IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 73

Suit No 1098 of 2013

Between

SAKAE HOLDINGS LTD

… *Plaintiff*

And

(1) GRYPHON REAL ESTATE INVESTMENT CORPORATION PTE LTD
(2) ERC HOLDINGS PTE LTD
(3) ONG SIEW KWEE
(4) HO YEW KONG
(5) ONG HAN BOON
(6) GRIFFIN REAL ESTATE INVESTMENT HOLDINGS PTE LTD
(7) GRYPHON CAPITAL MANAGEMENT PTE LTD
(8) ERC UNICAMPUS PTE LTD
(9) ERC INSTITUTE PTE LTD
10 TYN INVESTMENT PTE LTD (f.k.a. ERC INTERNATIONAL PTE LTD)
11 ERC CONSULTING PTE LTD

… *Defendants*

And

DOUGLAS FOO PEOW YONG

… *Third Party*

Suit No 122 of 2013

Between

SAKAE HOLDINGS LTD

… *Plaintiff*

And

ONG SIEW KWEE

… *Defendant*

And

DOUGLAS FOO PEOW YONG

… *Third Party*

JUDGMENT

[Companies] – [Directors] – [Shadow directors]

[Companies] – [Oppression] – [Minority shareholders]

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v
Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit

[2017] SGHC 73

High Court — Suits Nos 1098 and 122 of 2013
Judith Prakash JA
15, 19, 20–22, 26–28 January; 10, 16–19, 23–26 February; 24 June 2016

7 April 2017 Judgment reserved.

Judith Prakash JA:

Introduction

1 Douglas Foo Peow Yong ("Douglas Foo" or "Mr Foo") and Ong Siew Kwee ("Andy Ong" or "Mr Ong") met as fresh-faced young lads when they enrolled in National Service. They became fast friends and this friendship lasted beyond their National Service days and grew to encompass their families as well. By 2010, both were successful businessmen in different spheres. Andy Ong then invited Douglas Foo to invest in a property development with him. Douglas Foo accepted with alacrity and that seemingly innocuous decision spelt the beginning of the end of their friendship. Two years later, their relationship was in tatters and legal actions were started by

Douglas Foo's company against Andy Ong and his companies. The allegations are serious, involving oppression, breach of fiduciary duty and exploitation, and the amounts involved are substantial.

Background

Parties and law suits

2 There are two consolidated actions. The plaintiff in each action is Sakae Holdings Ltd ("Sakae"), a listed company of which Douglas Foo is a director and chairman of the board. The first action is Suit 122 of 2013 ("Suit 122") in which the defendant is Andy Ong alone. The second action is Suit 1098 of 2013 ("Suit 1098") in which there is a whole slew of defendants. The sixth defendant is Griffin Real Estate Investment Holdings Pte Ltd) ("the Company"), a company in which Sakae is a minority shareholder and in which the oppressive actions are alleged to have occurred. The other defendants are: (i) individuals including Andy Ong who were directors or alleged *de facto* directors of the Company; and (ii) various other companies which are controlled by Andy Ong and against which Sakae seeks relief.

3 On 3 September 2010, Sakae entered into a joint venture agreement ("the JVA") with the first defendant in Suit 1098, Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"). Under the JVA, Sakae was to hold 24.69% of the issued share capital of the Company with GREIC holding the remaining 75.31%. The purpose of the joint venture was to enable the Company to invest in about 90% of the units in the building in Victoria Street known as "Bugis Cube" with a view to selling the investment for a profit. At the time of the trial, the directors of the Company were Douglas Foo and Ho Yew Kong ("Mr Ho"), the fourth defendant in Suit 1098.

4 In Suit 1098, Sakae claims against the defendants for relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for conduct which was oppressive to Sakae as a minority shareholder in the Company. In line with the usual practice in minority oppression claims, the Company is a party to the suit solely as a nominal defendant. Sakae makes numerous allegations against the third, fourth and fifth defendants, who are Andy Ong, Mr Ho and one Ong Han Boon, who were allegedly directors of the Company at all material times, for wrongfully diverting moneys from the Company over the course of seven transactions. Sakae further claims against the remaining five defendants, which make up a group of companies allegedly owned and controlled by Andy Ong ("the ERC Group"), for the repayment of moneys that were diverted from the Company and for declarations that constructive trusts be imposed on assets which the ERC Group companies have purchased using moneys from the Company. There was also a claim against a tenth defendant but this was discontinued during the proceedings. In addition, Douglas Foo, who is also a director of the Company, has been joined as a third party. The claim made by Andy Ong, GREIC and six of the other defendants against Douglas Foo is that his breach of directors' duties owed to the Company contributed to the seven wrongful transactions and that he is liable to indemnify these defendants against any liability they may be found to have to Sakae.

5 In Suit 122, Sakae claims against Andy Ong for breach of fiduciary duty owed to Sakae (as one of Sakae's directors) and for the tort of inducing a breach of contract in relation to one of the seven transactions, specifically the conclusion of a share option agreement between the Company and ERC Holdings Pte Ltd in respect of shares in the Company.

6 At the close of the plaintiff's case, Andy Ong, Ong Han Boon, GREIC and the five companies in the ERC Group made a submission of no case to answer and elected not to call any evidence. In this judgment, I will sometimes refer to these defendants collectively as the "AO Defendants". Mr Ho is the only defendant who did not make such a submission or election. Sakae's claims against the AO Defendants and those against Mr Ho will therefore have to be assessed somewhat differently.

History of the parties

7 Douglas Foo and Andy Ong have known each other for more than 20 years. In July 2003, on Douglas Foo's recommendation, Andy Ong was appointed an independent director of Sakae, a position that he held until 18 March 2013.

8 The fourth and fifth defendants in Suit 1098, Mr Ho and Ong Han Boon, are Andy Ong's associates. These two defendants have held and continue to hold various positions in various companies in the "ERC Group", which is allegedly owned or controlled by Andy Ong. It is Sakae's case that Mr Ho and Ong Han Boon have, under the instructions of Andy Ong, wrongfully diverted funds from the Company for Andy Ong's personal benefit.

9 The remaining defendants are companies in the ERC Group and Sakae claims that they are the recipients of funds which have been wrongfully diverted from the Company. The relevance of each company to the dispute will be explained in more detail below but, for ease of reference, they are the following:

(a) GREIC, the first defendant;

(b) ERC Holdings Pte Ltd ("ERC Holdings"), the second defendant;

(c) Gryphon Capital Management Pte Ltd ("GCM"), the seventh defendant;

(d) ERC Unicampus Pte Ltd ("ERC Unicampus"), the eighth defendant;

(e) ERC Institute Pte Ltd ("ERC Institute"), the ninth defendant; and

(f) ERC Consulting Pte Ltd ("ERC Consulting"), the eleventh defendant.

10 GREIC is the company with which Sakae concluded the JVA for the purpose of investing in the Bugis Cube units. The Company was incorporated to carry out the joint venture and originally, as was intended, GREIC was the majority shareholder holding 75.31% of the issued capital with Sakae holding the remaining 24.69%. By the time of the trial GREIC held 45.35% of the issued capital with ERC Holdings having a 29.96% interest in the Company. Due to a further subscription for shares, Sakae maintained its shareholding percentage at the same level. At the time of trial, Mr Ho was the sole director of GREIC. Mr Ong, Ong Han Boon and Mr Ho are all shareholders of GREIC.

11 The second defendant, ERC Holdings, is a company founded by Andy Ong, who is its chief executive officer and owns 86.85% of its shares.

ERC Holdings is allegedly the ultimate holding company of the ERC Group, which includes, among other entities, the following defendant companies:

(a) GCM, a company established for the purpose of managing the Company's real estate investment. The directors of GCM are Andy Ong and Ong Han Boon.

(b) ERC Unicampus, an investment holding company. Mr Ho was the sole director of ERC Unicampus until 12 July 2013. He was replaced by Ong Han Boon who remained the sole director of ERC Unicampus at the time of trial.

(c) ERC Institute, a professional training and consultancy company. It is wholly owned by Entrepreneur's Resource Centre Pte Ltd, which is in turn wholly owned by ERC Holdings. The directors of ERC Institute are Andy Ong and Ong Han Boon.

(d) ERC Consulting, a company providing business consulting and education services. It is wholly owned by ERC Holdings. Andy Ong is one of the two directors of ERC Consulting.

Facts leading up to the dispute

12 Sometime in late 2009, Andy Ong floated the idea of acquiring over 90% of the units in Bugis Cube to Douglas Foo. The plan was to develop Bugis Cube and eventually sell the investment off at a profit. Douglas Foo expressed interest in the investment opportunity and suggested that the funding be provided by Sakae. The proposal culminated in the JVA under which GREIC and Sakae were to undertake the business of real estate

investment and other property-related transactions through the Company, with Sakae being the minority shareholder.

13 The JVA also provides that:

(a) The board of the Company shall consist of four directors, with GREIC and Sakae entitled to each appoint two directors regardless of their relative shareholding positions in the Company;

(b) With respect to certain defined matters (referred to as "Shareholder Reserved Matters"), the Company can only act if it obtains the prior unanimous approval of all shareholders in a general meeting, and these shareholders are required to act reasonably and in the best interests of the Company and the shareholders when exercising their voting rights;

(c) With respect to other defined matters ("Board Reserved Matters"), the Company can only act if it obtains the prior majority approval of all its directors, who are required to act reasonably and in the best interests of the Company and the shareholders when exercising their voting rights; and

(d) Any director or shareholder who has a direct or indirect interest in any matter that would require shareholder or board approval is obliged to declare that interest and is not entitled to vote on that matter.

14 At the same time as the JVA was entered into, Sakae also acquired 20% of the shares in GCM. Since Andy Ong had established GCM to provide

management services to the Company, Sakae took the view that its acquisition of GCM shares would be synergistic with its investment in the Company.

15 It is Sakae's case that it and Douglas Foo subsequently left the management of the Company in the hands of Andy Ong and GCM. In the years that followed, Andy Ong, Ong Han Boon and Mr Ho allegedly diverted the assets of the Company to the ERC Group over the course of seven transactions. Sakae's case is that the transactions were undertaken without its knowledge. Matters came to a head in early October 2012, when Douglas Foo started to have serious concerns about some of the transactions. He therefore convened a Sakae board meeting on 25 October 2012 ("the 25 October Meeting") to inform the board about his concerns. Andy Ong attended this meeting and was asked to explain various matters. Thereafter, Sakae conducted investigations into the Company's financial affairs. During the investigations, various transactions which Sakae found questionable were uncovered. These discoveries led to the institution of the suits.

The complaints

16 Sakae has classified its complaints as falling within seven separate categories. Rather than attempt to define at the outset all the terms used in setting out the seven categories, I shall explain each of them at the appropriate point in the analysis. The categories are as follows:

(a) The payment by the Company of excessive management fees to GCM and the execution of the "Sham Addendum" and the "Unauthorised Third Party Assignment of Proceeds";

(b) The giving by the Company of the "First Unauthorised Loan" and the execution of the "Sham First Loan Agreement";

(c) The wrongful diversion of $16m from the Company to companies in the ERC Group and the execution of the "Sham Lease Agreement";

(d) The execution of the "Sham Consultancy Agreement" by the Company;

(e) The giving of the "Second Unauthorised Loan" and the execution of the "Second Sham Loan Agreement" by the Company;

(f) The execution of the "Sham Share Option Agreement" by the Company which resulted in ERC Holding taking up shares in the Company and Sakae having to subscribe for extra shares to maintain its proportionate ownership of the Company; and

(g) The Company's unauthorised payment of $8m to Andy Ong and the execution of the "Sham Project Manager Agreement".

17 At the end of the plaintiff's case in the consolidated actions, as previously noted, the AO Defendants made a submission of no case to answer and elected not to adduce evidence. They dispute the various complaints and reliefs sought by Sakae on three bases. The first is that Sakae's claim does not establish a case in law. The second is that the facts do not support the allegations of oppression in any event. The third is that Sakae is not entitled to claim for declarations to trace into the sale proceeds of the properties which the defendants have allegedly purchased using the Company's funds. Mr Ho is

the only defendant who took a different course. He chose to put forward a positive defence and to adduce evidence, including by his own testimony. His position is that he had at all times acted in accordance with the norm accepted by the shareholders and directors of the Company. There is also a third party action against Douglas Foo in both suits. The allegation there is that Douglas Foo was in breach of the duties he owed to the Company as a director and that such breach contributed to the wrongful transactions.

18 In Suit 122, Andy Ong has not advanced any contentions in response to Sakae's case against him for breach of fiduciary duties owed to Sakae (as one of Sakae's directors) and for the tort of inducing a breach of contract other than those he has made in Suit 1098.

19 In the parties' closing submissions, there are allegations that various parties had departed from their pleadings. The actions were first commenced in 2013 and proceeded to trial in early 2016. In the interim, various parties had amended their pleadings and supplied further and better particulars. They thus had ample opportunity to consider how to frame their complaints and defences and to determine the case they had to meet. In so far as matters were not pleaded and the parties therefore did not have a chance to respond to them, it would not be fair to these parties to uphold or deny a claim on those bases. Therefore, whether parties have succeeded in establishing their case or defence will be determined strictly with reference to their pleadings.

The claims

20 Before I delve into the claims proper, there are two initial points to consider, the first being a legal one and the second a question of mixed fact

and law. The legal point relates to the approach to be taken by a court when a defendant submits that there is no case to answer and the legal cum factual point relates to whether Andy Ong, Ong Han Boon and Mr Ho were directors of the Company at all material times.

The implications of a submission of no case to answer

21 The submission of no case to answer made by the AO Defendants has implications on the standards of proof which apply to the different defendants and how the court should proceed in dealing with the evidence adduced by the parties.

22 It is settled law that a submission of no case to answer by a defendant will only succeed if the plaintiff's evidence, at face value, does not establish a case in law or is so unsatisfactory or unreliable that the plaintiff has not discharged its burden of proof (see *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 at [23]). At [24], that decision lays down the following principles for assessing the plaintiff's evidence in such situations:

(a) First, the plaintiff only has to establish a *prima facie* case as opposed to proving its case on a balance of probabilities;

(b) Second, in assessing whether the plaintiff has established a prima facie case, the court will assume that the evidence led by the plaintiff is true, unless it is inherently incredible or out of common sense; and

(c) Third, if circumstantial evidence is relied on, it does not have to give rise to an irresistible inference as long as the desired inference is one of the possible inferences.

23 The defendant's silence may strengthen the plaintiff's case if he could reasonably have raised evidence in rebuttal but does not do so (see *Bansal Hemant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33 at [15]). But the court will not draw an adverse inference against the defendant simply because he makes a submission of no case to answer (see *Lim Eng Hock Peter v Lin Jian Wei and another* [2009] 2 SLR(R) 1004 at [209]).

24 The court will not entertain a submission of no case to answer at the close of the plaintiff's case unless the defendant undertakes not to call evidence. The corollary is that where some, but not all, defendants make a submission of no case, the defendants who make the submission may cross-examine witnesses called by the remaining defendants (who did not make the submission), but not in a manner which would have the effect of adducing evidence and breaching the undertaking (see Jeffrey Pinsler, *Singapore Court Practice*, vol 1 (LexisNexis, 2014) ("*Singapore Court Practice*") at para 35/4/10).

How the court is to proceed in dealing with the evidence where some, but not all, the defendants submit no case to answer

25 It would be recalled that Mr Ho entered his defence and testified. As far as the case against him is concerned, the plaintiff must establish it on a balance of probabilities and is not entitled to invoke the lower standard that applies to the defendants who have submitted no case to answer. Mr Ho's

stand leads to the next issue. This is whether, in proceedings where some (but not all) defendants submit no case to answer and thus elect not to *adduce* evidence, the court should also prohibit these defendants from *relying on* evidence adduced by their co-defendant who did not make such a submission.

26 Sakae argues in the affirmative. Since the AO Defendants have submitted no case and elected not to adduce evidence, Sakae puts forward the proposition that, as a logical consequence, they are not entitled to rely on any evidence to support their submission. This includes the evidence adduced by Mr Ho. No direct authorities have been cited in support of Sakae's proposition.

27 I find Sakae's position questionable. Sakae's analysis (which is not made express in their submissions) would seem to proceed as follows. In a plea of "no case to answer", the allegation is that the plaintiff has not adduced the requisite evidence to establish the legal elements of his claim. The defendant, in undertaking not to call evidence, is telling the court that he intends to rely on the submission alone. The plaintiff's evidence, which is the only evidence before the court, is then examined on its merits and judgment is entered on that basis. In proceedings where some, but not all, the defendants submit no case to answer, the court will continue to hear the evidence of the witnesses called by the other defendants and therefore the evidence adduced is not limited only to that of the plaintiff. However, since the submission of no case implies that plaintiff's case is *by itself* unsustainable, it arguably follows that the defendants who submitted no case to answer should not be relying on the evidence adduced by these other defendants to impugn the plaintiff's case.

This appears to be the logic behind Sakae's position, but it is a logic that I do not accept.

28 First, it is clear from authority that the court, in deciding whether to uphold the defendants' submission of no case, may consider the evidence from the remaining defendants (who did not make the same submission) as it may reveal liability on the part of the former (see *Singapore Court Practice* at para 35/4/10). Sakae's proposition, that the AO Defendants may not draw the court's attention to Mr Ho's evidence in determining whether to uphold their submission, therefore sits uncomfortably with existing cases.

29 Second, if one considers the rationale behind the prohibition against calling evidence, there is no apparent basis for extending the scope of the undertaking not to *adduce* evidence to include an undertaking not to *rely on* evidence already adduced in court. According to *Singapore Court Practice* (at para 35/4/10), there are two main reasons for requiring a simultaneous undertaking not to adduce any evidence where the defendant makes a submission of no case to answer. First, it would be inappropriate for a court to make any ruling on the evidence until it has been completely presented. Second, the imposition of an undertaking avoids the expense and inconvenience which would result in recalling the witnesses for the defence if the court's decision to uphold the submission is reversed on appeal. These considerations concern the process of *adducing* evidence and are irrelevant to the situation where the adduction of evidence is complete and the defendant is merely seeking to *rely on* the evidence that is already on the record.

30 Third, it appears to me that accepting Sakae's argument would lead to an artificial and inconsistent approach in a case where the *plaintiff* also seeks

to rely on parts of the evidence adduced by the co-defendant who did not submit no case to answer. Can it be that when weighing the evidence adduced by that co-defendant with regard to the claims between the plaintiff and a defendant who has submitted no case to answer, the court is required to consider only the parts of that evidence which favour the plaintiff, while ignoring those parts which do not? Surprisingly, that is indeed the plaintiff's position. I deal with this in greater detail at [195]–[196] below, but in short, allowing a plaintiff to cherry-pick from a co-defendant's evidence in that manner does not strike me as a logical or fair outcome. In my view, both common sense and fairness dictate that evidence from a witness which can be used *against* a party must also be evidence which can be used *by* that party. The plaintiff cannot have its cake and eat it too.

31 The correct position, therefore, must be that where some, but not all, the defendants submit no case to answer, the court should not prohibit any of the defendants from relying on the evidence of their co-defendants which has already been adduced. In this case, the AO Defendants would not be barred from relying on Mr Ho's evidence to support their submissions as and when they choose to do so.

Were Andy Ong, Ong Han Boon and Mr Ho directors of the Company?

Sakae's submissions

32 Sakae's claims in the main action, Suit 1098, centre on the conduct of Mr Ong, Ong Han Boon and Mr Ho, who were allegedly in control of the Company's affairs when the various impugned transactions were undertaken. It is Sakae's position that their conduct of the Company's affairs resulted in seven categories of corporate actions which unfairly prejudiced it as the

minority shareholder and amounted to oppression. Further, these three individual defendants breached their fiduciary duties to the Company in the process. It therefore falls to be determined whether these defendants were directors of the Company at all material times and, as such, subject to the duties which have allegedly been breached.

The law

33 Directors of companies may be formally appointed (*de jure*), not formally appointed but acting as if they had been (*de facto*) and the puppeteer pulling the strings from above ("shadow"). Whether he is a *de jure*, *de facto*, or shadow director, such a person owes the same duties to the company under the Companies Act and at general law (see s 4(1) of the Companies Act; *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2009) at paras 7.14 to 7.20). A shadow director is a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act, even though he claims not to be a director (*Walter Woon on Company Law* at paras 7.3 and 7.20). The question whether a person is a *de facto* or a shadow director is a question of fact and degree (*Smithton Ltd (formerly Hobart Capital Markets Ltd) v Naggar* [2014] EWCA Civ 939 at [45]).

Evidence and analysis

34 What appears on the face of the Accounting and Corporate Regulatory Authority ("ACRA") records and from the directors' resolutions of the Company is as follows. Andy Ong and Ong Han Boon were both formally appointed directors of the Company, their respective appointment dates being 6 March 2008 and 29 October 2010. They both resigned on 20 January 2011, the date on which Mr Ho was, ostensibly, appointed to replace them. Mr Ho

resigned in March 2015, and Mr Ong and Ong Han Boon were re-appointed as directors at that time.

35 However, Sakae argues that the alleged change in the Company's directorship on 20 January 2011 was in fact backdated. It is Sakae's submission that Mr Ho was only appointed as a director in February 2012, and Mr Ong and Ong Han Boon were actually *de jure* directors up until around March 2012.

36 Over the course of proceedings, the defendants eventually conceded that the resignation of Ong Han Boon as director of the Company, and Mr Ho's appointment in his place, occurred in early 2012 but were backdated to 20 January 2011. I therefore take this as an agreed fact, and in any event it finds support in the evidence. It was clear from Mr Ho's testimony that Andy Ong approached him to be director only in late 2011, and that he was formally appointed sometime later. Mr Ho also confirmed during cross-examination that he only became a director of the Company sometime in 2012. Had anyone asked him in 2012 whether he was a director of the Company in January 2011, his answer would have been no. In addition, while the ACRA records indicate that Mr Ong's and Ong Han Boon's resignations and Mr Ho's appointment as director occurred in January 2011, this change in directorship was only lodged with ACRA in March 2012. No reason was given why the lodgement with ACRA had to be delayed for over a year.

37 Mr Ho's position on the precise time at which he was appointed shifted over the course of proceedings. In court, he gave evidence that he signed the relevant papers for his appointment in February or March 2012, but was a director of the Company only with effect from March 2012. In his closing

submissions, however, Mr Ho seemed to accept Sakae's allegation that he was appointed on or around 3 February 2012. I therefore consider it an agreed position between parties that Mr Ho became *de jure* director of the Company on 3 February 2012.

38 In relation to Andy Ong and Ong Han Boon, Sakae merely had to show a *prima facie* case that they formally resigned in March 2012. There is no evidence of when they actually resigned apart from the forms lodged with ACRA on 9 March 2012 which show the resignation date as 20 January 2011. The veracity of the form is suspect since Mr Ho was not appointed in January 2011 as it purports to show. The only reliable evidence that Mr Ong and Ong Han Boon ever resigned their directorships comes from the form lodged with ACRA on 9 March 2012 and I therefore find that to be their effective resignation date. For the purposes of the transactions in issue here, I find that Mr Ong and Ong Han Boon were *de jure* directors of the Company at all material times up to 9 March 2012.

39 The next question, then, is whether, even after 9 March 2012, Mr Ong and Ong Han Boon remained directors of the Company notwithstanding the notification of their resignations.

40 Sakae relies on the following evidence to argue in the affirmative. Minutes of one of Sakae's board meetings in October 2012 revealed that Andy Ong agreed to allow Sakae access to the Company's documents, to allow the Company's accounts to be audited if required, and to arrange for Sakae's representative to be added as a joint signatory to the Company's bank account with United Overseas Bank Ltd ("UOB"). According to Sakae, these were matters that only a director of the Company could agree to. E-mail

correspondence also showed that when Sakae sought documents relating to the Company's financial affairs in late 2012, Andy Ong was the one who decided whether information was to be released. In addition, Mr Foo and Voon Sze Yin ("Ms Voon"), Sakae's chief financial officer, gave evidence that they continued to deal with the Company via Andy Ong even after Mr Ho was appointed director. Ms Voon testified that she was refused Mr Ho's contact details when she attempted to communicate with him on the Company's affairs. In her dealings with the Company at the time, Ms Voon regarded Andy Ong as a *de facto* director.

41 Sakae also relies on Mr Ho's testimony. He testified as follows:

(a) At the time Andy Ong approached Mr Ho to be a director of the Company, Mr Ong had stated: "You don't have to do a lot of things; it is a small role. I have management company running the show." The management company Mr Ong referred to was GCM, of which he and Ong Han Boon were directors, and with which the Company had a management services agreement. Mr Ho agreed to be a director on the basis that he "trusted Andy Ong to run the affairs of [the Company]". He had been told, and knew, very little about the Company's corporate structure and ownership at the time he agreed to be a director.

(b) Mr Ho admitted that he did not control the Company even after his appointment as director. The person who was "left to control [the Company], to exercise governance of [the Company]" was Andy Ong, with his team in GCM. The GCM team included Ong Han Boon, who was, Mr Ho said, "Andy Ong's right-hand man". Mr Ong and

Ong Han Boon were the two signatories to the Company's bank account, and Mr Ong had "full power" to transfer moneys out of the Company without prior authorisation from the directors. Furthermore, Mr Ong made the "strategic and financial planning decisions", "investment management decisions", and "decisions relating to management, administration and the business and operations" for the Company. Mr Ho did not concern himself with any of these matters except when they were specifically brought to his attention. Mr Ho described the nature of his role in the Company as "reactive".

(c) Andy Ong discussed the Company's affairs at Sakae's board meetings, decided who could access its documents and what information about the Company could be disclosed, offered to have the Company's accounts audited, and engaged lawyers to represent the Company in various matters, all without consulting Mr Ho beforehand.

42 On the evidence, it is clear to me that Andy Ong was a shadow director of the Company from 10 March 2012 right up to Mr Ho's resignation. Even if Mr Foo's testimony is disregarded as being self-serving, the other available evidence is more than sufficient for me to conclude that Mr Ong continued to preside over the management of the Company's affairs throughout this period. It is telling that Mr Ho was given very little information about the Company when Mr Ong approached him to be a director, and that Mr Ho did not ask for further information about the Company even after he accepted the appointment. Right from the start, it was apparent that Mr Ong intended for Mr Ho to merely be a figurehead through whom he could exert control over the Company's affairs. It is also plain from the evidence that Mr Ong was not merely consulted on the Company's affairs, but continued to play a dominant

role in its major corporate decisions. Indeed, Mr Ong was able to, and in fact did, act unilaterally in key areas of corporate decision-making. On his part, Mr Ho was accustomed to acting on Mr Ong's instructions in the management of the Company. Much as Mr Ong tried to create the impression that he had ceased to control the Company, his highly influential role in directing the Company's affairs coupled with Mr Ho's reliance on his instructions to the point of unquestioning deference show otherwise. This was a classic case of shadow directorship, in which Andy Ong controlled the Company through Mr Ho and others. The interposition of GCM as manager of the Company does not in my view make Andy Ong's actions any less those of a director of the Company as they went far beyond what a manager could do without direction from the Company's board.

43 In relation to Ong Han Boon, however, I am not convinced that he was a *de facto* or shadow director during the period when he was not a formally appointed director. There was sparse evidence of his having had control of the Company's affairs after March 2012. Mr Ho's testimony contained sparing references to Ong Han Boon on the issue of control of the Company's affairs and, when it did, considered Ong Han Boon as part of Andy Ong's team in GCM. The picture which emerged was of Ong Han Boon merely playing a supporting role to Andy Ong. Even on Douglas Foo's evidence, Ong Han Boon was generally "accustomed … to act on the instructions of Mr Andy Ong". This is corroborated by Mr Ho's testimony that in their interactions, "Mr Andy Ong called the shots, and Mr Ong Han Boon took instructions from Mr Andy Ong". There is insufficient evidence to show, even on a *prima facie* standard, that Ong Han Boon was the one *making* the management decisions or that he exerted control over the Company's affairs to a degree which was

sufficient to establish a finding of *de facto* or shadow directorship once he had resigned from his position.

44 In these proceedings, Mr Ho's position is largely aligned with Andy Ong's and evidence which is adverse to Mr Ong would similarly run counter to Mr Ho's own interests. Thus, it seems to me highly unlikely that Mr Ho would have made the concessions that he did if they were not true. A seeming exception would be those portions of Mr Ho's evidence which concern the relative degrees of control which he and Mr Ong exercised in respect of the Company's affairs. In those respects, there may be some variance in their interests, given that Mr Ho's attempts to downplay his degree of control would tend to amplify Mr Ong's degree of control. However, I note that if Mr Ong or the other defendants had taken such a view of Mr Ho's testimony on those points, it would have been open to them to request that their counsel be permitted to cross-examine Mr Ho on those points regarding which their interests diverged. This was not done, and so I take it that the defendants in fact see their interests as still aligned and that Mr Ho was not attempting to vindicate himself at Andy Ong's expense. Further, as regards Ong Han Boon, given that Mr Ho was quite prepared to say that Andy Ong had been exercising control of a directorial nature over the affairs of the Company, he would have no reason to leave out any mention of Ong Han Boon exercising similar powers if Ong Han Boon had indeed done so. I therefore consider Mr Ho's evidence on these points to be reliable.

45 Overall, I find that Andy Ong was a *de facto* or a shadow director of the Company from March 2008 up to the end of 2012 at least, and therefore was throughout subject to the usual duties incumbent on a director. In relation

to Ong Han Boon and Mr Ho, however, the evidence only supports a finding of *de jure* directorship. They were, therefore, subject to fiduciary duties only during the periods they held the formal appointment. For Mr Ho, this was from 3 February 2012 to March 2015. For Ong Han Boon, this was from 29 October 2010 to March 2012.

The defendants' "overarching" points

46 Having dealt with the legal positions of Andy Ong, Ong Han Boon and Mr Ho, I can now turn to consider the various claims. I will first consider legal liability. The defendants have made certain overarching points which they say deal with all the claims. These are as follows:

(a) Sakae's claims in Suit 1098 are essentially corporate claims and cannot be brought against the defendants because of the proper plaintiff rule and the reflective loss principle.

(b) Sakae was in a position to resist the alleged oppressive acts and the defendants never had any dominant power over Sakae.

(c) The JVA already provides for remedies which Sakae specifically negotiated for.

(d) Sakae was able to remedy the alleged oppression by self-help measures after the transactions had occurred.

(e) Sakae knew, ought to have known, or was in a position to find out about the transactions which it is now complaining about.

It is well established that bad behaviour by directors in a company while forming a basis for an action by the company against the director concerned for breach of fiduciary duty or other corporate wrong can also, depending on the facts, amount to oppression of a minority shareholder who is unfairly prejudiced by such actions. Thus, I find it difficult to consider these contentions made by the defendants without having first established whether the transactions complained about are oppressive or not. I therefore propose to deal with Sakae's claims serially and in the course of doing so, if oppression is established in any case, will also consider whether any of the general rebuttals put forward by the defendants defeats the respective claim.

First, the set of claims relating to the payment of excessive management fees to GCM, the Sham Addendum and the Unauthorised Third Party Assignment of Proceeds

The Company's management agreement with GCM

47 The Company was incorporated to hold one major investment rather than to carry on business generally. Therefore, it was never intended to have its own staff or premises. Instead, all its affairs were to be managed by GCM, the seventh defendant in Suit 1098. This was something that Sakae had specifically agreed to.

48 On 23 February 2010, the Company entered into a Management Agreement ("the GCM Agreement") with GCM. By this agreement, GCM was appointed to manage the Company's affairs. Clause 4 of the GCM Agreement provided that as remuneration, GCM would receive "1% of Asset Purchase Price" of Bugis Cube as well as 10% of the Net Operating Profit (provided the Net Operating Profit each year was equal to or above 5% yield of the

investment) and 20% of the capital appreciation of Bugis Cube, if any. While this much is undisputed, the parties advance diametrically opposed versions of the subsequent events and the operative terms of the GCM Agreement.

Sakae's case

49 According to Sakae, the original terms of the GCM Agreement were not acceptable to it. Therefore, before entering into the JVA, Sakae specifically negotiated amendments to the GCM Agreement. Pursuant to these negotiations, the Company and GCM entered into a Supplemental Management Agreement ("SMA") on 3 September 2010, the same day as they entered into the JVA. The SMA amended the remuneration mechanism in the GCM Agreement, and the terms of the SMA were further amended by two letters dated 20 December 2010 from the Company to GCM ("the December Letters"). The agreement between the Company and GCM for the provision of management services by GCM to the Company was therefore contained in the GCM Agreement, the SMA and the December Letters. Taken together, they provided that the annual fees that the Company was to pay GCM for management services were $460,000 plus GST and such amount of profits as was to be determined between the Company and GCM.

50 Sakae subsequently discovered that GCM received management fees well in excess of those agreed even after the JVA was in force. On 7 December 2012, PricewaterhouseCoopers ("PwC"), who was engaged by Sakae to investigate the financial affairs of the Company, informed Sakae that "management fees paid to GCM total[led] approximately $2.6m for the period from August 2010 to July 2012". In their subsequent report issued on 14 January 2013 ("the PwC Report"), PwC stated that the Company had paid

GCM an amount of $1,063,739 on 24 May 2012. The amount was computed on the basis of the GCM Agreement and an addendum to the GCM Agreement which was allegedly created on 1 May 2010 (the so-called "Sham Addendum"). The Sham Addendum bore the signatures of Andy Ong for and on behalf of the Company and of Ong Han Boon for and on behalf of GCM, and provided that the Company would pay GCM much higher fees than what was provided for by the SMA. According to Sakae, it had not heard of the existence and terms of the Sham Addendum prior to receiving the PwC Report.

51 Sakae alleges that the Sham Addendum was backdated and that it was in fact only created sometime in August 2012. At that time, Andy Ong needed evidence of an asset which could be assigned to DBS as a security for a loan to ERC International, another of his companies. (ERC International was later renamed TYN Investment Pte Ltd and is the tenth defendant in these proceedings.) The Sham Addendum was created to provide DBS with that evidence, and to legitimise the excessive management fee payments that had already been made by that time.

52 Sakae's case is that Mr Ong and Ong Han Boon acted oppressively by causing the Company to pay management fees to GCM in excess of the amount Sakae had agreed to. According to Sakae, the total paid in extra and unauthorised fees for the years 2011 and 2012 amounted to $1,906,335.17. The payments were made under the Sham Addendum, which was unauthorised, had been concealed from Sakae, and was not in the Company's interests as it deprived the Company of the unauthorised fees for no good reason. The amendments to the management fee structure, which Sakae had

specifically negotiated, had been disregarded. So, too, had the JVA, which provided for the unanimous approval of the directors of the Company to be obtained before an agreement such as the Sham Addendum could be entered into; no such approval for the Sham Addendum was ever obtained. The fiduciary duties which Mr Ong and Ong Han Boon owed to the Company had also been breached when they entered into the Sham Addendum and made the excessive payments to GCM.

53 Furthermore, Sakae argues that Mr Ho, as a director of the Company during the period the unauthorised management fees were paid by the Company to GCM, cannot distance himself from the Sham Addendum.

The defendants' submissions

54 Mr Ong, Ong Han Boon and GCM deny that the operative terms of the GCM Agreement were contained in the GCM Agreement, SMA and the December Letters. Instead, their position is that the terms were contained in the GCM Agreement as amended by the Sham Addendum only. In their pleadings, these defendants aver that the SMA and the December Letters were created and signed at the request of Mr Foo who, prior to 3 September 2010, informed Mr Ong that such a document was required only for the purpose of satisfying requirements imposed by the Singapore Stock Exchange ("SGX") on Sakae as a listed company. Mr Foo had assured Mr Ong that the annual management fees that were payable to GCM would still be 1% of Bugis Cube's net asset value ("NAV"), rather than an annual management fee of $460,000 as provided for in the SMA. In fact, in or around November 2009, there was a "prior verbal agreement" among Mr Foo, Ong Han Boon and Mr Ong on the structure of the fees payable. These defendants claim that that

verbal agreement is evidenced by the 6 November 2009 Board Paper, but that it was not set out in the GCM Agreement due to an inadvertent error. The Sham Addendum was subsequently executed to reflect the verbal agreement and clarify the terms of the fee structure.

55 These defendants further argue that Sakae and Mr Foo had full knowledge of the basis of fees payable and subsequently paid to GCM, and conducted themselves consistently with GCM's rights under the GCM Agreement and the Sham Addendum. They argue that GCM had sent the Company's management accounts (which reflected sums in excess of S$460,000 per annum being paid by the Company to GCM) to Ms Voon and that despite having sight of them, Sakae did not raise any queries or objections. Further, during the 25 October Meeting which Sakae's board had specially convened to question Mr Ong on Sakae's investment in the Company, the board did not raise any objection when Mr Ong mentioned the fees that GCM was entitled to under the Sham Addendum. Therefore, it cannot be said that the defendants' conduct in respect of the GCM Agreement, as amended by the Sham Addendum, was oppressive or unfairly prejudicial to Sakae.

Mr Ho's submissions

56 Mr Ho adopts the same defence as the others in respect of Sakae's knowledge of, and failure to object to, the amount of management fees that were being paid to GCM. In addition, he argues that he was not involved in processing or approving any payments made to GCM. The Company's bank account was controlled and operated by Andy Ong and Ong Han Boon; Mr Ho was not a signatory.

Analysis

WHETHER THE PARTIES' AGREEMENT WAS CONTAINED IN THE GCM AGREEMENT, SMA AND DECEMBER LETTERS OR IN THE GCM AGREEMENT AND SHAM ADDENDUM

57 I accept Sakae's account that the parties' agreement in respect of GCM's management fees is contained in the GCM Agreement, SMA and December Letters. Mr Ong, Ong Han Boon and GCM chose not to call any evidence and therefore were unable to fully pursue several aspects of their pleaded account in closing. However, documents included in an agreed bundle without qualification stand as evidence in the case (see *Singapore Court Practice* at para 34/3A/13, cited in *Viet Hai Petroleum Corp v Ng Jun Quan and another and another matter* [2016] 3 SLR 887 at [18]). I therefore considered such evidence where it would assist in the determination of the issues. In any event, the defendants left a large part of Sakae's evidence unaddressed in their submissions. Explanations, where proffered, were also insufficient to rebut Sakae's evidence that the agreement was contained in the GCM Agreement, SMA and the December Letters.

58 First, it was evident from the documentary evidence that all relevant parties were aware of the amendments under the SMA and the December Letters and abided by them. Draft responses to SGX's queries on Sakae's proposed investment in the Company, for example, referred to the terms of the SMA as the operative terms for the management fees to be paid by the Company to GCM. These draft responses had previously been cleared by Mr Ong and Ong Han Boon, and were again circulated to them between 8 and 11 November 2010. Furthermore, when Sakae sought its shareholders' approval on its proposed investment in the Company by a circular dated 22 December

2010, it informed them that the agreement between the Company and GCM for the provision of management services was contained in the GCM Agreement, SMA and the December Letters, and that the fees to be paid by the Company to GCM were $460,000 plus GST and such amount of profits to be determined between the Company and GCM on an annual basis. The circular was drafted with the input of Mr Ong and Ong Han Boon. At the time, Mr Ong was also a director of Sakae and had approved the circular. Later, on 4 August 2011, Sakae's auditors, Deloitte & Touche LLP ("Deloitte"), presented a memorandum to the Sakae board which stated that "GCM provides management services to the Company at an annual fee of $460,000". Andy Ong was present at that board meeting. Sakae's Annual Reports for the years 2011 and 2012 also reflect that the GCM Agreement was amended by the SMA and the December Letters. There is thus ample basis to find that parties proceeded on the basis of a shared understanding that the terms in respect of GCM's management fees were set out in the SMA and the December Letters and that Mr Ong was aware of that understanding and did nothing to correct it.

59 By contrast, there is no evidence of the "prior verbal agreement" among Mr Ong, Ong Han Boon and Mr Foo, the terms of which the defendants allege were subsequently set out in the Sham Addendum. The 6 November 2009 Board Paper, which the defendants claim evidenced this verbal agreement, offers little assistance to their argument. It was prepared in connection with a proposed investment by Sakae in GCM, and it is not in dispute that the Sakae board did not accept the terms of that investment.

60 Second, the explanation that the SMA and the December Letters were conceived only for the purpose of satisfying SGX's requirements is dubious

for several reasons. There is no documentary evidence in support and, in any event, the defendants did not supply sufficient particulars of it. They failed to point out the SGX requirement which the SMA and December Letters were allegedly created to satisfy, to demonstrate the need to conceal the terms of the GCM Agreement and the Sham Addendum from SGX and Sakae's shareholders, or to explain why the terms of these documents would even fall within the purview of the SGX. In my view, these unsubstantiated and untenable assertions were merely an attempt to explain away the evidence which indicated parties' acceptance of the terms in the SMA and the December Letters.

61 Third, the Sham Addendum appears to be an *ex post facto* fabrication designed to cloak unauthorised payments with some semblance of legitimacy. There is no evidence of the Sham Addendum existing until sometime in August 2012, which was when Mr Ong approached DBS for a loan to ERC International (a point I will return to later). The defendants did not disclose any contemporaneous documents relating to the preparation or execution of the Sham Addendum. Further, the Sham Addendum was not tabled for discussion at any directors' or shareholders' meeting of the Company nor were there any directors' or shareholders' resolutions authorising its execution. The lack of contemporaneous documentary references to the Sham Addendum stands in marked contrast to the series of correspondence and documents which were circulated to directors and shareholders on the SMA and the December Letters. All this justifies the inference that the Sham Addendum was not created on or around 1 May 2010 as it purports to have been, and that neither the Sham Addendum nor the payments allegedly made pursuant to it had been authorised by the board or the shareholders of the Company. Thus,

GCM was not entitled to receive more in fees than had been agreed under the SMA. Any amounts paid to GCM in excess of the amounts payable under the SMA were excessive and would be recoverable by the Company.

WHETHER SAKAE AND DOUGLAS FOO HAD FULL KNOWLEDGE OF THE BASIS OF FEES PAYABLE AND SUBSEQUENTLY PAID TO GCM

62 The defendants have not proved that Sakae and Mr Foo were cognisant of the fee structure and the payments allegedly made pursuant to the GCM Agreement and the Sham Addendum. The fact that management accounts of the Company and GCM were sent to Ms Voon on several occasions does not, without more, automatically lend itself to the conclusion that Sakae was put on notice of the payments made to GCM.

63 In the first place, the persons whose knowledge is relevant, in that it may be imputed to Sakae, are the officers who represent Sakae's directing mind and will. There is no evidence that findings from the management accounts were brought to the attention of Mr Foo, who is Sakae's chairman. It was also not argued that Ms Voon's knowledge should be imputed to Sakae despite the fact that she does not occupy a position which carries with it the relevant managerial discretion. There is thus no basis to find that Sakae and Mr Foo knew of the excessive fees when it was Ms Voon who had received and reviewed the management accounts. This alone is sufficient to dispose of the defendants' contention; but for completeness, I go on to discuss whether the management accounts would have alerted Ms Voon to the excess payments.

64 In assessing whether Ms Voon would have known about the excessive fees from the management accounts sent to her, the context and purpose of

reviewing the said accounts must be borne in mind. On this point, I accept that while some of the entries in the accounts contain nondescript labels such as "administrative" and "ancillary" fees, there were other records which contained clearer indications that GCM was receiving excessive fees. Notwithstanding this, Ms Voon gave consistent evidence that she had examined the Company's accounts only with a view to incorporating them into the consolidated accounts of the Sakae Group, and not with a view to assessing them by any standard of propriety. Her purpose in conducting the review was thus to compile financial results which she deemed material for reporting as part of Sakae's own accounts. The management accounts were compilations of many documents and Ms Voon would have had to scrutinise the individual items contained therein and verify the accuracy of the motherhood statements made in the accounts in order to discover the anomalies. This was not what she was tasked to do and indeed, it would be impractical for Ms Voon to be alive to every potential irregularity in the minutiae of the accounts especially where there was no basis for her to suspect that parties would depart from the arrangement previously agreed upon. In the light of the context and purpose of Ms Voon's review, I am not satisfied that the irregularities on the face of the documents were serious enough to have raised any suspicion in her mind that GCM was receiving management fees in excess of what had been agreed.

65 The defendants submit that Ms Voon's claim, that she did not scrutinise the management accounts, is incredible. According to them, correspondence from Ms Carol Ong ("Carol Ong") (the chief financial officer of ERC Holdings) on 20 February 2012 shows incontrovertibly that Ms Voon had reviewed the management accounts in sufficient detail such that she was

in a position to request Carol Ong to make specific revisions to the accounts. The e-mail states:

> Hi Sze Yin,
>
> Attached revised accounts as requested.
>
> I have highlighted the changes.
>
> For GCM:
> Dr Amount due from GEM
> Cr Recovery of expense from GEM
> (Being interco recharge for salaries related expense)
>
> For [the Company]
> Dr Renovations
> Cr Amount due from ERCI
> Dr Depreciation expense
> Cr Accu Dep
> (Being capitalisation of renovation)
>
> Let us know what other information you'll need.
>
> Thanks,
> Carol.

According to the defendants, this shows that Ms Voon had asked for specific revisions to be made to the Company's accounts, relating to matters such as "Renovations" and "Amount due from ERCI". The defendants also sought to discredit Ms Voon's testimony when she claimed that she did not understand what those changes were about.

66 In my view, the defendants have overstated the evidence. The e-mail only shows that revisions had been made to the management accounts and that Ms Voon had requested the revised accounts. It does not indicate that it was Ms Voon who had initiated those revisions. According to Ms Voon, she understood that there were changes to the accounts previously furnished to her, and she was merely requesting the amended accounts in order to obtain the final figures and work off them. She also stated unequivocally that she did

not suggest any of the changes which were made. Indeed, Ms Voon's testimony offers another plausible interpretation. In this regard, I find that Ms Voon's evidence is consistent with her overall position that her role in reviewing the accounts was not to verify their accuracy but to gather information for the purposes of consolidating the accounts. I see no reason to doubt her evidence, and the e-mail on its own is not sufficient to show that Ms Voon had exercised the level of scrutiny which the defendants allege would have alerted Ms Voon to the excessive payments made to GCM.

67 Finally, the discussions at the Sakae board meeting on 25 October 2012 appear to be consistent with the plaintiff's assertion that Sakae and Mr Foo had been unaware of the excessive management fees that were being paid. The meeting had been convened because the Sakae board had started to harbour concerns about certain transactions which Mr Ong had undertaken in relation to the Company, and the purpose of the meeting was for him to account for them so that Sakae might investigate the matter if necessary. Amongst other things, Mr Ong was questioned about GCM's entitlement to certain fees and it is apparent from the recording that the board remained ignorant of crucial details pertaining to the transactions. I do not think that the board was in a position to make an informed objection at that point. Thus, its failure to object very specifically is hardly an indication that Sakae or Mr Foo knew of, much less were prepared to condone, the payments made to GCM.

WHETHER THE CONDUCT IN RELATION TO THE PAYMENT OF EXCESSIVE MANAGEMENT FEES AND THE ADDENDUM WAS OPPRESSIVE TO SAKAE AS A MINORITY SHAREHOLDER

68 In the light of the facts found above, I hold that the payment of the excessive management fees and the formation of the Sham Addendum were,

on their face, oppressive to Sakae as a minority shareholder. Not only was there a misapplication of the Company's assets to benefit another company (which Mr Ong and Ong Han Boon had endorsed as the two signatories to the Company's accounts), but the reduction/change in the fee structure for which Sakae had specifically negotiated was completely disregarded without Sakae's consent.

69 In preparing the Sham Addendum and channelling management fees to GCM in excess of what had been agreed in the genuine documentation, Mr Ong and Ong Han Boon acted in breach of their directors' duties to the Company. The transactions were not in the Company's interests and therefore the Company itself would have a cause of action against Mr Ong and Ong Han Boon. What makes the transactions oppressive is that they were transactions that could never have been conceived of by the minority shareholder or within its commercial expectations, given the express negotiations on the management fee that had taken place at the time of the JVA. Sakae had indicated what was acceptable to it and the defendants went behind Sakae's back to put in place and act on an arrangement that they knew Sakae would not agree to. The fact that Mr Foo was not a signatory to the Company's bank account in practice gave Andy Ong free rein over the Company's spending, a situation of which he took advantage. Such conduct was contrary to the standards of fair dealing which Sakae was entitled to expect.

70 As I mentioned earlier, the defendants have made the general submission that even if there was harm to the Company from their actions, Sakae's claim for oppression is devoid of merit as Sakae does not have any separate and distinct loss which is not merely reflective of that allegedly

suffered by the Company. In the case of the alleged overpayment of management fees to GCM, this would be the Company's loss, not Sakae's. I reject this argument for the reason given in [68] above. The law on this issue can be found below.

71 The leading case on the distinction between a wrong done to a company and a personal wrong suffered by a shareholder in that company is *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*"). There, the Court of Appeal observed that the distinction between personal and corporate wrongs is rarely clear and this lack of clarity is compounded in the context of s 216 of the Companies Act because the concept of commercial unfairness also appears to embrace wrongs to the company (at [62]). Immediately thereafter, however, the Court emphasised that a wrong done to a company may affect the interests of its members. In this connection, the Court cited the case of *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 as an example of a case where breaches of directors' duties involving the misuse of corporate funds were found to constitute oppressive conduct against a shareholder. Moving on to the analytical framework which should be employed to draw the line, at [69], the Court, having cited the observations of Millett J in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760, concluded that an action for relief under s 216 is appropriately brought where the complainant is relying on the unlawfulness of the wrongdoer's conduct as evidence of the manner in which the wrongdoer had conducted the company's affairs in disregard of the complainant's interest as a minority shareholder and where the complaint cannot be adequately addressed by the remedy provided for by law for that wrong. Further, in the leading and oft-cited case of *O'Neill v Phillips* [1999] 2 BCLC 1, it was stated that there are two situations in which a

member can complain of unfairness. One is where there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. The other is where equitable considerations make it unfair for those conducting the affairs of the company to rely on their strict legal powers.

72 The excessive fee payments fall within the first category mentioned above. They were unfair to Sakae as Sakae had clearly indicated the amount of fees it was prepared to accept to Andy Ong and GCM at the time the JVA was concluded. Mr Ong and Ong Han Boon purposely disregarded Sakae's position as to the proper amount of remuneration for GCM and manipulated the situation so that the majority shareholder's owner, *ie*, Mr Ong, could derive a benefit from the use of the Company's funds. Sakae is also using this complaint as evidence of a course of conduct by Mr Ong, Ong Han Boon and Mr Ho which oppresses it as a minority shareholder and is unfairly prejudicial to it and as part of the foundation for its prayer that the Company be wound up. Sakae has, however, also asked for various other reliefs connected with the excess payments. I will consider later whether such reliefs are available.

73 As for Mr Ho, there is little evidence to show that he was involved in or knew of the excessive fee payments to GCM or the Sham Addendum when he was director of the Company. In its submissions, Sakae relies on the allegation that in September 2012, Mr Ho had, without making further enquiries, signed two letters consenting to and acknowledging GCM's assignment of the proceeds under the GCM Agreement to DBS ("the Assignment Letters"). I do not think that the documents in any way demonstrate Mr Ho's knowledge of, or involvement in, the creation of the Sham Addendum or the excessive payments. They do not even mention the

Sham Addendum. There is thus not enough evidence to show a breach of fiduciary duty on Mr Ho's part in relation to the Sham Addendum. His conduct in signing the two letters is more relevant to the question of whether he has breached his fiduciary duty in relation to the assignment of the proceeds.

The Unauthorised Third Party Assignment of Proceeds

74 In this section, the defendants against whom the claims are brought are Mr Ong, Ong Han Boon, Mr Ho and ERC Holdings. I shall refer to them collectively as the "relevant defendants".

Factual findings

75 The narrative which emerges from the undisputed evidence is as follows. In August 2012, Andy Ong approached DBS for a loan to ERC International. At the time, Mr Ong was a director and indirect majority shareholder of ERC International. He represented to DBS that GCM was entitled to fees calculated on the terms of the GCM Agreement and the Sham Addendum. Copies of these documents were given to DBS. On behalf of GCM, Andy Ong agreed to assign to DBS the proceeds which GCM would receive from the Company (*ie*, the Third Party Assignment of Proceeds ("the TPAP")). On the basis of the documents provided and the security of the TPAP, DBS then agreed to make available to ERC International credit facilities in an aggregate amount of up to $48,640,000 ("the DBS Facility"). By a letter dated 12 September 2012, Mr Ho consented to the creation of the assignment on behalf of the Company. Acting as directors of GCM, Mr Ong and Ong Han Boon approved the execution of the TPAP by GCM as a deed on 17 September 2012. A notice of assignment was given to the Company on the

same day, which Mr Ho duly acknowledged on the Company's behalf. ERC International then drew down on the DBS Facility in order to pay about $60m to purchase a property known as the House of Tan Yeok Nee ("the TYN House") at 101 Penang Road. Sometime around September 2013, ERC Holdings sold its shares in ERC International, which owned the TYN House, to TYN Investment Group Pte Ltd at a price of about $73.8m.

76 The relevant defendants' core contention is that Sakae was fully aware of the TPAP and did not raise any objection at the material time. However, the evidence is that the TPAP was only brought to Mr Foo's attention on 4 October 2012 at the earliest, which was when Andy Ong's personal assistant forwarded, for Mr Foo's signature, certain documents which revealed the existence of the TPAP. By this time, the TPAP had already been executed. In addition, the inference that I draw from the minutes of the Sakae Audit Committee meeting on 17 October 2012 is that Mr Foo remained oblivious to the full implications of the transactions even then. This would explain why he had averred that the TYN House "has got nothing to do with Sakae" at the time, even though he had specifically convened the meeting to raise to the Audit Committee the irregularities that he had spotted. Indeed, this state of ignorance appeared to exist up until and during the 25 October 2012 meeting (which I have already addressed above). Against this background, I do not think the defendants' suggestion that Sakae's failure to object demonstrates its full awareness of the TPAP carries much weight. To put it another way, the parties propose two competing explanations for Sakae's non-objection at the meeting: according to the relevant defendants, Sakae did not object because it already knew and approved of the TPAP, whereas according to the plaintiff, Sake did not object because it did not yet fully grasp what was *objectionable*

about the TPAP. In the light of the surrounding context of the meeting, and the other evidence that has been adduced, I find that the latter explanation is the likelier one.

Analysis

77 It bears mention that Sakae ran a number of arguments in support of the position that the TPAP was neither in the commercial interests of nor authorised by GCM, of which Sakae is also a minority shareholder. I note that these arguments form the subject of a separate action (*ie*, Suit 1099 of 2013), but it is not clear to me how these allegations, even if substantiated, are relevant to the present inquiry. Whether GCM had complied with its own company procedures prior to entering into the transaction and whether GCM's own directors had acted in its commercial interests are not germane to the question of whether the transactions were oppressive to Sakae as a minority shareholder of the Company.

Whether the conduct in relation to the TPAP was oppressive

78 I find that the relevant defendants' conduct in relation to the TPAP, although it did not in the event cause any loss to the Company or Sakae, was part of Andy Ong's approach to the affairs of the Company. It demonstrated his belief that he was entitled to do anything he could get away with which would further the interests of companies in the ERC Group and of himself, irrespective of whether such actions benefited or were of any value at all to the Company and its shareholders considered independently of the ERC Group. The harm that was done to the Company was that if the TPAP had been enforced by DBS, a third party for value without notice, the Company would

have had difficulty resisting the payment on the basis that the Sham Addendum was a fraudulent document.

79 This time, the decision to override Sakae's interests in relation to GCM's fees was taken one step further: in addition to procuring an unauthorised increase in those proceeds, a loan for ERC International was then secured on the basis of the proceeds in order to purchase a $60m property. That purchase increased the value of ERC International and enabled Mr Ong to sell the company, of which he was an indirect majority shareholder, at a higher price. In other words, the transactions ultimately benefited Mr Ong himself. All this was carried out without Sakae's knowledge. In the course of engineering the TPAP, Mr Ong continued to place himself in positions of conflict of interest and breached his fiduciary duty to the Company. On Mr Ho's part, in "blindly" consenting to and acknowledging the assignment, there was a failure to protect the Company's interests and properly administer its affairs. This facilitated the wrongful action and disclosed a breach of Mr Ho's fiduciary duty to the Company. The DBS loan has been fully repaid and the TPAP has since been discharged. However, this does not change the nature of the actions taken by the relevant defendants. In themselves these actions might be considered only a corporate wrong. However, the only reason that the TPAP could be given by GCM was that the Sham Addendum had been fraudulently created and, to third parties, apparently created a legal obligation that GCM could enforce against the Company. This context brings the oppression into perspective because it cannot be within a party's commercial expectations that its joint venture partners would behave in such a fraudulent manner. Viewed cumulatively with the procurement of the Company's entry into the Sham Addendum and the excessive payments to GCM, the

transactions constituted a visible departure from the standards of fair dealing which Sakae was entitled to expect.

80 What I have said above does not, however, apply to Ong Han Boon. By August 2012 (when the TPAP was first conceived), Ong Han Boon was no longer a director of, and therefore did not owe any fiduciary duty to, the Company. Nor has any evidence has been led to show that Ong Han Boon was involved in engineering the TPAP itself prior to his formal resignation in March 2012. Therefore, it cannot be said that Ong Han Boon had breached his fiduciary duty in relation to the TPAP.

Whether there was a wrongful diversion of corporate opportunity

81 Before moving on to the next head of claim, I address Sakae's contention that Mr Ong, Ong Han Boon and Mr Ho had also breached their fiduciary duties by diverting a corporate opportunity (*ie,* the opportunity for the Company to purchase TYN House) from the Company to ERC International.

82 The relevant defendants deny the allegation on the basis that the purpose of the joint venture was solely to invest in Bugis Cube. This was captured in the Company's Memorandum of Association, which states its main object as follows:

> 3(a) To own in the name of the Company, the properties known as and situated at 470 North Bridge Road, North Bridge Commercial Complex #01-04/05, #02-01, #02-03 to #02-11, #03-01 to #03-12, #04-01 to #04-12, #05-01 to #05-12 and #06-01 to #06-12, Singapore 188735 for investment purpose for a minimum duration of ten years commencing from the date of ownership.

83 The Company's memorandum does not indicate any other business or investment as part of its objects. According to the relevant defendants, this meant that the Company could only hold units in one building for investment (*ie*, Bugis Cube). Since the Company was unable to take advantage of the investment in TYN House, the defendants argued that there was no wrongful diversion of corporate opportunity.

84 I agree with the relevant defendants that this is not a case of a corporate opportunity being wrongfully diverted. On this point, I find *Wilkinson v West Coast Capital* [2005] All ER (D) 346 ("*Wilkinson*"), on which the defendants rely, to be persuasive and apply its reasoning in my analysis. In that case, due to a provision in the shareholders' agreement that the company could not acquire or invest in another business unless there was at least 65% shareholder agreement in writing, the company was incapable of taking advantage of the opportunity in question. There was therefore no wrongful diversion of corporate opportunity although the directors had caused another company in which they had an interest to acquire the opportunity. In the course of its reasoning, the court recognised that the inability, for practical reasons, of a company to take up a corporate opportunity would not exonerate a director who took it for himself. But where there were legal restrictions on what the company could do, there was no breach of fiduciary duty on the part of the directors who engaged in an activity which fell within those restrictions. This is because the activity could not be within the scope of the company's affairs, and no relevant conflict of interest on the part of the directors would have arisen. The sort of legal restrictions contemplated by the court were constitutional documents, partnership agreements and shareholders' agreements.

85 On the present facts, the question is whether there is such a legal restriction in the Company's memorandum such that ERC International's purchase of TYN House did not involve a wrongful diversion of a corporate opportunity belonging to the Company. In my view, while the Company's memorandum does not contain an express restriction on its affairs in the form present in *Wilkinson*, the scope of its affairs is nevertheless limited to the objects which it chooses to state in its memorandum. This is because a company's memorandum defines, for the benefit of the public as well as the shareholders, the purpose for which the company is formed. Where a company chooses to include its objects in its memorandum, these objects constitute the basis upon which shareholders participate in, and form expectations about, its affairs. Activities which are not contemplated within the objects expressly included in the company's memorandum would be a departure from what was commonly intended and understood by members of the company and cannot be said to have been authorised by the company. In other words, by specifically stating that its object is to invest in Bugis Cube, the Company has impliedly restricted its affairs to the exclusion of other businesses including investing in TYN House. It is significant that the Company's memorandum had, in the lead-up to the JVA, been amended from a much wider statement of its objects which encompassed a diverse range of businesses (including acquiring properties for investment more generally) to one which primarily focuses on the Bugis Cube investment. It follows that there cannot have been a wrongful diversion of corporate opportunity (and a breach of fiduciary duties on this basis) since the purpose of the Company was restricted to the Bugis Cube investment.

86 The conclusion above is also consistent with Sakae's aim in investing in the Company. It did so to acquire an interest in units in Bugis Cube, not to carry on property investment generally. Correspondingly, Sakae has not established any duty on the part of Mr Ong or Ong Han Boon to scout out general investment opportunities on behalf of the Company. Mr Foo and Sakae were at all times aware that Andy Ong and the ERC Group were active in property investment on their own behalf, and could not have expected them to cease these activities or direct all future investments to the Company. There is nothing in the JVA to this effect. Finally, there is also no evidence that the opportunity of investing in the TYN House came to Mr Ong solely in his capacity as director of the Company. All this fortifies my conclusion that the investment in the TYN House cannot amount to a wrongful diversion of corporate opportunity.

Second, the First Unauthorised Loan and the First Loan Agreement

87 Mr Ong, Ong Han Boon and ERC Unicampus are the relevant defendants in relation to this head of claim.

88 The factual background to this complaint is as follows. By a facility letter dated 21 January 2011, UOB granted the Company a six-month short term loan facility of $10m ("the $10m Facility") for the express purpose of financing the Company's "working capital requirements". The Company utilised the $10m Facility to make a loan of $10m to ERC Unicampus to fund the latter's purchase of a property from Garden Estates Private Limited ("GEPL") in March 2011 ("the First Loan"). The said property was later named "Big Hotel". On or around 14 March 2011, at the Company's direction, UOB disbursed the loan amount of $10m directly to GEPL.

89 Two written agreements surfaced in relation to the First Loan. Each document purported to represent the agreement ("the First Loan Agreement") under which the Company had loaned the $10m to ERC Unicampus. Both documents are dated 25 January 2011 and bear Andy Ong's signature for and on behalf of ERC Unicampus. The critical difference between the two is in respect of the person signing for the Company: one document was signed by Mr Ho ("the HYK Version") while the other was signed by Ong Han Boon ("the OHB Version"). Sakae alleges that it first saw the HYK Version on 14 January 2013 when the PwC Report was released. PwC had found the document in the course of its investigations. The OHB Version was only disclosed by the relevant defendants much later, on 10 June 2015.

90 As noted earlier, directors' resolutions and ACRA records appear to document a change in the composition of the Company's board on 20 January 2011. These documents indicate that Mr Ho had been appointed to replace Mr Ong and Ong Han Boon on that date. However, as discussed above at [34]–[38], the documents were in fact backdated and the actual changes in directorship occurred much later, between February and March 2012.

91 Although the defendants argue that the First Loan has been repaid in full, Sakae claims that a sum of $7.9m remains outstanding.

Factual findings

The events surrounding the First Loan and the First Loan Agreement

92 On the evidence before the court, Sakae has shown a *prima facie* case that the following events occurred. In 2011, when Mr Ong and Ong Han Boon were still *de jure* directors of the Company, they arranged for the First Loan to

be given to ERC Unicampus to fund the purchase of Big Hotel from GEPL. No loan agreement was entered into at the time. Although the transactions were completed, it later occurred to them that problems might arise. Amongst other things, Mr Ong was on the other side of the loan transaction with ERC Unicampus. This was a conflict of interest situation. In addition, Mr Ong and Ong Han Boon had failed to comply with proper company procedure in arranging the loan transaction. To resolve these issues, Mr Ong and Ong Han Boon fabricated a paper trail in 2012 to create the appearance that: (a) Mr Ho had already replaced them on the Company's board at the time of the First Loan; and (b) Mr Ho had entered into the First Loan Agreement (*ie*, the HYK Version) for and on behalf of the Company shortly after he was appointed as director. Subsequent to the AO Defendants' amendment of pleadings admitting that the change in the Company's directorships had been backdated, they created and disclosed the OHB Version in an attempt to demonstrate that the First Loan was executed by a validly appointed director of the Company at the material time. Both the HYK Version and the OHB Version were created after the fact and there was no valid authorisation by the Company of the First Loan.

93 Everything stated in [92] above is a possible inference from the evidence led. Such possibility, as stated above, is all that Sakae needs to establish in a no case to answer situation – although I add, for completeness, that in the absence of contradictory evidence, it appears to me to be established on a balance of probabilities in any event. First, it is clear that it was Mr Ong and Ong Han Boon who had, acting jointly on the Company's behalf, issued a letter to UOB dated 3 March 2011 to draw down the $10m Facility and disburse that sum to GEPL. Second, there is no evidence that the

First Loan was validly authorised by the directors or shareholders of the Company. Third, the emergence of both the HYK Version and the OHB Version, particularly, the disclosure of the OHB Version at a late stage of the proceedings, was a red flag. I find the relevant defendants' explanation, that the HYK Version was created in addition to the OHB Version in order to be consistent with Mr Ho's backdated appointment on the Company's board, to be unsatisfactory. In so far as the OHB Version (which was purportedly entered into on the actual date it bears) was already in force, there would be no reason for the HYK Version to be created except for the deliberate purpose of fabricating a paper trail. It appears to me that the relevant defendants could not provide any sensible explanation for the existence of two versions of the First Loan Agreement and for the disclosure of the OHB Version only at the eleventh hour. Analysed against the backdrop of changes in directorship and the impression which the related documents sought to create, I find Sakae's suppositions to be a plausible – and, indeed, likely – explanation of the chain of events and the documentary evidence which has been put forward.

94 I also accept that Sakae was not aware of the transactions until 14 January 2013 when the PwC Report, which annexed the HYK Version, was released. The relevant defendants' argument, that Mr Foo would have known of the $10m Facility by 13 July 2011 because he had signed a directors' resolution on behalf of the Company approving a five-month extension of the facility on that date, does not take them very far. Just because Mr Foo knew about the $10m Facility does not mean that he knew about the First Loan as well. Mr Foo believed that the moneys were going into renovation works in relation to Bugis Cube, and indeed there is nothing in the $10m Facility documents to contradict that belief. The documents only indicate that the

facility was to fund the Company's "working capital requirements". When a company is not a financier, loans to third parties do not come out of working capital. In addition, the relevant defendants repeat their argument that Sakae would have known about the transactions because the management accounts, which would have alerted Sakae to these facts, had been sent to Ms Voon. For the reasons detailed above at [64]–[66], I do not find these arguments to be persuasive. I do not think that Ms Voon realised the nature and extent of the transactions at the time and, even if she had, there is no basis to impute her knowledge to Sakae. Therefore, it appears that Sakae had been kept in the dark about these transactions up until their investigations into the Company's affairs in 2013.

WHETHER THE FIRST LOAN HAS BEEN REPAID

95 In what I understand as an attempt to show that the Company had suffered no loss, the relevant defendants allege that the First Loan has been repaid. They rely on: (a) the PwC Report which stated that funds totalling $10m from various entities were deposited in the Company's account and were subsequently paid to UOB on 21 December 2011 to settle the $10m Facility; and (b) the evidence of Mr Foo and Ms Voon which appears to corroborate this position.

96 I do not think there is enough to show that Sakae's position, that $7.9m of the First Loan remains outstanding, is inherently incredible. According to Sakae, the entries in the accounts upon which PwC based their assessment merely created the impression that the First Loan had been repaid in full. In reality, only $2.1m has been repaid by ERC Unicampus. The following evidence was led in support. In PwC's written responses which sought to

clarify aspects of the PwC Report, the finding that the First Loan was "repaid" was made "in the context where [PwC] sighted various cash inflows from related entities of close to $10 million which was subsequently used to pay [UOB]". In other words, it was not that ERC Unicampus had returned the sum of $10m to the Company in full but merely that the entries in the Company's accounts indicated that funds totalling $10m from other entities had been transferred to the Company. This is corroborated by a series of accounts and receipts which, on closer scrutiny, show that only $2.1m of these transfers had been recorded as "payments" to the Company. The remaining cash inflows from these other entities had been recorded as "loans" to the Company. These "loans" were later "reclassified" in the Company's accounts as loans from these other entities to ERC Unicampus, thereby cancelling out the debt owed by ERC Unicampus to the Company. Yet there are no documents which indicate that these other entities had agreed to novate or assign the Company's debts to ERC Unicampus. In the final analysis, it appears that an exercise in creative accounting had been effected seeking to depict cash inflows to the Company in full satisfaction of the First Loan but ultimately leaving the Company $7.9m out of pocket. It must be remembered that the Company has no accounting staff of its own and that all its accounts are prepared by the staff of GCM pursuant to the latter's duties as manager of the Company.

97 Indeed, it is not inherently incredible that the Company had deliberately stalled for time prior to granting PwC access to its financial and accounting records in order to effect these transactions and entries. Based on the numerous letters exchanged in the lead-up to PwC's entry, Sakae's lawyers had met with considerable resistance from the Company before PwC was finally granted access 19 days after the request to inspect was first made.

98 In any event, it would probably be unsafe to take the evidence of Mr Foo and Ms Voon, which appeared to accept that the First Loan has been repaid, as final authority on the matter. It is clear from Mr Foo's evidence that Sakae relied on its accountants to carry out the in-depth investigations. All he and Ms Voon did at the time was to relate the findings from the PwC Report which, as noted above, were subsequently qualified. In other words, they were merely giving their opinion on, or their interpretation of, the PwC Report rather than stating based on their own knowledge whether the First Loan had or had not been repaid.

99 In the absence of other evidence to the contrary, there is a *prima facie* case that $7.9m of the First Loan remains outstanding.

Analysis

100 It is not disputed that Andy Ong was interested in more than 20% of the total voting power in ERC Unicampus at the material time on account of his shareholdings in various companies and that the First Loan did not receive the requisite company approval under s 163 of the Companies Act. The First Loan was therefore unlawful under that section.

101 I am satisfied that the conduct of Mr Ong and Ong Han Boon in relation to the First Loan and the First Loan Agreement was oppressive. The First Loan appears to have served only the interests of Andy Ong and ERC Unicampus without any real benefit to the Company. Not only was it unlawful under s 163 of the Companies Act, it was also in breach of cl 11.1(i) of the JVA which requires Sakae's prior approval before the Company can make any loan exceeding the sum of $2m. Yet, far from abiding by the understanding

reached with Sakae, Mr Ong and Ong Han Boon orchestrated the transactions without Sakae's knowledge or consent. Together with Mr Ho, they took active steps to create a paper trail seeking to depict the transaction as a legitimate one. I also observe that when Sakae was at the brink of discovering their misdeeds, little was done to remedy the loss caused to the Company. Instead, the exercise in smoke and mirrors was taken to the next level and entries in the Company's accounting records were effected in a further attempt to deceive Sakae into believing that no loss had accrued to the Company in the result. The chain of events evidences a pattern of disregard for Sakae's interests and a tendency on the part of the defendants to flout the norms expected of them in order to mask the extent of their wrongdoing. These facts also disclose a clear breach of fiduciary duty on the part of Mr Ong and Ong Han Boon.

102 In Mr Ho's case, his involvement may be particularised as (a) signing the HYK Version without making further inquiries; and (b) signing off as director of the Company on a letter which was backdated to 2 December 2011 and which appeared to demand repayment of $2.1m from ERC Unicampus ("the 2 December 2011 Letter"). Here, the objective evidence indicates that Mr Ho had committed the Company to a loan and signed off on documents on its behalf without even checking on the details of the transactions to which they pertained. Mr Ho argues that he believed a loan was going to be disbursed at the time when he signed the HYK Version. As for the 2 December 2011 Letter, he "didn't notice" whether the document had a date when he signed it. However, Mr Ho's testimony is insufficient to refute the allegation that he breached his fiduciary duty to the Company. Given that the loan was substantial, he should have made sufficient inquiries to satisfy himself that the transaction was in the Company's best interests. That he did

so was not apparent on the evidence. On balance, there is sufficient basis to find a breach of fiduciary duty on Mr Ho's part. Given that his actions had no real impact on the transaction itself but were simply undertaken in order to disguise Andy Ong's involvement, they were not oppressive to Sakae as such. However, they indicate a willingness on the part of Mr Ho to act on Andy Ong's direction without giving independent thought to what he was doing or the position of the Company's shareholders.

Third, the Wrongful Diversion of $16m to companies in the ERC Group and the Sham Lease Agreement

103 In relation to this head of claim, Mr Ong, Ong Han Boon, Mr Ho and ERC Holdings are the relevant defendants.

Background facts

104 The background to this allegation is as follows. Between 2010 and 2011, the Company had been leasing out units in Bugis Cube for rental income. It seems that the intention at the start was to operate Bugis Cube as an "edu-mall". ERC Institute, which ran a commercial school, was one of the Company's tenants. In August 2011, there were plans to sell Bugis Cube *en bloc*. These plans were, however, suspended after an attempt at such a sale was unsuccessful. What the Company subsequently decided to do with Bugis Cube is disputed by parties, but it is accepted that on or around 16 December 2011, notices were sent to all the tenants informing them that their leases would terminate in June 2012. On 9 March 2012, a company named DTZ Debenham Tie Leung (SEA) Pte Ltd ("DTZ") made Mr Ong an offer to purchase Bugis Cube *en bloc*. The offer was not taken up and in June 2012 the Company began selling off individual units in Bugis Cube.

105 It was subsequently discovered that, despite the notice given of the termination of all leases in June 2012, the Company had entered into an agreement on 1 March 2012 ("the Lease Agreement") to let out 40,500 square feet in Bugis Cube to ERC Institute from November 2012 onwards. The maximum lease period, if all the options to renew were exercised, would amount to nine years, giving ERC Institute the right to occupy Bugis Cube until 2021. Unlike the other leases that the Company had with the other tenants of Bugis Cube as well as previous lease agreements that the Company had had with ERC Institute itself, the Lease Agreement did not contain a standard clause giving the Company the right to terminate the lease, without compensation, on six months' notice. Only a few months after the date that the Lease Agreement was entered into, the lease was, apparently, terminated for the reason that the Company had decided to sell all the units in Bugis Cube on a piecemeal basis and needed them to be vacant for this purpose. Over the course of proceedings, the defendants disclosed two letters of termination which GCM (which was managing the leases on the Company's behalf) purportedly issued to ERC Institute at the time. The two letters were identical except for the fact that the one which was disclosed before the trial was dated 31 July 2012 and the one which was disclosed during the trial was dated 30 May 2012.

106 In any event, the Company paid $16m to ERC Institute in September 2012 as compensation for the early termination of the lease. The evidence shows that, instead of remitting the entire sum directly to ERC Institute, Mr Ong and Ong Han Boon, who were the two signatories operating the Company's current account, had transferred $14.3m to ERC International and $1.5m to ERC Unicampus. It appears that the transfers had been made

pursuant to two letters, both of which were dated 7 September 2012. In the first letter, ERC Institute had instructed the Company that an "agreed lease termination compensation of $16 million" shall be collected on its behalf by ERC Holdings. In the second letter, ERC Holdings appears to have followed up by instructing the Company to disburse the abovementioned sums to ERC International and ERC Unicampus. As for the remaining $200,000, ERC Holdings informed the Company that the sum would be "called upon as and when required". It was later revealed that ERC International had used the $14.3m to purchase TYN House and that ERC Unicampus had intended to use the $1.5m in connection with its plans for the Big Hotel.

107 A copy of the Lease Agreement, which bore Mr Ho's signature for and on behalf of the Company and Ong Han Boon's signature for and on behalf of ERC Institute, was provided to PwC in late 2012 when they were investigating the Company's affairs.

Sakae's submissions

108 Sakae's arguments on this head of claim are two-pronged. First, Sakae argues that the Lease Agreement and its premature termination were fabricated. They were devised as a way for Andy Ong to divert $16m from the Company to other members of the ERC Group in order to fund investments which would benefit himself. According to Sakae, it was known to Mr Ong from 20 July 2012 that the Company would have access to a fund of $16m. This was because on that day itself he had, on behalf of the Company, accepted a credit facility from UOB for an amount of up to $16m ("the $16m Facility"). It was from that point on that Mr Ong put in place a series of steps which would allow him to divert the $16m. These included the invention of

the Lease Agreement and its premature termination. Second, even if the Lease Agreement had not been fabricated and was in fact entered into contemporaneously, the entry into the Lease Agreement and the payment of $16m compensation were not in the Company's interests as: (a) the entry into the Lease Agreement for an aggregate lease period of nine years ran contrary to the agreed plan to sell all the individual units of Bugis Cube; (b) the Company was not able to terminate the lease prematurely without having to pay compensation; and (c) the computation of the $16m compensation amount was questionable. Further, the transactions had not been approved by the Company's shareholders and directors as required by the JVA, which provided as follows:

> **11. RESERVED MATTERS**
>
> 11.1 Save as otherwise provided in this Agreement, [the Company] shall not do any of the following in relation to [the Company] or any Group Company (each, a "**Shareholder Reserved Matter**") without the prior unanimous approval of all Shareholders (whom shall act reasonably and in the best interest of the Company and the Shareholders when exercising their voting rights) in general meeting:
>
> …
>
> (o) enter into any contract or commitment (other than contracts made in the ordinary course of business) involving expenditures reasonably estimated to being in excess of S$5,000,000; [or]
>
> (p) sale, lease, transfer or dispose of any building or property of [the Company] or any Group Company;
>
> …
>
> 11.2 Save as otherwise provided in this Agreement, [the Company] shall not do any of the following in relation to [the Company] or any Group Company (each, a "**Board Reserved Matter**") without the prior majority approval of all the Directors (whom shall act reasonably and in the best interest of the Company and the Shareholders when exercising their voting rights) present and voting:

> …
>
> (g) enter into any agreement which cannot be terminated by [the Company] or any Group Company without penalty within six (6) months of its commencement; [and]
>
> …
>
> (j) grant any lease or third party rights in respect of the property of [the Company] or a Group Company;
>
> …

On either account, Sakae was not informed of the Lease Agreement nor of the payments made to the companies in the ERC Group at the time.

109 Sakae therefore argues that the diversion of the $16m to companies in the ERC Group and the entry into the Lease Agreement constituted oppressive conduct. Mr Ong, Ong Han Boon and Mr Ho as directors of the Company had also breached their fiduciary duties in procuring the transactions.

The defendants' submissions

110 The relevant defendants deny that the Lease Agreement had been fabricated. According to them, after the attempted *en bloc* sale of Bugis Cube fell through, the first plan was to revert to the "Edu-mall" concept with ERC Institute as the anchor tenant. It was in the Company's interest to enter into the Lease Agreement at the time due to the profit that the lease would generate for the Company. It was only after Mr Ho had signed the Lease Agreement that Mr Ong received the offer from DTZ to buy Bugis Cube. Mr Ong and Mr Foo had subsequently agreed to reject DTZ's offer and sell the property on a piecemeal basis. The Lease Agreement was terminated as a result, and indeed it was in the Company's interest to do so as the profits from the sale of the individual units of Bugis Cube would far outweigh the compensation payable

to the tenant. The relevant defendants also argue that $16m was a fair amount as compensation and had been computed on the basis of a market survey done by Colliers International ("Colliers"). In any event, Sakae did not take advantage of the opportunities given to it to negotiate the compensation amount.

111 As for Mr Ho, he conceded at trial that he did not make further inquiries when signing the Lease Agreement and that this facilitated the diversion of funds. His main defence is that his conduct was not unreasonable as he had acted in accordance with what he referred to as "the Established Norm", which the shareholders impliedly accepted, in relation to the entry into lease agreements. This norm was to leave it to GCM to decide on the terms of the Lease Agreement. For reasons that are set out at [252]–[260] below, I consider that the Established Norm defence does not avail Mr Ho. In this part of the judgment, therefore, I will consider his other arguments.

Factual Findings

Whether the Lease Agreement is a sham document

112 I am persuaded that the Lease Agreement is a sham document. Having regard to the suspicious circumstances surrounding the creation and termination of the lease (for which there has not been any satisfactory explanation) as well as the internally inconsistent accounts proffered by the relevant defendants in respect of the features of the Lease Agreement, I am satisfied that Sakae has proven this allegation on a balance of probabilities.

Whether a nine-year lease was inconsistent with the Company's plans for Bugis Cube

113 In arriving at my conclusion, I first considered whether a nine-year lease could be reconciled with the Company's plans for Bugis Cube at the time. Not surprisingly, witness testimony on each side supported different accounts of what the Company decided to do with Bugis Cube following the unsuccessful attempt in August 2011 to sell the entire building. On the one hand, Mr Foo maintained that the goal was ultimately to sell the property and the lease would be wholly incompatible with this goal. On the other hand, Mr Ho's evidence was that the intention at the time was for the "Edu-mall" to be a long-term project and a nine-year lease was consistent with this objective.

114 Unfortunately, there was not much objective evidence to assist in understanding the true state of affairs at the time. Both sides had to rely on the transcript of the 25 October Meeting in support of their respective versions. During the meeting, Mr Ong stated that the decision had been made to "go back to our original plan, enhance it … and later … with the yield, try to sell it again". What Mr Ong had meant by this statement is not entirely clear from the rest of the transcript. It appears, however, that there could have been an intention to revert to the "Edu-mall" concept and then try to sell Bugis Cube *en bloc with existing leases* that would generate rental income for the new owner. In this regard, Mr Ong had explained that "the objective [in seeking out tenants] again is for yield, … [and] with that yield … we can sell at higher price". According to him, it was important to engage an anchor tenant (*ie*, ERC Institute) in order for the "Edu-mall" concept to work. The Company then proceeded to vacate the units to enable refurbishment works and sought out tenants to take up the leases once refurbishment was complete. After

receiving DTZ's later offer to purchase Bugis Cube, however, both he and Douglas Foo decided to reject the offer on the basis that selling the units on a piecemeal basis would be more profitable. They then proceeded to unwind their previous plans.

115 It appears that the transcript lends greater weight to the defendants' account, although in considering the evidence I was also cognisant of the fact that Mr Ong may have already been trying to explain away his conduct at this point. It seemed to me that insofar as the intention at one point was to sell Bugis Cube *with existing tenancies* for greater return (and this is taking Mr Ong's evidence from the transcript at its highest), it would have been reasonable to enter into a nine-year lease as part of the plan.

Whether the circumstances surrounding the Lease Agreement are questionable

116 Nevertheless, even if I accept that a nine-year lease was not inconceivable at the time, there are numerous reasons to doubt the legitimacy of the Lease Agreement itself.

THE CREATION OF THE LEASE AGREEMENT

117 To begin with, several anomalies appear when the Lease Agreement is compared with the other leases which the Company had concluded. First, even though it was allegedly entered into on 1 March 2012, stamp duty on Lease Agreement was not paid until 30 July 2012. In contrast, every other lease that the Company had with other tenants was registered for stamp duty on the day of the lease or a few days thereafter, without incurring penalty. Second, all the other leases which the Company had with other tenants of Bugis Cube as well as previous leases which the Company had with ERC Institute itself contained

a clause, cl 19.7, which gave the Company the right to terminate the lease, without paying any compensation, on six months' written notice. This clause was absent from the Lease Agreement. The defendants' explanation is that considering the long-term nature of the lease and the substantial sums which ERC Institute would be investing in such lease, it was logical for ERC Institute to negotiate a customised agreement that protected itself from significant losses which would be incurred should the Company be able to terminate the lease with only six months' notice. Even so, I found it curious that the Company would enter into a lease agreement which could be extended for up to nine years by the tenant without any ability on the Company's part to influence the length of the lease when in previous cases it had been careful to protect itself in this regard. It also appears that while the Lease Agreement required ERC Institute to pay a deposit of about $300,000 to the Company, no such payment had been made.

THE TERMINATION OF THE LEASE AGREEMENT

118 Next, there were circumstances surrounding the termination of the Lease Agreement which I found questionable. The letter of termination dated 31 July 2012, which was issued to ERC Institute and which was disclosed before the trial began, appears to have been created only around January 2013. This inference is supported by an e-mail dated 30 January 2013. The e-mail was sent by an employee of GCM, one Chua Wei Tat ("Mr Chua"), to Ong Han Boon, Carol Ong and Stephen Tan ("Mr Tan"), another employee of the ERC Group. In the e-mail, Mr Chua said that "[Andy Ong] yesterday came down … to make amendment to the Letter of Termination of [ERC Institute] tenancy. The date has been changed to 31 July 2012 based on his instructions". The defendants disclosed a letter of termination dated 30 May

2012 only during the trial, and sought to argue that the 31 July 2012 letter was merely created to replace the 30 May 2012 letter on Andy Ong's instructions. However, the defendants were unable to provide any satisfactory explanation for why the 30 May 2012 letter was not disclosed earlier, or why there was a need to issue two letters of termination.

THE $16M COMPENSATION

119 Furthermore, the need to pay the high sum of $16m as compensation is highly questionable.

120 First, there is quite a bit of confusion about the total floor area which was actually leased to ERC Institute under the Lease Agreement. The floor area leased allows a determination of the basis for the computation of the compensation amount. Different figures were referred to at various times over the course of proceedings; the defendants could not maintain a consistent and coherent position. It appears that the $16m compensation was calculated on the basis that the total floor area leased was 40,500 square feet, yet the Lease Agreement plainly states that the area leased would be 7,331 square feet. On one occasion, Mr Ong indicated that the correct figure should have been 40,420 square feet, which was derived from his own calculations based on the land area of Bugis Cube stated in a 2011 Knight Frank valuation report. In court, however, Mr Chua, on whose evidence the relevant defendants are also seeking to rely, maintained that he had personally worked out the leased area to be 36,677 square feet. He explained that the figure stated in the actual Lease Agreement had been an error on his part. This seems dubious as there was no evidence that any subsequent amendments had been made to the Lease Agreement. I observe that had the defendants adhered to the figure of

7,331 square feet as stated in the Lease Agreement, the monthly rental would have been $34.87 per square foot (an absurd number, that is about four times higher than any of the rental rates found in the defendants' own report from Colliers). It is difficult to accept that a mistake would have been made regarding such a material term of the lease or that it would not have discovered and corrected thereafter. The fact that there remained so many differences over the actual floor area to be leased long after the Lease Agreement had been concluded also strikes me as suspect.

121 Second, there are several problems with the figure of 40,500 square feet, which the defendants ultimately used in calculating the compensation amount. Based on the Singapore Land Authority's official Strata Certified Plan for Bugis Cube, the total area of all the strata-titled units in the Lease Agreement amounts only to 18,916.7 square feet. The defendants argue that this figure fails to take into account the common areas which were to be leased to ERC Institute as well. However, there is no evidence that the Company was legally entitled to let out the common areas. Even if the Company, having majority ownership of the building (91%), might have been able to obtain the MCST's approval to let out the common areas with relative ease, it was premature for the Company to charge ERC Institute rent, and for ERC Institute to claim compensation, in respect of those areas without evidence of any effort being made to obtain the approval of the MCST. Moreover, assuming the floor area was indeed 40,500 square feet, the rental rate charged would be $6.31 per square foot. This seems, oddly enough, to have been based on the rental estimate of $6 per square foot in Sakae's 6 November 2009 Board Paper and was out of line with the average market rental rate of $7.50

per square foot in 2012 as stated in the defendants' own Colliers report, on which the assessment of the compensation was allegedly based.

122 Third, the manner in which the funds had been paid out thereafter provides further reason to question their real purpose. It is suspicious that the money had been paid to and used by the other companies in the ERC Group for their own investments when the supposed purpose of the compensation was to enable ERC Institute to find alternative premises.

Conclusion on the authenticity of the Lease Agreement

123 While none of these circumstances is in itself decisive, in looking at the matter as a whole, each points to the conclusion that the Lease Agreement cannot be legitimate and should not be taken at face value. The main evidence on which the defendants seek to rely in their riposte is that given by Mr Chua and Mr Ho, who claim that the Lease Agreement was prepared in February 2012 and signed in March 2012. However, the defendants were unable to point to any objective evidence to substantiate these assertions. Considering the number of holes in Mr Chua's account, and Mr Ho's *laissez-faire* approach towards the transactions (which makes me reluctant to depend on his evidence on the more precise details), I place significantly less weight on their testimony. I also observe that if such a lease had truly been entered into, the Company's premature termination of the lease shortly after its conclusion would have been an incredibly capricious move considering the hefty compensation for which it would be liable. If indeed the decision to sell the units individually would lead to such a huge liability on the Company, one would expect the matter to have been brought up at a board meeting so that all the directors could decide on how the problem should be dealt with. On the

whole, it seems to me that the Lease Agreement was merely a sham concocted to divert funds from the Company, and the number of flip-flops made by the defendants in attempting an explanation was simply the product of their having been caught between a position that was inconsistent with the objective facts surrounding the Lease Agreement and one which did not accord with commercial realities.

124 I now address Sakae's contention that it was when Andy Ong was sure that a sum of $16m would be made available to the Company under the $16m Facility around July 2012 that he started to engineer the diversion of $16m to the ERC Group companies. According to Sakae, the computation of the compensation amount was therefore contrived in order to arrive at the pre-determined figure of $16m. In my view, this is a possible inference which may be drawn from the state of the evidence, in particular the awkward manner in which the ultimate figure of $16m had been arrived at. Indeed, I find it hard to accept that the $16m figure had been plucked out of thin air. Nevertheless, even though this allegation appears to have been advanced as an explanation to complete the picture that has emerged in the course of trial, it was not expressly pleaded and strictly speaking it is not open to Sakae to make this argument. In any event, I do not think it is necessary to make a finding on this point. The evidence discussed above is sufficient to raise serious doubts about the terms of the Lease Agreement and its authenticity even on a balance of probabilities.

Whether Sakae was informed of the transactions at the time

125 The question to be addressed is whether it is inherently incredible that neither Sakae nor Mr Foo knew about the transactions until sometime in

November 2012. The JVA required the approvals of the Company's shareholders and directors before a long term tenancy like the Lease Agreement and the subsequent termination were effected. There is no evidence that these approvals, which would have brought the transactions to the attention of Sakae and Mr Foo, were obtained. Indeed, Mr Ong was evasive about the payments during the 25 October Meeting. Rather than disclosing the payments made to the ERC Group companies, Mr Ong merely informed the board that the Company had needed another $15m loan from UOB and gave different accounts of why the loan was needed. It seems to me that the defendants had wanted to conceal the transactions from Sakae for as long as possible.

Analysis

126 In my view, the defendants had acted in clear disregard of Sakae's interests when they siphoned out $16m from the Company under the guise of prematurely terminating the Lease Agreement. Considering the fact that ERC Institute was not entitled to the $16m compensation in the first place, it does not lie in the defendants' mouths to insist that it was open to Sakae to negotiate the quantum of compensation in any event. Even if the Lease Agreement were not a sham document, the entry into an agreement under which the Company had no right of termination without incurring a sizeable liability for compensation and the $16m payment, both of which were deliberately concealed from Sakae, would itself be enough to constitute oppression in the light of the relationship between the shareholders. In arriving at my conclusion, I considered the fact that Mr Ong and Mr Ho deliberately omitted to obtain the requisite directors' approvals for the transactions and

deliberately contravened the JVA. I refer in particular to sub-clauses 11.2 (g), (i), (j) and (h)(iii) and (iv).

127 The $16m was ultimately used to benefit the ERC Group companies, and it is not disputed that Mr Ong had a sizeable interest in the companies which benefited from the transactions. By procuring the transactions, Mr Ong breached his fiduciary duties to the Company.

128 As for Mr Ho, it is clear from the evidence that he signed the Lease Agreement on Mr Ong's instructions without making any enquiries to satisfy himself that it was in the Company's interest to do so, when his duty to the Company required such questioning. He failed to ask questions about the terms of the Lease Agreement or about the fact that Mr Ong was on both sides of the transaction and faced a conflict of interest. His actions facilitated the wrongful diversion of funds and, in effect, promoted Mr Ong's interests over those of the Company. I therefore find that Mr Ho also breached his fiduciary duties to the Company and was complicit in the oppression.

129 In relation to Ong Han Boon, even though it appears that he had also been complicit in the oppressive behaviour, he had ceased to be a director by the time the transactions were effected. It follows that he no longer owed fiduciary duties to the Company at the relevant time. Sakae neither pleads nor argues any other basis on which liability may be attributed to Ong Han Boon. This may be relevant when considering what remedies should be ordered against whom, but not at the present stage of determining whether oppression existed.

130 Therefore, I find that Sakae has established its case in oppression in relation to the $16m diversion of funds and the Lease Agreement.

Fourth, the claim relating to the "Sham" Consultancy Agreement

131 In this section, the relevant defendants are Mr Ong, Ong Han Boon, Mr Ho and ERC Consulting.

Background facts

132 The background to this allegation can be stated briefly. On 2 May 2012, the Company engaged Knight Frank as the "Sole Marketing & Sales Agent" for Bugis Cube. Only two days later, on 4 May 2012, the Company and ERC Consulting apparently entered into an agreement under which the Company agreed to appoint ERC Consulting as its consultant in connection with the marketing and the promotion of the sale of Bugis Cube for a fee of $150,000 (the "Consultancy Agreement"). The Consultancy Agreement was signed by Mr Ho for and on behalf of the Company and by Mr Ong's brother, Ong Siew Bok, for and on behalf of ERC Consulting. It is not disputed that Ong Siew Bok would have taken instructions from Mr Ong. Newspaper advertisements as well as brochures were subsequently printed in line with the agreement to publicise the sale of Bugis Cube, although Sakae disputes the extent to which ERC Consulting had in fact been responsible for these promotional activities (and indeed, whether they had been carried out pursuant to the Consultancy Agreement at all).

133 The official launch event for the sale of Bugis Cube was held on 23 and 24 June 2012 at InterContinental Hotel. In June and July 2012, Mediacorp billed ERC Consulting about $30,000 for advertisements in the *Today*

newspaper. It appears that payment of $160,500 (comprising the agreed fee and GST) was made by the Company to ERC Consulting pursuant to the Consultancy Agreement on 24 December 2012, although the defendants' initial position was that no money had been transferred to ERC Consulting.

Inspection of documents at the Commercial Affairs Department

134 After the start of the trial in January 2016, further documents relating to the Consultancy Agreement were produced pursuant to an inspection at the Commercial Affairs Department ("CAD") by Sakae's solicitors on 1 and 2 February 2016. These comprised, *inter alia*, a journal voucher, an invoice and a list of transactions which documented the $160,500 payment from the Company to ERC Consulting as a "Marketing Consultancy fee for [the] sale of Bugis Cube". Thereafter, the defendants ceased to dispute the fact that payment had been made to ERC Consulting.

135 The inspection also revealed an e-mail chain which was circulated not long after Sakae's solicitors requested an inspection of the Company's accounting and financial records on 9 November 2012 ("the E-mail Chain"). The E-mail Chain shows that on 19 November 2012, Carol Ong had written to Mr Chua stating: "attached is a copy of the consulting agreement at $150,000. Please could you assist to let us have a schedule of work done in order to allow ERC Consulting to raise the invoice in November 2012." In reply, Mr Chua e-mailed Carol Ong to say that he had "[a]dded in Schedule 1". In a follow-up e-mail, Mr Chua attached a copy of the entire Consultancy Agreement, including a page described as "Schedule 1", and wrote, "Please use this revised agreement instead".

Sakae's submission

136 It is Sakae's allegation that the Consultancy Agreement is in fact a sham document which was fabricated to enable Mr Ong and his associates to divert moneys from the Company to his own companies, using those who were accustomed to act on his instructions, while Sakae and Mr Foo remained in the dark. According to Sakae, the Consultancy Agreement was an unauthorised transaction, carried out in breach of the fiduciary duties which Mr Ong, Ong Han Boon and Mr Ho owed to the Company, and constituted an instance of oppressive conduct.

Factual findings

Was the Consultancy Agreement a sham document?

137 To start with, I deal with Sakae's contention that there was an overlap of responsibilities between the Consultancy Agreement and the agreement with Knight Frank. According to Sakae, this indicated that the Consultancy Agreement was unnecessary and not in the Company's interests. I do not draw this inference. The Company had the prerogative to decide how to market Bugis Cube and to determine whether it required additional assistance apart from Knight Frank's services. The main question here is whether ERC Consulting's services were engaged in good faith or simply to enable the diversion of funds. There was some degree of overlap between Knight Frank's and ERC Consulting's duties which appears from the description of the scope of duties in the Consultancy Agreement, but to me this in itself is not conclusive.

138 More telling is the evidence surrounding the creation of the Consultancy Agreement which, in my view, provides some reason to doubt the authenticity of this contract. First, the only evidence which supports the defendants' argument that the Consultancy Agreement had been entered into contemporaneously is Mr Ho's testimony. He asserted that he had signed the agreement sometime in May 2012. The paper trail, however, indicates that the Consultancy Agreement first emerged sometime in November 2012. This was when it was attached to Carol Ong's 19 November 2012 e-mail. There is no documentary proof of the Consultancy Agreement existing before this. Second, the contents of the E-mail Chain raise further suspicions about when the Consultancy Agreement was actually created. In her 19 November 2012 e-mail, Carol Ong requested a "schedule of work" from Mr Chua in order to raise an invoice to the Company. Mr Chua had responded by adding a schedule to the Consultancy Agreement and informing Carol Ong to use the "revised agreement" instead.

139 The practice of creating a "revised agreement", by unilaterally adding a schedule of work onto an already concluded contract, so as to raise an invoice to a paying company seems rather unusual. If the objective was to merely provide a breakdown of services justifying the $150,000 worth of fees incurred during the billing process, ERC Consulting could have raised the schedule of work together with the invoice itself. In addition, the copy of the Consultancy Agreement which was circulated in the E-mail Chain was unsigned. If the Consultancy Agreement had already been signed in May 2012 as Mr Ho claims, surely a signed copy would have been circulated. The stronger inference to be drawn from the evidence is that the attachment was

still in the stages of drafting and preparation when the E-mail Chain was being circulated.

140 Furthermore, it was apparent from the inspection at CAD that the defendants had attempted to suppress documents relevant to the disposal of the matter, and an adverse inference should thus be drawn against them. The documentation of the $160,500 payment and the E-mail Chain were clearly material to the present proceedings and would have been in the possession, custody and power of the defendants or at least of the Company, GCM and ERC Consultancy. There is no reason why the documents should not have been disclosed earlier, and indeed the defendants have not proffered any satisfactory explanation for not doing so. The events therefore raise a presumption that the defendants were seeking to withhold information which would have been unfavourable to them.

141 Indeed, based on the documents which were produced pursuant to the inspection, there are at least two aspects of the defendants' conduct which are questionable. First, considering the fact that the Consultancy Agreement first emerged in the paper trail only on 19 November 2012 (which was about ten days after PwC commenced its investigations), the timing of its appearance raises a suspicion that the document was created as an afterthought for production to PwC. Second, it is highly unlikely that someone who genuinely thought that they were legally entitled to be paid $160,500 would suppress evidence of that payment as was done here. I find the defendants' conduct in this respect to be inconsistent with their position that the Consultancy Agreement was a legitimate contract.

142 The strongest evidence in support of the relevant defendants' case comes from the invoices which document the advertisements taken out to publicise the sale of Bugis Cube. It also appears that a detailed breakdown of the $150,000 consultancy fee charges was provided. The breakdown showed that ERC Consulting claimed for costs incurred in, *inter alia*, event management at InterContinental Hotel and newspaper advertisements placed in Lianhe Zaobao, Business Times and the Straits Times. However, I do not think that the evidence on which the defendants seek to rely is fatal to Sakae's case. Besides the Mediacorp invoices which were addressed to ERC Consulting, there is no evidence showing that ERC Consulting had been involved in those transactions in any way. InterContinental Hotel had billed the Company directly for the use of its facilities and services during the launch event, and the agencies which had printed event booklets and flyers for the launch and placed advertisements in the other newspaper publications had addressed their invoices directly to the Company. There was no evidence to indicate that any of these payments had been made by ERC Consulting such that it was entitled to be reimbursed by the Company. Nor did the evidence indicate that any of the work detailed under the breakdown of costs had actually been carried out by ERC Consulting rather than the Company's manager GCM in the usual course. From the state of the evidence, I am hard-pressed to find that ERC Consulting had in fact undertaken work amounting to $150,000 pursuant to the Consultancy Agreement as it claims. Even if it had placed some orders for the Company, the designation of a fee of $150,000 appears completely arbitrary. There is no evidence of any bargaining having been carried out or quotes from independent third parties having been obtained.

143 Overall, the inference that I draw from the evidence is that following the commencement of PwC's investigations on 9 November 2012, the defendants created the Consultancy Agreement to justify paying ERC Consulting $150,000 from the Company. The evidence that ERC Consulting had taken out advertisements with Mediacorp in June to July 2012 was conveniently trotted out to give the document a veneer of legitimacy. Thinking that they could rely on the Consultancy Agreement, the defendants proceeded to transfer $160,500 from the Company to ERC Consulting in December 2012. Yet they were caught out when they sought to conceal evidence of the transfers while at the same time maintaining a steadfast position that no payments had been made until they were confronted with clear evidence to the contrary. On the totality of the evidence, I find that the Consultancy Agreement was created and backdated to justify a fee payment that was far in excess of what ERC Consulting could legitimately claim for any work it had done in the marketing of Bugis Cube.

Were the transactions concealed from Sakae?

144 I am also satisfied on the evidence that the Consultancy Agreement had been hidden from Sakae. According to Mr Foo, the first time he sighted the Consultancy Agreement was in January 2013 when it was disclosed in the PwC Report. He had no knowledge of the agreement before then, did not agree to it and, to his knowledge, the Company's board did not approve it. While the defendants assert that Mr Ong had kept Mr Foo in the loop from the time ERC Consulting was to be engaged up until the launch event itself, there is nothing to support these allegations given that Mr Ong and Ong Han Boon have elected not to adduce evidence. Indeed, there was nothing on the face of the marketing materials which would have indicated to Mr Foo that ERC

Consulting was involved in promoting Bugis Cube at any time. It seems to me that this was yet another instance in which the AO Defendants had deliberately sought to conceal information from Sakae so as to divert the Company's funds without being detected.

Analysis

145 I find clear breaches of fiduciary duties on the part of Mr Ong and Mr Ho in relation to the Consultancy Agreement. It is apparent from Mr Ho's testimony that he had acted under Mr Ong's directions the entire time. He was content to rely on Mr Ong's explanation of the Consultancy Agreement without verifying whether committing the Company to the obligations thereunder was truly in its interest. While Mr Ho argues that it is "not unreasonable" for him to rely on Mr Ong to ensure that the transactions were in order based on the "Established Norm" (see [250] below), this is an argument I reject. In addition, given that Mr Ong had an effective interest of 81.78% in ERC Consulting, it would have been clear that he created a conflict of interest situation by initiating a transaction with a company which he substantially owned. The conflict was not disclosed to the Company's board even though Mr Ong had an obligation to do so. It seems to me that Mr Ho, by merely doing Mr Ong's bidding the entire time without independent inquiry, had in fact preferred Mr Ong's interests over those of the Company. Therefore, considering the evidence as a whole, I find that Mr Ong, by orchestrating the diversion of funds to a company in which he was an indirect majority shareholder, and that Mr Ho, by signing the Consultancy Agreement on Mr Ong's instructions without conducting proper inquiries, had clearly breached the fiduciary duties which they owed to the Company.

146 Ong Han Boon was not a director of the Company at the material time, and in any event there is no evidence to suggest that he had been directly involved in orchestrating these transactions.

147 The next question is whether the conduct above and the breaches of fiduciary duties amounted to oppression. In parties' submissions, a key issue of contention was whether the transaction had been authorised. In this regard, I observe that, compared to some of the other transactions discussed thus far, entry into the Consultancy Agreement did not require the approvals of the board nor of the shareholders of the Company under the JVA. In my view, however, the significance of this point is overshadowed by the finding that the Consultancy Agreement is a sham document that was concealed from Sakae. The critical point is that those controlling the Company (*ie*, Andy Ong via Mr Ho) had fabricated the Consultancy Agreement to give the impression that the Company was obliged to pay $150,000 to ERC Consulting, a company that Mr Ong controlled, and then caused the Company to make the payment due to ERC Consulting, although there is no evidence that ERC Consulting performed services worth the amount that was paid. In addition, they concealed the fact of the payment from the minority shareholder, Sakae, and its nominee director, Mr Foo. Given that all this had been carried out on the quiet and that the defendants had clearly sought to stymie Sakae's attempts to understand the extent of the wrongdoing thereafter, it does not lie in the defendants' mouths to assert now that Sakae had ample opportunity to verify the transactions and remedy the situation but chose not to do so. On the whole, I find that the facts in relation to the Consultancy Agreement disclose a visible departure from the standards of fair dealing which Sakae is entitled to expect.

Fifth, the Unicampus Loan and the Unicampus Loan Agreement

148 In relation to this head of claim, the relevant defendants are Mr Ong, Ong Han Boon and ERC Unicampus.

Background facts

149 By a facility letter dated 4 May 2012, UOB granted the Company a six-month short-term loan facility of $10m for the purpose of financing its "working capital requirements" ("the Second $10m Facility"). It appears that a number of other things occurred on the same day. First, Mr Foo and Mr Ho, as directors of the Company, signed off on a board resolution to approve a loan of $10m from the Company to ERC Unicampus under an agreement dated 7 May 2012 ("the Unicampus Loan Agreement"). Second, by way of another board resolution, Mr Foo and Mr Ho called an Extraordinary General Meeting ("EGM") for 7 May 2012 to approve the Unicampus Loan Agreement. Third, Mr Ho issued a notice to inform the Company's shareholders (*ie,* Sakae and GREIC) of the EGM and its purpose. Fourth, Mr Foo and Mr Ho, as the corporate representatives of the respective shareholders, signed an acknowledgment of the said notice. On 7 May 2012, the Company's shareholders passed a resolution to approve the Unicampus Loan Agreement. This was documented in the minutes of the EGM. In this regard, Mr Foo and Mr Ho, again as the shareholders' respective corporate representatives, had signed off on the record of attendance. I shall refer to the four documents which Mr Foo appears to have endorsed as "the Approvals". I also observe that although the Approvals indicate that the Unicampus Loan Agreement had been annexed to every single one of them in an "Appendix A", the documents

which were disclosed in the course of proceedings did not contain any "Appendix A" or annex any draft loan agreement for that matter.

150 The Unicampus Loan Agreement was duly entered into and dated 7 May 2012. It was signed by Mr Ho for and on behalf of the Company and by Andy Ong for and on behalf of ERC Unicampus.

151 On 22 May 2012, the Company drew down on the Second $10m Facility and the sum of $10m was deposited into one of its bank accounts. On 25 May 2012 and 29 May 2012, the Company paid, from the same bank account, sums of $950,000 and $8m respectively to ERC Unicampus (collectively, "the Unicampus Loan"). Each payment was made by way of a cheque dated 23 May 2012, which bore the signatures of Mr Ong and Ong Han Boon. It is not known how the funds were applied by ERC Unicampus. Parties do not dispute the fact that the Unicampus Loan was subsequently repaid in full.

Sakae's complaint

152 Sakae's complaint under this head of claim is that in orchestrating the Unicampus Loan and the Unicampus Loan Agreement, Mr Ong had "tricked" Mr Foo, as a director of the Company, into signing the Approvals which indicated that Sakae knew of, and consented to, the transactions. The Unicampus Loan and the Unicampus Loan Agreement were in fact unauthorised and in breach of the JVA, and indeed Sakae and Mr Foo had been kept in the dark about the transactions until 15 October 2012 when Mr Ong revealed their existence to Mr Foo. It is also Sakae's position that the Unicampus Loan Agreement is in fact a sham document which was created

after the fact and backdated. Accordingly, the transactions were carried out in breach of the fiduciary duties which Mr Ong, Ong Han Boon and Mr Ho owed to the Company, and were oppressive to Sakae as a minority shareholder.

Factual findings

153 The factual issues which fall for determination are, broadly, as follows:

(a) Whether Sakae had truly consented to the Unicampus Loan Agreement;

(b) Whether Sakae knew about the transactions at the material time; and

(c) Whether the Unicampus Loan Agreement is a sham document.

Whether Sakae truly gave consent to the Unicampus Loan Agreement

154 The key question which needs to be answered in relation to this head of claim is whether Sakae's consent to the Unicampus Loan Agreement had in fact been obtained. In order to succeed here, Sakae must be able to show that: (a) Mr Foo did not knowingly approve the transactions; and (b) Mr Ong was aware that Mr Foo did not knowingly approve the transactions at the material time. If this were the case, then there would be no basis for arguing that Mr Ong had obtained Sakae's consent to the transactions by the mere fact that Mr Foo's signature was found on the Approvals.

Sakae's submissions

155 Sakae relies primarily on Douglas Foo's evidence to support its case. According to Mr Foo, he trusted Mr Ong to ensure the propriety of all transactions and documents in respect of the Company that were placed before him for his signature. Whenever documents came from Mr Ong, he did not read them in detail and "sign[ed] them blindly without much attention". In fact, Mr Ong had known this to be Mr Foo's practice. It was only on 15 October 2012 when Mr Ong showed Mr Foo the board resolution approving the Unicampus Loan Agreement, that he truly appreciated the significance of what he had signed off on. Mr Foo was shocked to see his signature on the document, and claimed not to recall having seen or signed the board resolution in question. Mr Ong had noted Mr Foo's shock upon seeing the board resolution which authorised the Unicampus Loan Agreement, but had asked Mr Foo to "pretend" that he did not see the document. Mr Foo immediately proceeded to call a Sakae audit committee meeting on 17 October 2012 to report the matter and a Sakae board meeting on 25 October 2012 to commence investigations. In this regard, the transcripts show that Mr Ong had also apologised repeatedly at the 25 October Meeting for the fact that Mr Foo may have signed the documents "unwittingly". According to Sakae, the evidence as a whole goes to show that Mr Foo did not knowingly approve the transactions complained of at the material time, and that Mr Ong was well aware of that fact.

The defendants' submissions

156 The defendants seek to impugn Sakae's evidence on a number of grounds. To begin with, the defendants argue that Mr Foo's signature was

appended to four separate documents and it is unbelievable that he would have signed all of them "unwittingly". Next, the defendants highlight the number of internal and external inconsistencies in Mr Foo's evidence to undermine the credibility of his narrative. The inconsistencies in his evidence pertain to:

(a) *Mr Foo's general practice of endorsing documents placed before him*. At one point, Mr Foo testified that he would "routinely make it a point to ask [his] staff for more information and substantiating documents in order to aid [his] understanding of the nature and import of the documents" which he was required to sign. This evidence was, however, at variance with his insistence that he would sign off on documents blindly without much attention if they came from Mr Ong.

(b) *Mr Foo's level of scrutiny in signing the Approvals*. First, Mr Foo conceded in court that he would be especially concerned about any loan facilities that the Company would be committing itself to, and he felt that as a director he needed to know what facilities the Company was obtaining. But, when questioned on the Approvals, Mr Foo protested his ignorance of the transactions even though he had signed off on them. Second, Mr Foo testified that he would generally have a "quick glance" at the documents placed before him for "big titles, directors' resolution" and for "big terms like loan or something". If they were standard, routine documents, he would just sign them. However, had he seen the word "loan" in a document, he would have made further enquiries about its purpose. He added that documents pertaining to related party transactions would also have set off alarm bells in his head. Yet, this entire account sits uncomfortably with his

own position that he was not alive to the significance of the Approvals, which prominently indicated that they were relevant to authorising the Unicampus Loan Agreement.

(c) *The circumstances under which Mr Foo had come to sign the Approvals "unwittingly"*. On various occasions in court, Mr Foo indicated that the Approvals had been slipped into a bundle that Andy Ong had given to him and that he was "tricked" into signing them on Mr Ong's representation that the bundle merely consisted of "routine documents". Based on the transcripts of the 25 October Meeting, however, Mr Foo had informed Sakae's board that it was Ms Voon who had received the relevant documents by e-mail and printed them out for him to sign. Indeed, if Mr Foo's own account at the 25 October Meeting were to be believed, Mr Ong cannot be said to have "tricked" him into signing the said documents at the time as it appears that Mr Foo had merely proceeded to endorse them of his own accord.

The defendants therefore submit that Douglas Foo's evidence, that he did not knowingly approve the transactions, is unbelievable and that Sakae's claim ought to be rejected.

Decision

157 There are two aspects to this issue. The first is whether Mr Foo knew what he was signing and the second is, if he did not, whether Mr Ong knew that and took advantage of it. To convince me to answer the second question in the affirmative, Sakae would need to show on the balance of probabilities that Mr Ong knew Mr Foo would not read anything put before him but would

just sign documents blindly, and cynically decided to take advantage of such behaviour.

158 I do not agree with the defendants' contention that it is totally unbelievable for Mr Foo to have signed four *separate* documents "unwittingly", though I agree that such behaviour is only likely to occur in very rare relationships where unquestioning trust exists and the parties' interests seem completely aligned. I also recognise that Mr Foo is an educated, intelligent, and experienced businessman. But it is a fact of human experience that bonds of friendship and affection, and the trust which spring from them, can lead a person to do things which he would, if he were to view the matter dispassionately, recognise to be imprudent. In this case, I accept that Mr Foo's evidence shows him to have placed a high degree of trust in Andy Ong because of their long and close personal friendship stretching back to their National Service days. It is particularly striking that Mr Foo had no qualms about extending to Mr Ong large personal loans of indefinite duration on short notice and without requiring any security; he appears to have taken it for granted that he and Mr Ong had each other's backs, as it were, and that Mr Ong would not abuse the trust that had been reposed in him.

159 If Mr Foo could demonstrate such a degree of trust in Mr Ong in respect of Mr Foo's personal funds, it is not surprising that he might do the same in respect of Sakae's business. Indeed, in the latter context, Mr Foo had an additional reason to trust Mr Ong: since the two of them had set out on what was intended to be a mutually beneficial arrangement between Mr Ong and his companies and Sakae, Mr Foo was not irrational (although he may have been naïve) to expect that Mr Ong would view their interests as aligned

and work toward the long-term success of the relationship as opposed to short-term – and illicit – gains. Under these circumstances, it is not implausible that Mr Foo would sign documents coming from Mr Ong without much attention. Indeed, there is clear evidence that Mr Foo had become accustomed to doing so to the point that he could not even remember the documents in question. Furthermore, while evidence was not led on this particular point, I do not think it is controversial to assume that Mr Foo, considering his executive profile, would be presented with large volumes of paperwork requiring his signature on a regular basis and might very well have skimmed over those that came from reliable sources.

160 In theory, therefore, it is not entirely inconceivable that Mr Foo would have signed all four documents without even going through their contents due to the fact that they had come from Mr Ong. Against this, however, is Mr Foo's assertion that he did not sign anything without a single glance but would give the documents before him a quick look and would take note of certain significant words and phrases like "loans" and "facilities". In this connection, the defendants have emphasised the inconsistencies in Mr Foo's evidence regarding whether he was aware of the significance of the Approvals that had been placed before him. Most of these inconsistencies were born out of the very awkward position in which Mr Foo found himself on the stand. On the one hand, he had to advance Sakae's interest in the action but, on the other, it had been his duty at the material time, as a director of the Company appointed by Sakae, to ensure that Sakae's interest in the Company would be protected – including by taking care when signing documents on behalf of the Company. For Mr Foo to allege that Sakae did not consent to the transactions despite his having signed off on the Approvals would be to concede his own failings as

Sakae's representative in the Company. Thus, it is not surprising that Mr Foo attempted to depict himself as an otherwise dutiful director who diligently carried out all the responsibilities that were expected of him even though he claims to have signed some documents unwittingly. Indeed, the incompatibility of the two positions which he sought to take on the stand was brought to the fore when he was specifically cross-examined on the Approvals, during which he made a rather tortured attempt to maintain his image as a dutiful director while at the same time grappling with what was done right under his nose.

161 To put it bluntly, having considered Mr Foo's evidence as a whole, I do not believe his testimony that he was *always* as careful as he claims to have been. This is not to suggest that he was always careless; in fairness to Mr Foo, it appears more likely that he was not habitually careless, but was willing to lower his guard when reviewing documents originating from trusted individuals such as Mr Ong. I therefore find that Sakae has established on a balance of probabilities – though not, it should be said, by an overwhelming margin – that Mr Foo was indeed unaware of the nature of the documents which Mr Ong sent him at the time that he signed them. I go on to consider whether Mr Ong would have known of such imprudent behaviour.

162 Sakae makes much of Mr Foo's unchallenged evidence that Mr Ong was familiar with his habit of rubber-stamping documents when he knew that they came from Mr Ong. It is also not disputed that Mr Foo had relied heavily on Mr Ong with regard to the Company's management. In these circumstances, there may have been an understanding that Mr Ong would highlight matters of significance that warranted closer attention. However, I

find it difficult to conclude that not only did Mr Ong know that Mr Foo would have appended his signature without properly considering the contents of the documents, if Mr Ong had not specifically flagged them out to him, but that he would have relied on such carelessness to slip in documents that he knew Mr Foo would take issue with. All the more when he was not presenting the documents directly to Mr Foo but sending them through Ms Voon. Not only did this mean that Mr Ong would not have had the opportunity to actively lull Mr Foo into a sense of complacency with regard to the documents, it also introduced a risk that Ms Voon might examine the documents herself and ask Mr Foo questions about them. By all accounts Mr Ong is a shrewd businessman and a very clever operator. From the findings I have made so far, it is obvious that if he needs to support his actions he is quite capable of creating documents and reasons well after the fact to do so. It therefore appears to me far more likely that instead of depending on Mr Foo's carelessness and trust, Mr Ong would have expected Mr Foo to ask him about the Second $10m Facility and the Unicampus Loan and would have prepared an explanation with which to try and convince Mr Foo to support the proposal. The fact that Mr Foo did not raise any questions about the transaction after being given documents to approve was, perhaps, a bonus, but not something Mr Ong would have relied on. The most that can be said is that when no questions came, Mr Ong may have wondered whether Mr Foo had properly understood the documents, and may have suspected that Mr Foo had not. Even if such doubts or suspicions, which Mr Ong did not pursue, could amount to Nelsonian knowledge of Mr Foo's ignorance (which the plaintiff did not argue), such *post hoc* knowledge would be some distance away from establishing the plaintiff's case that Mr Ong had set out to "trick" Mr Foo and Sakae at the time the documents were submitted for signing. In my view, there

is not enough to demonstrate on a *prima facie* basis that Mr Ong would have known that Mr Foo did not truly appreciate the significance of the documents on which he had signed off.

163 In arriving at my conclusion, I also considered the transcripts of the 25 October Meeting. During the meeting, Mr Ong informed the board that he "did not know" Mr Foo had signed on the two board resolutions unknowingly. While Mr Ong's assertion is somewhat at odds with the apologetic stance which he had also taken during the meeting, the fact is he was on the defensive then and may have been trying to defuse the situation by being apologetic. It would not have helped to call Mr Foo a fool for not taking proper care. Further, even if he was genuinely apologetic (in the sense of recognising that he had done wrong), that would not necessarily indicate that he had known of Mr Foo's ignorance as to the nature of the documents. It could equally be that he was aware that he should have brought the documents to Mr Foo's special attention, rather than leaving Mr Foo to review them himself (a point I return to at [169] below).

164 While I am not able to accept Sakae's position that its consent to the Unicampus Loan Agreement had not been obtained, and consider that it must be deemed to have known of the existence or proposed existence of this document and the related transactions, these findings do not mean that the defendants did not act oppressively in relation to the same. I must now consider whether Sakae's deemed knowledge offers the relevant defendants a defence to Sakae's complaints.

Whether Sakae knew about the transactions at the material time

165 I can deal briefly with the defendants' contention that, however Mr Foo had acted, Sakae was actually aware of the transactions at all material times. They argue that the management accounts which were sent to Ms Voon in July 2012, as well as certain e-mail and SMS exchanges between Andy Ong's employees and Ms Voon in August and October 2012, show that Sakae had knowledge of the Unicampus Loan Agreement even prior to 15 October 2012.

166 In my view, the evidence on which the defendants seek to rely does not bring them much nearer to their goal. First of all, the management accounts sent to Ms Voon only contained a bare statement that an amount of about $10.8m was due to the Company from ERC Unicampus with no indication as to what the nature of the transaction was. Moreover, from the manner in which the accounts are tabulated, it seems that one would have to delve quite deeply into the financial records in order to appreciate the significance of the entry. In my view, this is not sufficient to have alerted Ms Voon to the transaction and, in any event, there is also no indication that the accounts were brought to Mr Foo's attention. Second, based on the court record (the e-mail exchange itself was not disclosed during proceedings), the e-mails which were sent in August 2012 indicate that one Amy Le had requested Mr Foo to sign one of the Approvals but retracted that request shortly afterwards. Ms Voon's evidence was that she no longer had to deal with the issue, and it also appears that no other follow-up action was taken to alert Mr Foo to the matter. Third, the SMS exchange on 15 October 2012, during which Ms Voon requested further documents in relation to the Unicampus Loan, had taken place pursuant to a telephone conversation earlier that same day during which Carol Ong had

informed Ms Voon about the loans. It in no way suggests that Ms Voon had been informed of the transactions long before the SMS exchange occurred, much less that Mr Foo was aware of the goings-on. Therefore, the evidence does not support the defendants' contention that Sakae clearly knew about the transactions at the material time.

167 In the absence of any evidence to show otherwise, I thus accept Sakae's account that the transactions were not brought directly to its attention until 15 October 2012.

Whether the Unicampus Loan Agreement is a sham document

168 The inference that the Unicampus Loan Agreement was in fact created and signed after the fact and backdated is also a possible one. As Sakae points out, there is no contemporaneous evidence to indicate that the Unicampus Loan Agreement existed on or around 7 May 2012. In particular, although the Approvals indicate that the draft agreement was annexed to every single one of them in an "Appendix A", other documents described as "Appendix A" were disclosed together with the Approvals during the proceedings. In my view, there is enough to meet the *prima facie* threshold in establishing that the Unicampus Loan Agreement was created subsequently, though that does not take Sakae very far if it had, impliedly, given the nod to the transaction.

Analysis

169 In view of my finding that Mr Ong could not have known that Mr Foo did not know what he was approving when he signed the Approvals, I am not able to hold that the Unicampus Loan was unauthorised by, and oppressive of, Sakae. However, I do think that Mr Ong acted wrongly in not bringing the

transaction specifically to Mr Foo's attention and in not disclosing his conflict of interest up front. He waited to be asked about the matter instead of being proactive. Mr Ong's wilful failure to divulge important information when the documents were given to Mr Foo for endorsement was improper. He knew that the proposed transaction required specific approval pursuant to the JVA but took no active steps to obtain the same. He must have been aware that the transaction which he was orchestrating served the interests of ERC Unicampus over those of the Company, and indeed it appears that the Company did not stand to gain any commercial benefit from the Unicampus Loan. In this, Mr Ong acted in breach of his fiduciary duty as a shadow director of the Company.

170 In their submissions, the defendants raise the fact that the Unicampus Loan has been re-paid to support their argument that the conduct was not unfairly prejudicial to Sakae. However, it has been held that in such instances the improper transactions are nevertheless material as evidence of "oppression" or "disregard" (see, *eg*, *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* [1978] 2 MLJ 227). This is simple common sense: the fact that no loss eventuated does not change the fact that, when the transaction was entered into, Sakae's interests were disregarded and the Company was subjected to a *risk* of loss. Therefore, while the Company does not appear to have suffered any loss on the evidence, that fact does not affect my conclusion that Mr Ong acted improperly.

171 As for Mr Ho, his defence is essentially that he had signed off on the transactions in reliance on Mr Foo's signature as an indication that Mr Foo had consented to the transactions both in his capacity as a director of the

Company and in his capacity as Sakae's corporate representative. Therefore, Mr Ho cannot be said to have breached his fiduciary duties to the Company in doing so. I accept this submission. There is indeed no evidence to suggest that Mr Ho was aware that Mr Foo had signed the Approvals unknowingly. However, I must observe that it is apparent from Mr Ho's evidence that he had failed to apply his mind to the transactions when they were presented to him. As the record shows, it was very difficult to get a straight answer out of him on the details of the Unicampus Loan Agreement and the Approvals on which he, too, had signed off. When questioned on whether he remembered signing the board resolution approving the Unicampus Loan Agreement, his response was hesitant and he merely acknowledged that his signature was found on the document. When pressed for further details about his appreciation of the nature of the transactions, Mr Ho gave equally vague answers and seemed to be speculating about the import of the board resolution even while he was on the stand. Mr Ho repeatedly claimed ignorance about the implications of his having approved the transactions and attributed a lot of what he had done to his reliance on Mr Ong for advice and instructions. Furthermore, Mr Ho admitted during trial that it was not in the Company's interests to be lending $10m to ERC Unicampus and that he would have realised this had he properly considered the transaction at the time. The fact that Mr Ho had not applied his mind to the nature and import of the transactions he was asked to endorse shows that, in carrying out his duties, Mr Ho was generally content to rely wholly on Mr Ong's instructions regardless of whether or not the transactions were in fact in the Company's interests.

172 In relation to Ong Han Boon, I observe that even though he appears to have been complicit in making the unauthorised transfers to ERC Unicampus,

he was not a director of the Company at the time. It therefore cannot be said that there has been a breach of fiduciary duty on his part.

173 I therefore find that, in relation to this claim, oppression has not been made out. However, inasmuch as the matters falling within this claim do show further breaches of fiduciary duty on the part of Andy Ong (who failed to bring the documents to Mr Foo/Sakae's special attention and to disclose his own conflict of interest) and Mr Ho (who failed to inquire at all into the transactions), they lend context to, and strengthen, my conclusion – in respect of other specific claims – that Mr Ong and his associates conducted themselves in a way which was oppressive to Sakae. They also may give rise to claims which the Company may later pursue, thought that is not a matter before me in the present suit.

Sixth, the Share Option Agreement

174 In relation to this head of claim, Mr Ong, Ong Han Boon, ERC Holdings and Mr Ho are the relevant defendants in Suit 1098. This head of claim is also the subject matter of Suit 122, where Andy Ong is the sole defendant.

Background

175 This claim revolves around an option in respect of shares in the Company which was allegedly entered into in September 2010 between the Company and ERC Holdings ("the ERC Option"). Essentially, the Company was said to have agreed to grant ERC Holdings an option to subscribe for 8.8 million of its ordinary shares at the price of $8.8m.

176 It was, however, Mr Foo's evidence that in the discussions leading up to the signing of the JVA, he and Sakae specifically informed Mr Ong and Ong Han Boon that no options were to be granted to any party to acquire shares in the Company without Sakae's approval. Pursuant to that requirement, cl 11.1(c) of the JVA was drafted to provide expressly that the Company was not to create, allot, issue, purchase, redeem or grant options over any of its shares, or re-organise its share capital in any way without the prior unanimous approval of all its shareholders.

177 On 5 June 2012, the Company's shareholders agreed to sell the first to fifth floors of Bugis Cube on a unit by unit basis and its directors approved the sale on the same day. As property prices had picked up significantly from early 2010 when Bugis Cube was purchased, the Company stood to make a significant profit from the sale in which profit Sakae would have had a 24.69% share.

178 The next day, 6 June 2012, Mr Ong informed Mr Foo about the ERC Option and that ERC Holdings intended to exercise this option. This information upset Mr Foo because ERC Holdings' acquisition of 8.8 million shares would substantially dilute Sakae's holding in the Company. Consequently, Sakae's share of the profits from the Bugis Cube unit sales would be substantially reduced. Mr Foo informed Mr Ong that he would not approve the issue of new shares to ERC Holdings. In response, Mr Ong claimed that Mr Foo had previously agreed to the ERC Option. He told Mr Foo that if Sakae wish to maintain its 24.69% shareholding in the Company it would have to subscribe for a further 2,641,975 shares at the price of $2,641,975.

179 Mr Foo considered that Sakae had no choice but to give in to this demand because court proceedings would be costly, lengthy, and would undermine the relationship between himself and Mr Ong. He therefore yielded to Mr Ong's demand and caused Sakae to pay a further $2,641,975 to the Company for new shares in order to maintain its 24.69% shareholding in the Company. In connection with the transactions, Mr Foo signed a whole series of documents (later backdated to 31 May 2012 and 1 June 2012) which authorised and approved the allotment of 8,058,025 shares to ERC Holdings and 2,641,975 additional shares to Sakae.

180 It should be noted that while Douglas Foo was informed of the ERC Option on 6 June 2012, ERC Holdings had paid the Company $8.8 million on 24 May 2012, some two weeks earlier, in purported exercise of the option. It is also Sakae's case that ultimately $8m of this payment had been funded by it. That is the subject of another complaint which I will deal with later.

181 At the time the payment was made, Sakae was not shown any written agreement embodying the option. A document purporting to be a Share Option Agreement ("the Five-paged SOA") was only sighted by Sakae when it was discovered by PwC in late 2012. On its face, the Five-paged SOA was dated 17 September 2010, some two weeks after the JVA was entered into. The Five-paged SOA bears the signatures of Ong Han Boon, on behalf of the Company, and Mr Ong, on behalf of ERC Holdings.

182 This is not the end of the matter. The Five-paged SOA shown to PwC in 2012 is, as my nomenclature indicates, a document containing five pages. On 5 February 2016, Ms Voon filed a supplemental affidavit of evidence-in-chief in which she said that earlier that month Sakae's solicitors had found

internal e-mails amongst the defendants or their employees which appeared to indicate that the Five-paged SOA was created at the earliest in late March 2012 and not on 17 September 2010. Thereafter, the defendants disclosed a new document which stated on its face that it was the Share Option Agreement dated 17 September 2010 between the Company and ERC Holdings for 8.8 million shares in the Company. This new document is only one-page long ("the One-paged SOA").

183 As a result, in their closing submissions, Sakae also contended that there had never been a share option granted to ERC Holdings in September 2010 and that the option was conjured up in 2012 in order to benefit the defendants.

Sakae's complaints and the defendants' defence

184 Sakae's pleaded complaints in Suit 1098 are as follows:

(a) It was not aware of any share option until June 2012;

(b) When informed by Andy Ong that ERC Holdings would be exercising the ERC Option, Sakae was forced into a corner and had no option but to approve the allotment of the Company's shares to Sakae and ERC Holdings;

(c) Sakae's actions were done in circumstances where it was clear that they were done under protest; and

(d) Sakae would not have had to pay $2,641,975 to the Company for additional shares but for the conduct of the defendants.

185 Sakae's complaint in Suit 122 is that Mr Ong had failed to disclose the ERC Option and that, but for his actions in breach of his fiduciary duties to Sakae, Sakae would not have had to subscribe for the additional 2,641,975 shares in the Company. Sakae also alleges that Mr Ong induced the Company to breach the JVA by causing it to grant the share option to ERC Holdings.

186 The pleaded defence in Suit 1098 sets out the following averments:

(a) In late 2009, Mr Foo and Mr Ong agreed that in exchange for Mr Ong providing a personal guarantee to support a bank loan of $32.2m to the Company to enable the Company to purchase the Bugis Cube units, Mr Ong or his nominee would be granted a share option to subscribe for 4 million shares in the Company. Subsequently, on 7 March 2010, there was a "Verbal Share Option Agreement" that, in exchange for Mr Ong providing a personal guarantee to obtain a loan of $34.5m, he or his nominee would be granted a share option to subscribe for 8.8 million shares in the Company. This verbal agreement was subsequently formalised in the Five-paged SOA.

(b) In early June 2012, Mr Ong informed Mr Foo that ERC Holdings would be exercising the share option and Mr Foo agreed. Neither he nor Sakae disputed, questioned or attempted to stop the exercise and therefore Sakae is estopped from denying the validity of the Five-paged SOA.

(c) In mid-June 2010, there was a further agreement, called "the Mid-June Agreement", by which Mr Foo and Mr Ong agreed that ERC Holdings would exercise the ERC Option only partially; Sakae

would subscribe for additional shares to maintain its 24.69% stake; and in return, ERC Holdings would be beneficially entitled to $250,000 worth of GREIC's shares which were then held by Mr Ho on trust, ultimately, for Mr Foo and his wife, and the sixth floor of Bugis Cube would be sold to ERC Holdings for $10m. This agreement led to an estoppel which prevented Sakae from denying the validity or authenticity of the Five-paged SOA or asserting that it had been forced into a corner.

(d) In the alternative, Sakae had waived its rights in respect of the option when it approved the partial exercise of the Five-paged SOA and the additional allotment of shares to Sakae in or around June 2012.

187 In their closing submissions, the defendants make the following points:

(a) Mr Foo signed seven separate documents in connection with the issue and allotment of shares in the Company to ERC Holdings consequent upon its exercise of the option. Some of these documents were signed as a director of the Company while others were signed as Sakae's corporate representative. Mr Foo signed similar documents approving the issue and allotment of additional shares in the Company to Sakae itself. It was his evidence in court that he was fully aware when signing them of the purpose of all these documents.

(b) There was no evidence that Sakae was forced into the transaction; rather, the indications were that Sakae entered it willingly. First, Sakae had the time and ability to seek legal and other advice on whether there was a valid and enforceable option had it wished to do

so. The documents were sent to Mr Foo for signature on 6 June 2012. He did not sign them immediately. While the actual date of signature is not clear, there was correspondence on the transaction between Sakae and Carol Ong during the ensuing two weeks. Neither Mr Foo nor Ms Voon asked for a copy of the share option agreement nor sought legal advice on the validity of what was proposed. Third, the issue of Sakae's subscription for additional shares was discussed at three of Sakae's management meetings but at none of these did Mr Foo make any protest about the situation or allege that the ERC Option was in breach of the JVA or Mr Ong's duties as a director of Sakae itself or that he had been forced into buying additional shares to preserve Sakae's position.

(c) Even if one were to believe Mr Foo's assertion that he was surprised there was a share option agreement, Sakae had not explained why in that case Mr Foo went ahead to sign the documents to allow the ERC Option to be exercised. The reality was that if Mr Foo had not signed the documents authorising the issue of new shares to ERC Holdings, the ERC Option could not have been exercised.

(d) Sakae's conduct is consistent with the mid-June 2012 Agreement and the Verbal Share Option Agreement made in early 2010. Mr Foo did not ask to see the share option agreement because he was aware of it and had agreed to it.

(e) As a result of all of the above, the defendants' conduct was not oppressive or unfairly prejudicial to Sakae.

188 Sakae accepts that Mr Ho did not hold office in the Company in 2010 and therefore could not have agreed to the ERC Option at that date. However it maintains that it has a claim against him for acting in breach of duty in 2012 in that he, either acting alone or with the other directors failed to disclose to, or concealed the ERC Option from, Sakae. Further, he was aware that Sakae allowed ERC to exercise the option and itself subscribed for additional shares under protest. Sakae also alleges that Mr Ho blindly signed various resolutions and documents approving the exercise of the ERC Option in breach of his fiduciary duties owed to the Company.

189 Briefly, Mr Ho submits in response that Sakae has no basis for any complaint against him in relation to these transactions because:

(a) Sakae, through Mr Foo, had signed various directors' and shareholders' resolutions approving the exercise of the ERC Option and the subscription for and allotment of additional shares;

(b) There was no evidence, apart from bare allegations made by Mr Foo, that he had signed these documents under protest or that Mr Ho was aware of the same; and

(c) Mr Ho's evidence that no one, including Mr Foo, had informed him of any alleged protest, had not been challenged by Sakae.

Factual findings

190 The factual issues that arise in connection with this complaint are:

(a) Did the Company grant an option in September 2010 to ERC Holdings to purchase 8.8 million shares?

(b) Was there a verbal share option agreement between Mr Foo and Mr Ong in 2010 and/or a mid-June 2012 Agreement?

Was the ERC Option granted in September 2010?

191 The issue of whether the ERC Option was granted in September 2010 is, to a certain extent, but not wholly, tied up with the question of the validity of the Five-paged SOA and that of the One-paged SOA.

192 Both documents purport to be dated 17 September 2010 and to record the Company's agreement to confer an option on ERC Holdings to purchase 8.8 million common shares in the Company for $8.8m. Both documents are signed by Ong Han Boon on behalf of the Company and by Mr Ong on behalf of ERC Holdings. Whilst neither signatory came to court to confirm that he had signed the documents on behalf of his company, or to confirm the dates on which they were signed, Sakae does not rely on such technicalities to dispute the authenticity of the documents. Instead, its arguments centre on the way in which the documents were used in the proceedings and on the e-mail correspondence within the ERC Group in 2012 that came to light in February 2016.

193 I deal first with the Five-paged SOA. This document was first produced as the written evidence of the ERC Option in November 2012 when it was shown to PwC. Subsequently, it was relied on as such by the defendants in their pleadings and affidavits in both Suit 1098 and Suit 122. The attitude taken was that the Five-paged SOA had been concluded and signed on or about 17 September 2010 and it was included in the defendants' lists of documents on that basis. The situation changed drastically after Sakae's

solicitors went to the CAD office in February 2016 and examined documents which had been seized from the defendants. They then alleged that they had discovered correspondence which indicated that the Five-paged SOA was not in existence prior to March 2012. The defendants subsequently produced the One-paged SOA. It should be remembered that the trial of these actions started in mid-January 2016, so these discoveries were made while the trial was ongoing.

194 On 15 February 2016, Mr Chua filed an AEIC as a witness for Mr Ho which contained evidence on, *inter alia*, the creation of both the One-paged SOA and the Five-paged SOA. Essentially, he stated that on or around 22 March 2012, he was shown a hard copy of the One-paged SOA. Mr Chua was concerned by its contents and he proposed to Carol Ong that the ERC Option should be transferred to Mr Ho and Mr Ho would later transfer it back to ERC Holdings. Subsequently, he was instructed by Carol Ong that for listing/accounting reasons all existing options had to be amended to include a five-year validity period. It would be noted that the One-paged SOA contained no limitation on its validity. On 30 March 2012, Mr Chua gave instructions for the One-paged SOA to be replaced by the Five-paged SOA which was to be backdated to the date of the ERC Option. On 24 April 2012, Mr Chua saw an e-mail to which was attached a signed copy of the Five-paged SOA.

195 It was clear from Mr Chua's AEIC that the Five-paged SOA must have been prepared and signed in late March/early April 2012 and then backdated. Mr Chua's AEIC also purported to support the position that the One-paged SOA was actually in existence from about 17 September 2010. Sakae submits that whilst it can rely on the first part of Mr Chua's evidence, which is in its

favour, the defendants cannot rely on the part of Mr Chua's evidence that is in their favour. This is because, apart from Mr Ho, the defendants elected not to call evidence. Further, Mr Ho did not need Mr Chua's evidence since he was not a director in September 2010 and his defence was that accordingly he could not be held responsible for anything that was done at that time. Sakae alleged that Mr Ho had adduced the evidence of Mr Chua for the sole purpose of bolstering the defence of the other defendants and that this was an illegitimate course of action.

196 I do not accept Sakae's contention that I cannot look at Mr Chua's evidence when considering whether or not the One-paged SOA was authentic and therefore supports the defendants' position. Once Mr Chua came to court and affirmed the truth of his AEIC and was then cross-examined, whatever evidence he gave became part of the record of proceedings and available for me to assess and if I so decide, rely on, when coming to my decision. The fact that he was called by Mr Ho who, strictly, may not have required Mr Chua's evidence to support his defence, is ultimately irrelevant. If Sakae had been able to prevent Mr Chua from testifying at all, or had applied to expunge from Mr Chua's AEIC matters irrelevant to Mr Ho's defence, that would be a different matter. But this did not happen.

197 Sakae submits that it is clear that the One-paged SOA was conjured up in the middle of the trial to explain away the documents its solicitors had discovered which showed that the Five-paged SOA was created only in April 2012. It further submits that the submission of the One-paged SOA as containing the ERC Option meant that all the pleaded defences which were advanced on the basis of the Five-paged SOA had evaporated.

198 I find that the Five-paged SOA was not drafted and signed on or around 17 September 2010. It was drafted sometime in March/April 2012 and signed in April 2012. Therefore, it could not embody the ERC Option which had allegedly been granted in or about September 2010. Nor could the Five-paged SOA support the pleadings in relation to the ERC Option. This does not mean, however, that the ERC Option did not exist at all. It could equally, have been embodied in the One-paged SOA which contained the essential terms of the share option granted to ERC. The additional terms in the Five-paged SOA were irrelevant to the dispute between the parties which was over the existence, rather than the terms, of the ERC Option. The essence of Mr Ong's and Ong Han Boon's defence to Sakae's claim was that there was a valid share option agreement and therefore the wrong identification in the pleadings of the Five-paged SOA as embodying this option could not by itself defeat this defence.

199 The question squarely before me is whether the evidence supports or undermines the authenticity of the One-paged SOA. The only direct evidence I have on this is Mr Chua's assertion that Carol Ong told him she had a hard copy of the document and showed it to him on 22 March 2012. The context of Mr Chua's evidence may be relevant. He said that in early 2012, Carol Ong told him that there were plans for ERC Holdings to be listed on the SGX and in that connection, the share options held by ERC Holdings needed to be valued. Mr Chua asked to see the actual share options. Eventually, on 22 March 2012, he saw the hard copy of the One-paged SOA. It was only after that that he gave instructions for the preparation of the Five-paged SOA which had to include a validity period so as to satisfy certain valuation requirements.

200 It should be noted that apart from the One-paged SOA itself bearing the date 17 September 2010, there is no other document in court which shows that the One-paged SOA was signed on or around that date. There are no directors' resolutions from either the Company or ERC Holdings authorising the grant or acceptance of the ERC Option. Nor is there any correspondence similar to that in March/April 2012 which accompanied the creation of the Five-paged SOA. This absence of contemporaneous documentation casts some doubt on the authenticity of the One-paged SOA. In addition, the ERC Option was not disclosed in the draft SGX circular to Sakae's shareholders dated 28 November 2010 or in the actual circular dated 22 December 2010. Mr Chua confirmed in cross-examination that the existence of the ERC Option had not been drawn to Sakae's solicitors' attention when they were preparing the documentation relating to the circular and information to be given to SGX.

201 There is also Mr Chua's e-mail to Carol Ong of 23 March 2012 which appears to give the impression that the ERC Option had yet to be granted and when it occurred should be put in the name of Mr Ho. Mr Chua explained this e-mail as arising from his concern that if ERC Holdings exercised the ERC Option, its shareholding in the Company (whether directly or indirectly through its shareholding in GREIC) would exceed 50% and that would mean the Company's accounts would have to be consolidated with ERC's accounts. He therefore suggested that the ERC Option be transferred to Mr Ho who could transfer it back to ERC Holdings at a later time. In the event, since the listing was not proceeded with, this concern lapsed. However, this was not a very satisfactory explanation as it ignored the tenses used in the e-mail and the apparent meaning of the same. I quote:

> 1 Can we discuss on this issue? In [the Company], [ERC Holdings] cannot be holding the 8.8 million share options as [ERC Holdings] **will then** hold (2.905 + 8.8)/(12.555 + 8.8) = 54%. The share options are thus made in [Mr Ho's] name.
>
> 2 …
>
> 3 Since [Andy Ong] says that Sakae is aware of the targeted equity+ options being $25m, **should we also give** 8.8m [the Company] options to GREIC so that the share value for Sakae and GREIC remain the same.
>
> [emphasis added in bold]

I find it difficult to read the above language as referring to options that were already in existence.

202 It should also be noted that in September/October 2010, SGX was dealing with the ERC Group because of Sakae's investment in the Company. At that time, SGX asked the ERC Group to disclose whether there was any ongoing transaction in which Mr Ong was interested. Mr Chua replied that there were none. If the ERC Option had existed at that time, it would clearly have been an interested party transaction and would have needed to be disclosed.

203 As noted more than once above, the defendants pleaded their case on the basis that the ERC Option was contained in the Five-paged SOA. During the trial, this assertion was found to be false. The defendants then produced the One-paged SOA as the ERC Option agreement. In the circumstances, the defendants clearly had the burden of showing that the One-paged SOA was made when they alleged it was made. In my judgment, they have not discharged this burden. The evidence is murky. I therefore find that it has not been proved that the One-paged SOA was made on or about September 2010.

There is therefore no proof that the ERC Option was granted in September 2010.

Was there a verbal share option agreement between Mr Foo and Mr Ong in 2010 and/or a mid-June 2012 Agreement?

204 Mr Foo was the only witness to give evidence on what transpired between him and Mr Ong in 2009, 2010 and June 2012 in relation to the ERC Option or any proposed option to be granted to ERC. He testified that at no point during his discussions with Mr Ong relating to the purchase of Bugis Cube, or at any time thereafter did Mr Ong suggest or Mr Foo agree, that if Mr Ong were to provide a personal guarantee to the bank for the proposed loan to finance the purchase of Bugis Cube, ERC Holdings would be granted an option to acquired shares in the Company. In this connection, Mr Foo explained that he could not have entered into such an agreement on behalf of Sakae which was a listed company with its own board of directors and that this was something that Mr Ong would have known as a member of Sakae's board. Sakae submits that there is no basis to suggest that Mr Foo's evidence is inherently incredible or out of all common sense or reason.

205 I agree that Mr Foo's evidence is not inherently incredible. There is documentary evidence (by an e-mail dated 5 March 2010) to show that prior to the entry of the JVA, Sakae made it clear to the ERC Group that it was not prepared for any options in the Company to be granted without its express approval. This stand was reinforced by cl 11.1(c) of the JVA which I referred to in [176] above. Mr Ong's agreement to this term being included in the JVA is not consistent with the alleged prior agreement that he had with Mr Foo in relation to the grant of an option to ERC Holdings in return for Mr Ong's issue

of a personal guarantee. Had there been such an agreement, one would have expected that either no such clause would have been inserted in the JVA or that an exception would have been made for the option that had already been agreed upon to verbally.

206 Sakae submits that the pleaded defence of the "Verbal Share Option Agreement" is "full of inconsistencies". In the Suit 122 defence, the plea is that there is one oral agreement entered into on or around 8 March 2010. This defence did not refer to any alleged phone call on 7 March 2010 between Mr Foo and Mr Ong during which the former agreed to the ERC Option. Sakae submits that this was because the Suit 122 defence was filed before it disclosed a copy of the e-mail of 5 March 2010. When the Suit 1098 defence was filed by AO Defendants, it included a reference to the phone call taking place two days after the e-mail in order to imply that the contents of the e-mail had been superseded. I agree that the two defences are inconsistent and, more importantly, there was no e-mail or other writing from Mr Ong or the ERC Group sent out after the alleged conversation of 7 March 2010 to document Sakae's change of position as allegedly agreed to by Mr Foo during that conversation.

207 Further, Sakae makes a good point when it submits that any verbal share option agreement between Mr Ong and Mr Foo would have been superseded by the JVA. Clause 32 of the JVA provides that it and the documents referred in it contain the whole agreement among the parties and supersede all previous agreements relating to the transactions contemplated therein. Mr Ong and ERC Holdings must have been aware of this provision since Mr Ong signed the JVA on behalf of GREIC.

208 For the reasons given above, I am satisfied that there was no verbal share option agreement in 2010. Even if there had been, it would not have survived the conclusion of the JVA.

209 I turn to the mid-June 2012 Agreement. As stated in [186(c)] above, this Agreement was made between Mr Ong and Mr Foo and allegedly had four terms. Mr Foo denied having entered any such Agreement. Mr Ong did not appear to controvert Mr Foo's evidence. Instead of producing direct evidence of the mid-June 2012 Agreement, the defendants want me to infer it from the fact that the allotments of additional shares in the Company, to ERC Holdings and Sakae respectively, took place. Whilst I may be able to infer that there was some agreement that ERC Holdings would only take up only 8,058,025 shares instead of 8.8 million shares so that Sakae would only have to subscribe for an additional 2,641,975 shares in order to maintain its shareholding of 24.69% in the Company, such an inference would only prove two of the terms of the mid-June 2012 Agreement. There is no evidence to support the existence of the other two terms, which were that ERC Holdings would be beneficially entitled to $250,020 worth of GREIC shares then held by Mr Ho or that the sixth floor of Bugis Cube would be sold to ERC Holdings or its nominees for $10m. The text messages that the defendants rely on do not refer to ERC Holdings or any of the terms of the alleged agreement. Further, the fact that the sixth floor of Bugis Cube has not been sold cannot be evidence that the fourth term was agreed to. The defendants alleged the existence of the mid-June 2012 Agreement; they have the onus of proving it. They have not discharged that onus. I find, therefore, that there was no such agreement.

Analysis

210 I have found that there is no evidence of any valid share option agreement, whether written or verbal, existing between the Company and ERC Holdings in June 2012. I am also satisfied on the evidence that Sakae voluntarily subscribed for additional shares in order to maintain its percentage shareholding in the Company. I do not accept that Sakae or Mr Foo was forced to do this. There were other courses which Sakae could have taken: it could have gone to court to injunct the exercise of the alleged option; alternatively, it could have refused to co-operate with the exercise, *ie,* Mr Foo could have refused to sign any of the documents that were required to give effect to ERC Holding's exercise of the option. Mr Foo was an experienced businessman and it is difficult to accept that he was in such a panic-stricken state that he completely overlooked the availability of legal and other professional advice which might have been able to help Sakae stop the exercise of the option without itself having to subscribe for additional shares.

211 Having said all of the above as to the voluntariness of Sakae's actions, which is basically the contention of the defendants, I have concluded that Sakae's participation in the share option exercise did not change its nature as an oppressive action orchestrated by Andy Ong which unfairly prejudiced Sakae and was in disregard of its interests. Mr Ong and Ong Han Boon acted in breach of duty to the Company in relation to their efforts to make it appear that the Company was bound by a share option agreement in favour of ERC Holdings. I conclude this because I have found that no valid option existed in September 2010 and they must have known this. Mr Foo did not ask to see the option. I accept that this was, once again, because of his long friendship with and great trust in Mr Ong. At that time he could not contemplate that Mr Ong

would be so bold as to create an option where one had not previously existed. If a valid option really existed, Mr Ong could and would likely have shown Mr Foo both the option documents and explained when and why they had been created. It is not surprising that he did not do so and that the documents came to light much later. If Sakae and Mr Foo had been shown the Five-paged SOA and told it was only signed in April 2012, it is inconceivable that they would have allowed ERC Holdings to exercise it or applied for further shares for Sakae. As for the One-paged SOA, assuming it was created much earlier than the Five-paged SOA, if it had been shown to Sakae together with the Five-paged SOA, so many questions would have been asked as to the need to create the Five-paged SOA when an apparently valid document already existed, that again a spanner may have been put in the works of the exercise of the option.

212 The position of Mr Ho is somewhat different. He was not a party to the creation of any option in 2010 and said he did not know about what happened in March/April 2012. Sakae asserts that Mr Ho was liable because he signed directors' resolutions and other documents approving the exercise by ERC Holdings of the ERC Option. He did this without reading or applying his mind towards what he was doing. I do not, however, accept that argument by Sakae. Mr Ho may have acted blindly but there was nothing to put him on notice regarding the validity of the transaction. Further, he was entitled to rely on Mr Foo's approval of the same documents since Sakae was the entity with an interest in the Company which would be adversely affected by the exercise of the ERC Option. Mr Foo did not speak to Mr Ho at all about it, not even to ask what Mr Ho knew about the option. Mr Ho may have been a cypher but that

alone would not make him liable to Sakae in all the circumstances of this transaction.

213 As regards Suit 122, I find that Andy Ong was in breach of his fiduciary duties to Sakae. As a director of Sakae, he had to protect Sakae's interest. Obviously, he knew about the prohibition on share options in the JVA and therefore even if there had been a valid share option between ERC Holdings and the Company in September 2010, he had a duty to inform Sakae of it before it was concluded. He should not have concluded it on ERC Holdings' behalf without Sakae's consent. He was in a clear conflict of interest position but took no steps to fulfil his duties to Sakae in that regard. On the basis that there was no valid ERC Option, it would also have been a breach of his duty to Sakae when he failed to inform Sakae of this at the time that ERC Holdings purported to exercise the ERC Option. As I have found that no valid ERC Option existed, it is not necessary for me to consider Sakae's further claim against Andy Ong for inducing a breach of the JVA.

Seventh, the Project Manager Agreement and the payment of $8m to Andy Ong

214 Mr Ong and Mr Ho are the relevant defendants in respect of this head of claim.

215 On 24 May 2012, the Company paid Andy Ong $8m. Sakae's allegation is that Mr Ong caused the Company to make this payment for which there was no justification and did so without Sakae's knowledge or consent. The defendants' position is that this was a valid payment made to Mr Ong for work to be done on behalf of the Company pursuant to an agreement between the Company and Mr Ong bearing the date 4 May 2012 and entitled

"Appointment of Project Manager" ("the May PMA"). The May PMA was signed by Mr Ho for and on behalf of the Company and by Mr Ong on his own behalf. Sakae alleges that the May PMA is a sham.

216 The May PMA is a four-paged document with a three-paged schedule describing the work to be done. It is made between the Company as "The Client" and Ong Siew Kwee as "The Project Manager". The purpose of the May PMA is to appoint Mr Ong to act as project manager (cl 2) and the project referred to comprises the Main Contract Works needed to renovate and refurbish Bugis Cube (cl 4). The Project Manager has the responsibility of ensuring that the project is completed to the fullest satisfaction of the Client (cl 8). An important and interesting clause is cl 9 which fixes the "Contract Sum" at $8m which includes all payments due for the Main Contract Works. Further, and rather unusually, the Contract Sum is guaranteed by the Project Manager and any debts and claims in relation to the project and exceeding the Contract Sum shall be borne by the Project Manager without further recourse to the Client. Payment of the Contract Sum was to be made upon signing of the May PMA.

Sakae's position

217 Sakae contends that the reason for the $8m payment had nothing to do with the refurbishment of Bugis Cube. Andy Ong needed the money to help ERC Holdings exercise the ERC Option. That was why the payment was made in May 2012. Mr Ong procured that the payment was recorded in the Company's accounts as a "Prepayment and Deposit" in relation to Bugis Cube in June 2012 but only had the May PMA drawn up much later when Sakae started to query the payment.

218 It is Sakae's position that it knew nothing about the payment or the May PMA in May or June 2012; it only found out about the payment some months later and even then the May PMA was not mentioned. The May PMA popped up only in 2013, just in time to support Mr Ong when he was resisting legal proceedings brought by Sakae.

219 According to Sakae, it was only at the 25 October Meeting that Mr Ong informed the Sakae board that a project manager had been appointed to carry out the refurbishment works at Bugis Cube. At that meeting, Mr Ong told the board four things: (i) that for the purpose of these works, $5m was "parked" with the management committee of Bugis Cube ("the MCST"); (ii) $3m worth of interior works had been done; (iii) he had himself paid $8m upfront but had since been repaid with funds from the UOB Facility; and (iv) that there was a project manager. When Mr Ong was asked who the project manager was, his response was that he did not know.

220 In November 2012, Ms Voon inspected the Company's records and discovered that a payment of $8m to Andy Ong had been recorded as a reimbursement to him for sums that he had apparently paid to a "project manager" in relation to the refurbishment works. Ms Voon then asked for documents showing that $5m had been paid to the MCST and that $3m had been paid for the interior refurbishing of the units in Bugis Cube. Nothing was provided at that time. It was only when PwC inspected the accounts in December 2012 that a letter dated 20 November 2012 from the MCST to the Company confirming the receipt of $5m was produced. The letter was vague in that it did not state when the MCST had received the money. Accordingly, PwC thought it did not constitute adequate evidence to show that $5m of the

$8m paid to Mr Ong on 24 May 2012 was indeed to repay him for the same amount that he had allegedly already paid the MCST on behalf of the Company.

221 The May PMA itself was not disclosed until February 2013 when Andy Ong and Mr Ho filed affidavits in OS 124 of 2013, a proceeding started by Sakae for leave to bring a derivative action in the Company's name against Mr Ong and Mr Ho. Sakae points out that the defendants had not explained why they had not told either Sakae or PwC in November 2012 about the existence of the May PMA. Nor had they explained why a copy was produced only in February 2013. The only reasonable conclusion, Sakae submits, is that the $8m paid to Andy Ong in May 2012 was not pursuant to any project manager or other agreement. The May PMA was created after the fact to provide a justification for the payment.

The defendants' position

222 For obvious reasons, no direct evidence was given by Andy Ong on the circumstances in which the May PMA was signed or the payment of $8m was made to him. Mr Ho, however, testified that Mr Ong had explained to him that the May PMA was required so that Mr Ong could handle the renovations of Bugis Cube on an urgent basis and thus achieve the best sale price for the units. Mr Ong also told him that Mr Foo had agreed to appoint Mr Ong as the project manager with the Contract Sum being capped at $8m. There was no reason for Mr Ho to doubt this representation because of the norm adopted in the conduct of the Company's affairs (I say more about this norm below). Mr Ho believed that Mr Ong was the best person for the job and that the May PMA was in the commercial interests of the Company. After the PMA was

signed, Mr Ho was no longer involved in and was not consulted on the renovation works to be carried out to Bugis Cube. He was not involved in the actual payment of the $8m to Mr Ong and he had no knowledge of when this payment was made, whether it was before or after he signed the May PMA.

223 Since Mr Ong is unable to make any factual assertion on the basis of what he told Mr Ho or Mr Foo or Sakae, Mr Ong's closing submissions lean heavily on the argument that Sakae/Mr Foo would have or should have known what was going on. He relies on the following:

(a) Both Mr Foo and Ms Voon accepted during cross-examination that refurbishment works had to be undertaken on the individual strata units and the common areas of Bugis Cube in order to achieve the sale of the units.

(b) They knew that partition works and beautification of the facade were part of the refurbishment works.

(c) Sakae clearly knew that Mr Ong was the one who was handling the works, given Mr Foo's admission that he assumed that Mr Ong would see to the works and that he had no objection to the latter doing so.

(d) From a document that Ms Voon presented at Sakae's audit committee meeting on 23 February 2012, Sakae was well aware that the estimated cost of the renovation works was approximately $8m, including the mechanical engineering, partition and facade works.

(e) Ms Voon said during cross-examination that, based on her recollection, $8m was actually paid to Mr Ong and that he was supposed to be in charge of all the costs of refurbishment, although subsequently she attempted to backtrack and said that this was information she was given during her investigation.

(f) The fact that Sakae knew the $8m was paid to Mr Ong for the refurbishment works also explains why Sakae did not raise any objection when it received the management accounts which recorded the payment. These were sent to Sakae in June 2012.

(g) At the 25 October Meeting, Mr Ong expressly informed the board that $5m had been committed to the MCST for the facade works and $3m was required to do the interior works.

(h) The Company benefited from the May PMA. As Mr Ho testified, as the Project Manager, Mr Ong was able to make decisions with regard to making payments in advance so that he could ensure the renovation went ahead speedily. With the renovations being speeded up, the sale of the units could also be completed more quickly. Further, under cl 9 of the May PMA, the Company's liability for the work was capped at $8m.

(i) By virtue of the May PMA, the units on the first to fifth floors of Bugis Cube were all sold and the Company made a tidy profit.

224 It is also Mr Ho's position that the May PMA was validly entered into between the Company and Mr Ong. Mr Ho's evidence was that he signed it on behalf of the Company sometime within a month of 4 May 2012, the date

stated on the document. Further, Mr Foo expressly authorised Mr Ong, Ong Han Boon, and Steven Tan to enter into the May PMA on the Company's behalf so as to give effect to the sale of the units. This authorisation came from the directors' resolution dated 5 June 2012 which approved the sale of the units and specifically stated that Mr Ong *et al* were authorised "to sign on all relevant documents relating to the sale of the Property on the Company's behalf". This authority, the defendants say, must surely have included the signing of the May PMA, without which the sale of the units would not have occurred.

Factual findings

225 The factual issues that arise in connection with this claim are:

(i) When did Sakae/Mr Foo learn about the $8m payment?

(ii) Did Sakae agree to or know about the appointment of Mr Ong as project manager?

(iii) When was the May PMA concluded?

The first two issues are closely connected so I will deal with them together.

Sakae's knowledge of the $8m payment and the May PMA

226 In their defences, both Mr Ong and Mr Ho pleaded that Mr Ong had told Mr Foo sometime on or around 4 May 2012 to attend a board meeting of the Company at 7pm that same day to discuss a project manager agreement. Mr Foo did not reply and did not turn up at the meeting but Mr Ho was there. Mr Ong briefed him on the proposed agreement. While Mr Ho agreed in principle, he asked for further quotations in respect of the work to be done

under the May PMA. Subsequently, Mr Ong spoke to Mr Foo about the May PMA and Mr Foo told Mr Ong to proceed with Mr Ho and that he did not need to be updated on the details. In Mr Ho's defence, he pleaded that Mr Ong had told him about that conversation with Mr Foo.

227 Notwithstanding the pleading, no direct evidence was adduced that Mr Ong had told Mr Foo about the alleged meeting on 4 May 2012 or had briefed him on the details of the May PMA. Mr Ho could only testify that Mr Ong had told him about these communications. That was hearsay and not admissible to prove the truth of the allegation. Mr Ho did not speak to Mr Foo directly. Mr Foo's own evidence was that Mr Ong did not call or speak to him in or around May 2012 about any board meeting of the Company or about the intention to have a project manager agreement, and Mr Foo never discussed the details of the agreement with Mr Ong. After giving this evidence, Mr Foo was not asked any questions by counsel for the defendants in relation to when he had first learned about or seen a copy of the May PMA. There is no reason to doubt the truth of Mr Foo's evidence.

228 The only assertion that the defendants made about Sakae/Mr Foo's knowledge of the May PMA related to the alleged communications in May 2012. They did not assert that it had been disclosed to Sakae/Mr Foo on any other date after May 2012 and before it was produced in February 2013. I find that neither Mr Ho nor Mr Ong informed Sakae/Mr Foo about the May PMA at any time prior to February 2013. The fact that Mr Foo signed a resolution in June 2012 authorising various persons to sign relevant documents relating to the sale of Bugis Cube is no indication that he knew about the May PMA. The natural meaning of the phrase "all relevant documents relating to the sale of

Property" does not include agreements like the May PMA. It refers to sale and purchase agreements and formal transfers. I was somewhat surprised that the argument was put forward at all.

229 Turning to the issue of the $8m payment, there is just one document on which the defendants can rely, and that is the Company's management accounts for June 2012 which were furnished to Sakae in July 2012. The defendants argue that these must have been scrutinised by Ms Voon and when she did so, she would have become aware of the $8m payment. They also rely on her alleged slip that she knew that $8m was actually paid to Mr Ong and he was supposed to be in charge of all the costs. The document, however, is not as clear as the defendants submit. The payment was described as "Prepayment and Deposit" and was recorded in the management accounts as an asset, when it should have been recorded as an expense. Anyone looking at that entry would not think that it involved a payment out by the Company. Ms Voon confirmed that she could not remember whether she had in fact noticed the "Prepayment and Deposit" entry in the management accounts and no one had briefed her on it. Further, I note that the entry did not indicate a payment to Mr Ong much less that this payment was in the nature of a project manager fee. I accept Ms Voon's evidence in this connection. It is consistent with her other evidence that her scrutiny of the management accounts of the Company was for a limited purpose in relation to Sakae's consolidated accounts.

230 The defendants also rely on so-called "admissions" made by Mr Foo that he knew that the refurbishment works had to be done and that he assumed that Mr Ong would see to these works and had no objections to Mr Ong so doing. I cannot see these "admissions" as evidence of Mr Foo's knowledge

that Mr Ong was to be prepaid a management fee of $8m for seeing to the works at Bugis Cube. Knowing that the Company might have to pay up to $8m for such works, does not translate into knowledge that Mr Ong was going to take the amount as a fee and, under the PMA, be entitled to keep any savings realised in doing the works. Further, the Company's business was all along managed by GCM which was run by Mr Ong and this was the basis on which Mr Foo assumed that Mr Ong would take charge of the works. Mr Ong acting personally as a manager and being entitled to a personal payment would be a very different thing from Mr Ong acting on behalf of GCM. Thus, Mr Foo would obviously have expected that if this was to be the case there would be a discussion between Mr Ong and Sakae/himself prior to the contract being concluded.

231 I find that in May/June 2012 Sakae did not know about the management fee to be paid to Mr Ong or that such a fee was indeed paid to him in May 2012. Sakae only found out about the payment to Mr Ong in November 2012.

When was the May PMA actually entered into?

232 Having considered all the evidence, I am satisfied that the May PMA was not signed in May 2012 or around that date. I find that it is more probable than not that the agreement was only signed sometime in October or November 2012.

233 There is no contemporaneous correspondence regarding the drafting of the May PMA. By "contemporaneous" I mean the period between mid-April 2012 and mid-June 2012. According to Mr Ho, he signed the May PMA

within about a month of its date of 4 May 2012. If true, that means that the May PMA would have been drafted during the period mentioned earlier. The defendants, however, have not produced any draft or e-mail or other correspondence from that period. The only document which deals with a draft PMA was sent out much later.

234 When Sakae's solicitors went to the CAD office in February 2016, they discovered an e-mail dated 4 October 2012 from Carol Ong to one of her colleagues, Stephen Tan. The e-mail stated that one "Mahin" assisted to draft "the attached project management agreement" and that she wanted to remove some of the paragraphs from the draft as she found the document too detailed. Carol Ong went on to ask for Stephen Tan's help to ascertain whether the draft was sufficient "for our needs". This e-mail certainly raises suspicions that the May PMA was not in existence in October 2012. It should be noted that the draft attached to the e-mail was dated 1 May 2012 (though it was not signed), not 4 May 2012. Further, it provided for a contract sum of $5m and a contingency fund of $3m in respect of the Main Contract Works. The contract sum was to cover both the contractors' cost and the project manager's professional fees, and it was intended that a schedule of professional fees for the project manager would be included as "Schedule 3" to the PMA. This draft was clearly different from the May PMA.

235 To explain away the implications of the 4 October 2012 e-mail, Mr Ho adduced the evidence of Wijesekera Mahin Chandika ("Mr Mahin") who was the person referred to as "Mahin" in the e-mail. Mr Mahin qualified as a lawyer in Sri Lanka and was employed as a lecturer by ERC Institute from March 2012 to December 2015. Mr Mahin's evidence was that in September

2012, Carol Ong told him that the parties to the May PMA had agreed to change some of its terms and that she required his assistance to change some of its wording and/or clauses. She told him that under the May PMA the contract sum was $8m which included the Project Manager's fees as well as the costs of the works to be undertaken. If the fees and costs exceeded $8m, the excess was to be borne by the Project Manager. Carol Ong said that the parties wanted to break down the contract sum of $8m into two components of $5m and $3m and they also wanted to remove the provision that the Project Manager would bear any amount in excess of $8m. She asked him to include provisions to strengthen the Company's position and Mr Mahin then suggested providing for liquidated damages and a retention sum. Shortly thereafter, Carol Ong sent Mr Mahin an e-mail attaching a PDF copy of the May PMA. He noted that it was signed by both Mr Ong and the Company. Thereafter, there were further discussions between Mr Mahin and Carol Ong. The upshot was that instead of drafting a variation agreement or addendum, Mr Mahin was instructed to prepare a fresh PMA. He did this and sent Carol Ong e-mails with his new drafts. It was one of those drafts that was sent on by Carol Ong to Stephen Tan in her e-mail of 4 October 2012. The point of all this evidence was to establish that the May PMA had been drafted and signed well before September 2012.

236 I do not accept Mr Mahin's evidence as summarised above as being the truth. Sakae has made many points about the lack of coherence and credibility in his evidence. Several of these are well founded. I am particularly impressed by the following:

(a) Although Mr Mahin claimed that in September 2012 Carol Ong sent him one e-mail attaching a PDF copy of the May PMA and

subsequently also sent him an e-mail attaching a Microsoft Word version of the May PMA, and that thereafter he sent her an e-mail attaching the draft PMA with his proposed amendments, he was unable to produce any of those e-mails. The only explanation he gave was that they could not be found. However, that was not a credible reason for non-production since the e-mails should have been in both Mr Mahin's and Carol Ong's e-mail accounts. Even though Mr Mahin changed offices and changed computers after October 2012, there was no reason offered for why the e-mails could not be retrieved from the server.

(b) Mr Mahin claims that Carol Ong had asked him to make amendments to the May PMA but she had sent him a PDF version of it. This was an odd thing to do as it required him to re-type the whole document before amending it. It was only later that she sent him the Microsoft Word version of the May PMA. If she had wanted amendments to be made quickly and efficiently, she would have sent this version first and not bothered with any other. The only reason for Mr Mahin to see the PDF version was so that he could testify that the May PMA was already in existence before he came up with his draft.

(c) Carol Ong allegedly asked Mr Mahin to include provisions in the new draft PMA which would strengthen the Company's position. During his cross-examination, however, he conceded that neither of the drafts that he produced contained such provisions. At some point during his cross-examination, Mr Mahin accepted that it was "very possible" that it was after he sent out his draft PMA that the same was amended to become the May PMA which was adduced in court.

(d) The May PMA bears the date 4 May 2012. However, in the draft that Mr Mahin prepared in September 2012 the date is blank, while in his later October 2012 draft, the date is 1 May 2012. That makes no sense if there was already a signed agreement dated 4 May 2012 and the idea was to come up with an amended version of that agreement. The amended version would either retain the date 4 May 2012 or bear a date after 4 May 2012.

(e) Mr Mahin claimed that he had been instructed to break down the contract sum of $8m into a contract sum of $5m and a contingency sum of $3m. He admitted, however, that if he had seen the May PMA in September 2012, he would have understood that the $8m contract sum had already been paid to Mr Ong. He conceded that in those circumstances the proposed breakdown was illogical. He did not have any credible explanation for why he would have been asked to make an irrational amendment like that.

237 In the circumstances, the more probable course of events was that Mr Mahin was instructed to draft a project manager agreement with certain clauses. He then prepared his September 2012 draft and later amended it to become the October 2012 draft. The October 2012 draft was sent to Carol Ong who in turn sent it to Stephen Tan for further help in tailoring it to "our requirements" and sometime thereafter it turned into a draft that became the May PMA.

Analysis

Mr Ong's position

238 I have found that Mr Foo was not informed either about the $8m payment or the proposed project manager agreement in May or June 2012. I have also found that the May PMA was most probably produced and executed around October 2012. In these circumstances, there is no merit in the defences put up by Mr Ong. He had no authority to take the $8m in May 2012 and he must have caused the production of the May PMA as a cover-up to give the payment a veneer of respectability.

239 I do not accept the defendants' submission that the Company and Sakae benefited from the May PMA and the $8m payment. It is not in doubt that the refurbishment works had to be done. The issue is whether the whole scheme of appointing a project manager and making an upfront payment was commercially justified or necessary for the purpose of the works. In my judgment, there was no justification for payment of $8m in May 2012 or for appointing Mr Ong personally as project manager.

240 Dealing first with the payment of $8m, the justification given by Mr Ho for this was that it would allow Mr Ong to make decisions with regard to paying in advance so that he could set the progress of the works. This justification is specious: if proper quotations had been obtained and the contractors required advanced payments, there was nothing to stop these advance payments being made by GCM from the Company's funds. GCM was in charge of the accounts and the business of the Company and there was no requirement for prior permission to be obtained from Sakae in regard to payments that were genuinely needed to carry on the Company's business or

enhance its assets. Accounts were sent to Sakae after the event, not before, and the experience of GCM would have been that it was given free rein with utilisation of the Company's funds.

241 Mr Ho's testimony was that the renovation works were not handled by GCM as it only handled the business aspect of the Company and its daily operations. This evidence also did not make much sense to me. GCM was run by Mr Ong and it had a full staff which handled the Company's affairs. No reason was given why that staff could not handle the renovation works. Nor was there an explanation how Mr Ong on his own, without the assistance of any staff member, would be able to handle the management of the renovation works, especially since he was concurrently running the ERC Group.

242 The evidence that $8m needed to be paid upfront was also questionable. Andy Ong's position was that $5m had to be paid to the MCST in May 2012 and that he had made this payment upfront, only obtaining reimbursement from the Company a few days later. A cheque dated 21 May 2012 for $5m made out by Mr Ong to the MCST was produced. However, other evidence showed that the cheque was apparently deposited into the MCST's bank account on 16 November 2012. Indeed, the letter issued by the MCST confirming that it had received the money was dated 20 November 2012. Why would the MCST, which allegedly needed the money in May 2012, have only deposited the cheque in November 2012? The answer that springs to mind is that the cheque was only received in November 2012.

243 Further, there was no evidence that in fact the MCST needed $5m from the Company in May 2012. At an Extraordinary General Meeting of the

MCST on 28 May 2012, the subsidiary proprietors of Bugis Cube (including the Company) agreed to a budget of $5m for that part of the renovation works to be done by MCST. It was also resolved that $4.5m would be funded by way of levies paid by the subsidiary proprietors (including the Company) in four quarterly instalments with effect from 1 July 2012; and that the balance of $0.5m would be paid from the sinking fund. As the Company held 91% of the share value, the total amount it had to pay by way of the four levies was slightly over $4m. In accordance with that obligation, in July 2012, the Company made a payment of about $1.2m to the MCST. If the Company had already paid $5m, there was no reason to pay a further $1.2m. Additionally, considering that the Company's liability was fixed at the EGM on 28 May 2012, it would on that day have been entitled to the return of the $800,000 or so overpayment made about a week earlier. I cannot see how it could have been a benefit to the Company to pay $5m upfront when its legal obligation was to pay only about $4.1m over four quarterly instalments beginning in July 2012. Indeed, as I observed in the course of the hearing, payment of $5m by the Company meant that it had paid the total amount budgeted for the renovations when at least part of this cost was to be paid by the other subsidiary proprietors and from the sinking fund.

244 As for the $3m for the interior works, there is no evidence that the cost of the interior works came up to that much. When Mr Ong filed his affidavit of evidence-in-chief in November 2015, he stated that up to that point the expenses incurred in relation to all the renovation works totalled about $6.4m. He gave a breakdown which showed that this figure included about $4.8m payable to the MCST between July 2012 and June 2013. Thus, the other works would have come up to less than $2m. As Sakae points out, the figures given

in respect of the amount actually incurred have been changing throughout the proceedings and the total cost of the refurbishment works cannot be ascertained from the documents in court.

245 I conclude that there was no commercial reason for $8m to be paid to Mr Ong in May 2012 even if he had truly intended, at that time, to use the money only for the work to be done to Bugis Cube. The Company would have been better served to have kept the money in its coffers and to have paid it out only as and when required, and to the extent required, by the individual contracts.

246 In my judgment, Mr Ong was in breach of his fiduciary duty to the Company when he took $8m from the Company in May 2012. This action was also oppressive to Sakae because it meant that Company funds were diverted and misapplied to enable ERC Holdings to exercise the share option. Under cl 9 of the JVA a director or shareholder who has an interest in a matter must declare his interest to the Company and the other shareholders. Mr Ong did not do so in relation to the May PMA or the $8m payment. This is another reason for holding the action to be oppressive and not just a corporate wrong.

Mr Ho's position

247 I now turn to Mr Ho's position. Before I deal with the specific issue of the May PMA, I would like to deal with a general defence put forward by Mr Ho in his closing submissions. This defence was put forward in answer to many of Sakae's claims but I think that this is a convenient juncture to deal with it as it is one of Mr Ho's main defences to the present head of claim.

248 Mr Ho's argument is that his actions should be assessed with reference to an alleged norm in relation to how the Company's affairs were to be conducted ("the Established Norm"). At its core, the Established Norm defence relates to the practice of leaving the management of the Company largely to Mr Ong and his team in GCM. As there is some evidence which seems to support Mr Ho's allegations (particularly in relation to how Mr Foo had himself followed this practice), Mr Ho's argument requires some analysis.

MR HO'S SUBMISSIONS ON THE ESTABLISHED NORM

249 Mr Ho argues that in determining whether he had acted in breach of any fiduciary duty or in a manner oppressive to Sakae, the court must have regard to: (a) how he came to be appointed and what the shareholders of the Company expected of him as director; and (b) the norm established by the shareholders and directors of the Company as to how its affairs were to be run.

250 According to Mr Ho, he was brought into the Company to play a "small role" as a non-executive director. He alleges that Mr Foo and Mr Ong had, prior to his appointment, settled on the Established Norm in relation to how the Company's affairs were to be conducted. The Established Norm as described in Mr Ho's closing submissions is reproduced as follows:

> (a) Mr. Foo left it to Mr. Andy Ong and/or his team in GCM to run / manage [the Company's] day-to-day business / affairs. Mr. Foo had little / no involvement in the same. In Mr. Foo's words, Mr. Andy Ong was "*running the show*" in [the Company];
>
> (b) Mr. Foo was on very good terms with Mr. Andy Ong and trusted Mr. Andy Ong / GCM to act in [the Company's] and Sakae's interests in relation to the [Company's affairs], as Mr. Andy Ong was both a director in GCM and Sakae. Such was the level of faith and trust Mr. Foo reposed in Mr. Andy Ong / GCM that Mr. Foo was content to let Mr. Andy Ong /

> Mr. Ong Han Boon remain as [the Company's] bank account signatories and operate / control [the Company's] bank account;
>
> (c) there were no formal [Company] board of directors' meetings held, where GCM would update the [the Company's] directors on [the Company's] affairs and/or the [Company's] directors would discuss [the Company's] affairs;
>
> (d) in this regard, Mr. Foo would obtain updates on [the Company's] affairs directly from Mr. Andy Ong;
>
> (e) Mr. Foo would not communicate directly with Mr. Ho in relation to [the Company's] affairs but would do so through Mr. Andy Ong. As far as Mr. Foo was concerned, Mr. Foo was dealing with Mr. Andy Ong and not Mr. Ho; and
>
> (f) Mr. Ho was not expected to undertake an active role in relation to the affairs of [the Company].
>
> [emphasis in original]

251 In these circumstances, Mr Ho argues that he had acted in a manner consistent with the Established Norm, which was essentially to leave it to Mr Ong and his team in GCM to manage the Company with little or no interference. Mr Ho therefore alleges that Sakae has no basis to complain that its rights have been oppressed due to his conduct. He relies on the authority of *Tokuhon (Pte) Ltd v Seow Kang Hong and others* [2003] 4 SLR(R) 414 ("*Tokuhon*") and *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 ("*Tan Yong San*") in support of this position.

WHETHER THE ESTABLISHED NORM IS PLEADED OR INCONSISTENT WITH MR HO'S PLEADED CASE

252 I observe that Mr Ho, in seeking to rely on the Established Norm in his submissions, has taken especial care to frame it in a manner which aligns with the position in his pleaded case. Indeed, besides references in his pleadings to the fact that various aspects of the Company's management had been left to

GCM, the following paragraphs of Mr Ho's Defence seem at first glance to be consistent with his submissions on the Established Norm:

> 15. Insofar as [the Company] was concerned, [Mr Ho], being a non-executive director of [the Company], was not involved in the day-to-day management of [the Company]. The day-to-day management of [the Company] was undertaken by the 7th Defendant, Gryphon Capital Management Pte Ltd ("GCM") pursuant to a Management Agreement entered into between [the Company] and GCM dated 23 February 2010 ("Management Agreement").
>
> 16. As a result, [Mr Ho] in discharging his duties as a non-executive director of [the Company] relied on Mr Andy Ong and the 5th Defendant, Mr Ong Han Boon (Wang Hanwen) ("Mr Ong Han Boon") (being representatives of GCM) in the day-to-day management of [the Company's] affairs.

253 In considering his submissions and pleadings in totality, however, it is evident that Mr Ho is now seeking to run a different case from what he had pleaded. The purport of Mr Ho's submissions on the Established Norm is ultimately to justify his failure to discharge his director's duties on the basis of some sort of shared expectation or understanding among the directors and shareholders that this was acceptable conduct in the Company's corporate governance. This is in contrast to the paragraphs of his Defence quoted above, which merely state that his involvement was limited and that he left matters to Andy Ong and Ong Han Boon, without any mention of this state of affairs being one which the directors and shareholders had agreed to or acquiesced in. In effect, Mr Ho is now arguing that there is an implied agreement, or otherwise an estoppel by convention, both of which must be specifically pleaded under O 18 r 12 and O 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) respectively (see *Singapore Civil Procedure 2016* (Foo Chee Hock gen ed) (Sweet & Maxwell, 2015) ("the White Book 2016") at paras 18/12/5 and 18/8/13). This was not done, and Sakae was not given an

opportunity to test the evidence. It would therefore be unfair to consider Mr Ho's submissions on this point or to make findings thereon. Furthermore, Mr Ho's contention is clearly at variance with his own pleaded case that he was appointed as director for the purpose of exercising independent control over the Company's affairs so that Mr Ong would not be in a position of conflict. The inconsistency is apparent from the following paragraphs of his Defence:

> 9. Sometime between 2010 and 2011, Mr Andy Ong approached the 4th Defendant to enquire if he was willing to take up further directorships in other companies in which Mr Andy Ong had an interest.
>
> 10. Mr Andy Ong explained to [Mr Ho] that *to ensure good corporate governance and to avoid conflicts of interest*, he would like the companies in which he had an interest to be controlled by *independent directors*. [Mr Ho] agreed.
>
> …
>
> 13. As a director of [the Company], GREIC and ERC Unicampus ("Companies"), [Mr Ho] had in all respects and at all material times in the discharge of his duties as a non-executive director of the Companies:
>
> (a) acted honestly and used reasonable diligence;
>
> (b) exercised independent judgment;
>
> (c) acted in good faith and in the best interests of the respective Companies; and
>
> (d) acted in accordance with the general and fiduciary duties of a director to the respective Companies.
>
> 14. [Mr Ho] denies the allegations repeated throughout the Statement of Claim that [Mr Ho] was "accustomed to act under the directions and/or instructions and/or influence and/or wishes of Mr Andy Ong". [Mr Ho] avers that he would not condone and/or agree to any actions which he considers to be against the interests of the Companies.
>
> …
>
> [emphasis added]

254 In other words, Mr Ho's pleaded case is that his role included, among other things, guarding against conflicts of interests and maintaining independent oversight of the Company's affairs – functions which the Established Norm allegedly excludes. Thus, as much as Mr Ho seeks to shoehorn the Established Norm into his Defence, the pleaded facts cannot ground the legal argument sought to be made. Indeed, permitting Mr Ho to read the Established Norm into his pleadings would be at odds with the well-established principle that one is not entitled to assert two inconsistent versions of the facts where he knows or must know that one version is false. Therefore, Mr Ho is not entitled to rely on the Established Norm in his submissions.

WHETHER THE ESTABLISHED NORM IS SUPPORTED BY EVIDENCE

255 Even if he were allowed to rely on the Established Norm, Mr Ho's argument is not borne out by the evidence. In so far as Mr Foo himself had not discharged the very same duties which Mr Ho was bound to discharge, there is nothing to suggest that this alone could give Mr Ho a licence to do the same. There is no evidence that indicates that Mr Foo and Sakae regarded such conduct as acceptable on Mr Ho's part; notably, the statements which Mr Ho relies on as absolving him from responsibility all come from Andy Ong. In fact, even considering the understanding between Andy Ong and Mr Ho only, Mr Ho's argument is undermined by his own evidence at trial. He asserted he had been reassured by Mr Ong that he would only have a "small role" as a director and that he agreed to be director on the basis that he "trusted Andy Ong to run the affairs of [the Company]". It is equally clear from his testimony, however, that the reason for his appointment in Mr Ong's stead was that "he [*ie*, Andy Ong] doesn't want to have conflict of interest". Mr Ho further testified that in his understanding, a director had to "look after the best

interests of the company and exercise fair judgment". He also agreed that as a director of a company, he had to exercise reasonable endeavours and efforts to understand the business and affairs of the company. In other words, he would have had to be alive to, at the very minimum, the need to exercise independent thought in the discharge of his duties even if he did leave the management of the Company in Mr Ong's hands. I am therefore not convinced that Mr Ho was entitled to act according to the Established Norm (if it did in fact exist). Indeed, considering the context of Mr Ho's appointment, I would go as far as to say that Mr Ho had to act extra cautiously and make an effort to think independently if Mr Ong were involved on the other side of the transaction. The potential conflict of interest between Mr Ong and the Company was, after all, the very thing Mr Ho had been appointed to ward against.

WHETHER THE ESTABLISHED NORM IS SUPPORTED BY CASE LAW

256 Further, the cases on which Mr Ho seeks to rely do not take him very far.

257 In *Tokuhon*, it was alleged that a director-shareholder, Mrs Seow, acted in breach of her fiduciary duties because she had shared information with a third party which was confidential to the company and which did not put the company in good light. In that case, Mrs Seow had written letters to the third party describing, among other things, a number of ongoing disputes within the company. The evidence indicated that because all the director-shareholders regarded the third party as a confidante, a peacemaker and a referee amongst them, the rest of them had similarly divulged confidential information to the third party themselves and did not object to Mrs Seow's actions even though they were aware of it. On the facts, the Court of Appeal held that such conduct

was the norm that had been set by the director-shareholders, and was impliedly accepted by all of them. Nevertheless, the Court of Appeal was careful to conclude that these were "exceptional circumstances". Mrs Seow's actions did not constitute a breach in that instance, although it would have been considered one normally (at [41]).

258 The facts before me are very different. First, they do not disclose a shared expectation regarding the conduct of directors. Indeed, as noted above, there is no evidence to show that Mr Foo and Sakae were aware of, much less prepared to accept, the manner in which Mr Ho had acted in relation to the transactions. I am not convinced that there are "exceptional circumstances" here to excuse Mr Ho's actions. Second, compared to the specific norm in *Tokuhon* of divulging confidential company information to a third party confidante, the Established Norm as set out at [250] above is very much broader with no defined limits. Mr Ho's arguments on each head of claim in his closing submissions show the Established Norm shifting depending on the particular transaction which Mr Ho seeks to address. For example, in relation to the Lease Agreement, the Established Norm is that the shareholders of the Company left it to GCM to decide the terms of the leases which the Company entered into. In relation to the May PMA, however, the Established Norm is that (i) Mr Foo was content to leave Mr Ong to handle the Company's affairs, with little or no involvement on his part; (ii) Mr Foo and Mr Ho did not have any direct communication with each other in relation to the Company's affairs and always communicated with each other through Mr Ong; and (iii) Mr Ong owed fiduciary duties to Sakae as its co-director, insofar as the Company's affairs were concerned. Without putting too fine a point on it, it seems that the Established Norm is capable of meaning whatever Mr Ho needs it to mean for

the purposes of defending this suit. I do not think that the principle in *Tokuhon* was intended for such a broad application and indeed, the upshot of allowing the principle to extend to Mr Ho's protean conception of the Established Norm is that Mr Ho would not be held to any of the standards expected of directors. Thus, the argument subverts the most basic tenets of corporate governance and must be rejected.

259 Similarly, *Tan Yong San* was decided on its own unique facts and is of no application here. In that case, the complainant, Tan, had been brought into two companies for the sole purpose of fulfilling the then existing statutory requirement that a company have at least two directors. In consideration for assuming the liabilities of a director, Tan was paid monthly director's fees and given a minority shareholding in the two companies. In that case, the court found (at [119]–[120]) that "[t]here was absolutely no other reason for Neo to have made Tan a director and shareholder". Tan was "never really concerned about his rights as a shareholder" and "never displayed any interest on how the business of [the two companies] was being run". Therefore, the facts disclosed an implied understanding between Tan and Neo that Neo could run the companies as his "personal fiefdom" as long as Tan was able to collect his director's fees every month. This prevented Tan from complaining that Neo had been manipulating the two companies for his own personal gain.

260 It is clear that *Tan Yong San* is of tangential relevance to the present case. There is no evidence of an implied understanding – much less one that was shared by the plaintiff, and not just Mr Ong and Mr Ho – that it was acceptable for Mr Ho to act in the way that he did. On the contrary, on Mr Ho's own evidence as well as the provisions contained in the JVA, there was

an expectation that as a director he was obliged to discharge his duties in accordance with the law.

Conclusions on Mr Ho's defence

261 In so far as Mr Ho's defence to this head of claim relies on the Established Norm, I reject it. Having found that the May PMA was not signed within a month of 4 May 2012 as Mr Ho alleges, it must follow that when he signed it he knew that it was being backdated to May 2012 for dubious reasons. I reject his evidence regarding the board meeting in May 2012 at which the May PMA was to be discussed. Further, I disbelieve his account that Mr Ong told him that Mr Foo had agreed to the $8m and the PMA. I do not believe either that Mr Ho did not know that Andy Ong had received an unjustified payment. I conclude that Mr Ho was not only in breach of fiduciary in signing the May PMA but that he was also party to the oppressive action constituted by the unjustified payment to Mr Ong.

General defences

262 I mentioned in [46] above that the defendants had put forward certain points which they considered to be overarching defences to Sakae's claims. I would like to say a little more about these defences now.

263 The first defence is that Sakae's claims in Suit 1098 are essentially corporate claims and cannot be brought against the defendants because of the proper plaintiff rule and the reflective loss principle. There are two points in this defence: the corporate nature of the claims and the reflective loss principle. In relation to the nature of the claims, I have considered this under each of the claim headings above. My findings have been that most of the

claims are properly to be considered as oppression claims (although some of them could also be brought as claims by the Company against the various defendants). However, just because Sakae has established that it has been oppressed does not mean that it is entitled to all the reliefs it has asked for. I consider its entitlement in the section entitled "Other Reliefs".

264 The other four defences are more or less of the same nature and can be considered together in this section. They are that:

(a) Sakae was in a position to resist the allegedly oppressive acts and that the defendants, specifically GREIC, Mr Ong, Ong Han Boon and Mr Ho ("the relevant defendants" in this section), never had any dominant power over Sakae.

(b) The JVA already provides for remedies which Sakae specifically negotiated for.

(c) Sakae was able to remedy the alleged oppression by self-help measures after the transactions had occurred.

(d) Sakae knew, ought to have known, or was in a position to find out, about the transactions which it is now complaining about.

I have considered some of these points in relation to the individual claims but, to make sure that I have not overlooked anything, I will do so again in this section.

Sakae's ability to resist oppression

265 The defendants submit that although Sakae owns 24.69% of the Company's shares, the relevant defendants do not have dominant power in the Company. There is no power imbalance which prevented Sakae from using the corporate structure in the Company to stop the alleged oppressive conduct. The JVA was drafted to give Sakae control. Various clauses were specifically inserted to protect Sakae's interests. Under cl 7 of the JVA, Sakae can appoint half of the Company's board of directors. Under cl 8, there had to be at least two directors' meetings each year, and each meeting had to be attended by at least one director appointed by Sakae. Clause 11.1 of the JVA sets out a list of Shareholder Reserved Matters which require unanimous approval of all the Company's shareholders. Clause 11.2 of the JVA sets out a list of Board Reserved Matters which require majority approval of the Company's directors. Clause 12 gives Sakae wide-ranging access to the Company's accounts and other information that it might reasonably require on the business or affairs of the financial position of the Company.

266 The defendants say that whilst Sakae has assumed the posture of an oppressed shareholder, viewed in the round, Sakae and Mr Foo had powers at both the shareholder and board levels which would enable them to stop the alleged oppressive acts. They were at liberty to exercise those powers but never did so.

267 The short answer to the submissions of the relevant defendants in this regard is that, as Sakae submits, the test is not whether the minority shareholder was given equal rights to those enjoyed by the majority shareholder, but whether the minority shareholder has the power to change its

fate by taking control of the Company. This is the principle laid down in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723. The Court of Appeal there held that it would be contrary to the purpose and intent of s 216 of the Companies Act to permit a shareholder to seek relief where he possesses the power to exercise self-help by taking control of the company and bringing to an end the prejudicial state of affairs (at [49]).

268 In the present case, although Sakae has equal representation on the board of directors, this representation does not give it the power to remove the other directors appointed by the majority shareholder if they act oppressively and without regard for Sakae's interests. In fact, under cl 7 of the JVA, the chairman of the board of the Company is a director appointed by GREIC and the chairman has the casting vote. Further, as a minority shareholder, Sakae has no power to oust any director at a shareholders' meeting. Further, being equally represented on the board of a company does not help the minority shareholder when those who are in control of and run the company carry out transactions on the quiet, do not consult the board and do not obtain board approval as happened in several instances discussed in earlier paragraphs of this judgment.

269 It is also peculiar that the relevant defendants relied on cl 11 of the JVA as embodying a number of rights and protections that Sakae specifically negotiated for and secured. Clause 11 cannot be a "self-help" remedy because Sakae's complaint is that in breach of the terms of cl 11 the relevant defendants carried out various transactions without even seeking the unanimous approval of the shareholders or the board. The presence of cl 11 in

the JVA did not assist Sakae. It was simply by-passed whenever the relevant defendants did not want their actions to be obstructed by Sakae.

270 The defendants make several arguments based on the right given by cl 12 to Sakae to have access to the accounts and records of the Company. For present purposes, it suffices to say that even if Sakae had inspected the records much earlier and discovered some of the wrongful actions undertaken by the relevant defendants, it would not have been able to take control of the Company and cause the Company to take action against Mr Ong, Ong Han Boon or Mr Ho. It would only have been able to start its oppression action earlier.

The remedies provided by the JVA

271 The relevant defendants submit that as the JVA was prepared as an arm's length agreement by Sakae's lawyers after negotiations, Sakae is not entitled to ignore the clauses in the JVA which provide it with specific remedies in the event of a dispute or a breach of the JVA by GREIC. Clause 18 of the JVA provides that where a shareholder of the Company commits a material breach of any its obligations under the JVA, any other shareholder is entitled to purchase all of the shares belonging to the shareholder in breach at a price equal to 90% of the shares' Fair Value (as defined in cl 19). This latter clause provides a specific and detailed procedure for an approved accountant to determine the Fair Value of the shares. In addition, under cl 26 of the JVA, if any dispute arises in relation to the JVA, the party shall hold a meeting in an effort to resolve a dispute and any dispute which cannot be resolved may be referred to arbitration.

272 The relevant defendants point out that Sakae had specifically negotiated for, and obtained, the inclusion of cll 18 and 26 to protect its interests and to provide a remedy for it in the event of a dispute. Sakae's recourse for any alleged breaches of the JVA would therefore lie under those provisions. Yet, Sakae did not seek recourse to the remedy under cl 18 nor did it apply for arbitration. Indeed, it resisted the application of the other shareholders of the Company to stay Suit 1098 in favour of arbitration. In these circumstances, Sakae cannot claim it was oppressed and entitled to reliefs for oppression.

273 I do not accept these submissions. There is nothing in the JVA that confines the innocent shareholder to the remedy afforded by cl 18 of the JVA in the event of a breach by another shareholder. It is pertinent that cl 18.3 states that following an event of default "any Non-Defaulting Shareholder **may** give a written notice … to the Defaulting Shareholder … requiring the Defaulting Shareholder to sell all of the [Company shares] held by the Defaulting Shareholder" [emphasis added]. Thus, it is clear that the buy-over remedy is an option available to the Non-Defaulting Shareholder; it is not the only remedy to which the Non-Defaulting Shareholder is restricted by the terms of the JVA.

274 I note that Sakae makes the point that even if cl 18 does not directly restrict the available remedies, its existence shows that Sakae had open to it an exit mechanism which it *could* have used, and that this option nullifies the oppressive quality of the relevant defendants' conduct. I reject this argument for three reasons. First, in order to invoke the remedy in cl 18, the person in default must be a shareholder. Neither Mr Ong nor Ong Han Boon nor Mr Ho

is a shareholder of the Company. The cl 18 remedy is not available against them. Secondly, the cl 18 remedy does not require the defaulting shareholder to put back into the Company any money taken out of the Company before the sale takes place. Finally, if a majority shareholder of a company is the defaulting shareholder, it is unlikely that the innocent shareholder would want to pay more money for shares in a company which has been run in someone else's interests. The argument would have been somewhat more compelling (which is not to say that it certainly would have succeeded) if the clause had given the innocent shareholder a choice between buying out the defaulting shareholder and being bought out by it at a fair price which would take into account any loss to the value of the shares occasioned by the oppression. Clause 18 includes no such option. For these three reasons, it is clear to me that the contractual remedy provided in cl 18 does not fully address the possible consequences of minority oppression. Consequently, if the law affords the innocent shareholder other remedies, it would be unjust to restrict him to those provided in the contract.

275 Finally, there are public policy considerations which militate against the relevant defendants' arguments. As has often been observed, s 216 of the Companies Act offers a wide range of remedies if a minority shareholder has been oppressed or its interests have been unduly prejudiced by the actions of the majority. These have been expressly provided by Parliament and should not be lightly derogated from. A shareholder's agreement must be very carefully drafted if the intention of the parties is to remove their rights to have access to such remedies in the event of a breach of the shareholder's agreement. No such clear language exists in the JVA and, in my view, it would be against public policy to read cl 18 as having such an effect. As a

matter of principle, the fact that a contractual remedy is available to a shareholder cannot preclude an oppression claim where the facts of the case justifies such a claim.

276 As for the arbitration argument, the fact that the application by the defendants for a stay of Suit 1098 was unsuccessful precludes the defendants from relying on cl 26 now. The decision of the Assistant Registrar was appealed against by the defendants but, on the day of the hearing of the appeal, they withdrew the appeal. That was the end of the matter. The defendants have no further basis to rely on cl 26.

Sakae's self-help remedies

277 The relevant defendants submit that after the transactions occurred, Sakae would have been able to use self-help remedies in two ways to remedy any alleged oppression. First, Sakae could have remedied the transactions it is now complaining of at the 3 April and 11 April 2013 board meetings of the Company. Second, Sakae could have taken control of the Company by exercising its rights under the JVA to buy-out the other shareholders. As far as this second self-help remedy is concerned, I have already set out its limitations and Sakae's entitlement to have recourse to such remedies provided by s 216 of the Companies Act as it could justify. I do not need to deal with this further.

278 In relation to the first self-help remedy, the defendants rely on the following facts. In March 2013, Mr Ho proposed holding a board meeting of the Company to discuss amongst other things, the PwC Report, the compensation paid by the Company for the termination of the Lease Agreement, the GCM Agreement, the Consultancy Agreement and the May

PMA. The board meeting was fixed on 3 April 2013 and gave Sakae and Mr Foo the opportunity to seek clarification and information regarding the transactions which they were concerned about. When the meeting took place, however, Mr Foo inexplicably refused to discuss any of the transactions, including even the compensation for the termination of the Lease Agreement which was an item he had asked to be put on to the agenda.

279 The meeting was attended by Mr Ho and Mr Foo as directors of the Company and by Mr Ong and Ong Han Boon as GCM's representatives. Ong Han Boon tabled a report on the Bugis Cube project and this gave Mr Foo a perfect opportunity to discuss and resolve various issues relating to Bugis Cube. Instead of doing so, Mr Foo demanded that Mr Ong and Ong Han Boon leave the meeting. The report indicated that GCM was open to negotiate the appropriate compensation for the termination of the Lease Agreement and Mr Foo should therefore have been aware that Mr Ong and Ong Han Boon were prepared to discuss and/or revise this compensation. Yet Mr Foo refused Mr Ho's offer to discuss the compensation amount due to the position taken by Mr Foo. Nothing was resolved and no decision was taken in relation to any of the transactions at the 3 April 2013 meeting.

280 The agenda for the 11 April 2013 meeting covered most of the same matters. When the agenda was e-mailed to Sakae's lawyers, it attached the same report by GCM dealing with the compensation paid to ERC Institute. Mr Ong and Ong Han Boon were present at the meeting, representing GCM. When it started, Mr Ho said that he wanted to have everything answered and explained, but Mr Foo did not take up this invitation. He simply wanted to discuss the appointment of a monitoring accountant and the termination of the

GCM Agreement before he would discuss any of the transactions. Mr Foo deliberately adopted an obstructive stance at the meeting despite knowing that Mr Ong, Ong Han Boon and Mr Ho wanted to address and resolve the issues in dispute. Thus, nothing substantive could be discussed.

281 I accept Sakae's submission that there were in reality no self-help remedies available to Sakae at these meetings. First, the defendants did not suggest exactly how Mr Foo could have remedied the oppression at the 3 April and 11 April 2013 board meetings. Their allegation was that Mr Foo could have discussed the oppressive acts and transactions at the meetings but there is no indication how such discussions could have led to resolution rather than to more conflict. Mr Ho did not offer to resign and be replaced by a nominee of Sakae nor did GCM offer to turn over all the books and brief Sakae on everything that had taken place. Secondly, in any case, such actions would not have remedied the oppression because they would not have cancelled the oppressive acts or repaid to the Company the money that had been wrongfully taken from it. In this action, the defendants have justified the various transactions – they have not admitted creating sham documents or that moneys were wrongly paid out of the Company to Mr Ong among other defendants. Considering that it has taken the court action and a long and expensive trial to establish what actually happened and put Sakae in the position of obtaining at least some of the reliefs for which it has asked, I cannot accept that if Mr Foo had discussed with Mr Ong, Ong Han Boon and Mr Ho all that they allegedly wanted to discuss, it would have remedied the oppression suffered by Sakae. Simply put, given that a demand letter and lawsuit were insufficient to encourage the relevant defendants to come clean and put matters right, it

would be unjustifiably optimistic to suppose that asking nicely at an earlier date would have done the trick.

Sakae's knowledge of the transactions

282 The defendants say that in relation to each and every transaction which Sakae is now complaining of:

(a) Sakae in fact knew about the transaction at the material time;

(b) Sakae ought to have known about the transaction at the material time; or

(c) Sakae was in a position to find out about the transaction at the material time.

283 As far as the allegation that Sakae knew about any particular transaction at the material time is concerned, I dealt with it when I discussed the relevant transaction and need not consider that allegation again. In this part of the judgement therefore, I will only discuss the assertion that where Sakae did not know what was happening it ought to have known or was in a position to find out about it but did nothing.

284 Sakae submits that there is no legal principle that a claimant is precluded from claiming s 216 relief if it ought to have known or was in a position to find out about the oppressive acts. It relies on the English case of *Re Tobian Properties Ltd* [2013] 2BCLC 567 ("*Re Tobian*"). In that case, the English Court of Appeal rejected the contention that a complaint in an unfair prejudice petition for excessive directors' remuneration should fail because the filed accounts disclosed the remuneration and the petitioner had not been

diligent in checking those accounts and raising the complaint earlier. The court noted that shareholders are limited by the statutory requirements in relationship to oppression remedies, and held that a failure to read accounts which have been filed does not impose any limit on a party seeking remedies for oppression. The court also held that the suggestion that the minority shareholders can be held to be disentitled from seeking remedies for oppression just because they do not read the company's accounts would be to impose a requirement for diligence that has no basis in the statutory provisions or in principle or authority.

285 With respect, I agree with the rationale for the holding in *Re Tobian*. Applying that principle to the present case means that Sakae as a shareholder of the Company had no duty to investigate what was going on or to scrutinise the accounts with great diligence. Therefore, even if such scrutiny would have revealed the impugned transactions (which it would not necessarily have done considering the efforts at concealment made by the defendants), Sakae's failure to do so cannot adversely affect its rights to claim its remedies under s 216. In the *Re Tobian* case, the shareholder concerned did not hold a position on the board of the company. I do not think, however, that Mr Foo's position on the board here changes the analysis. In his position as Sakae's nominee, *ie*, as the shareholder's representative, he could not have had any stronger duty of diligence than Sakae itself had. It lies ill in the mouths of majority shareholders and directors who have abused their powers to say that they would not have been able to do so had the minority shareholder and director been more active and involved.

286 The principle drawn by the editors of *Hollington on Shareholders' Rights* (Sweet & Maxwell, 7th Ed, 2013) (at [7-245]) from *Re Tobian* is that, in assessing whether the minority shareholder has been unfairly prejudiced, while it is right to have regard to objective standards such as those prescribed by statute for the bringing of derivative claims and settled equitable principles, it is not correct to seek to impose higher, judge-made, standards of diligence such as a shareholder asking for and reading the company accounts. Lest this position be thought to be harsh on majority shareholders, I should point out that in a case where the carelessness of the minority shareholder led to truly inadvertent prejudice to the minority shareholder's rights (*eg*, where the minority shareholder carelessly failed to understand and to object to actions harmful to minority interests which would not have been apparent to the majority), such prejudice would not amount to oppression – *not* because the minority was careless, but because it could not be said, in such a situation, that the majority had intentionally disregarded the minority's interests or had acted contrary to expectations of fair play. That is obviously not the case here, where the relevant defendants' intentions to disregard Sakae's interests, and their departure from expectations of fair play, were clear. Thus I need say no more about the defendants' attempt to defend themselves against Sakae's claim on the basis that Sakae ought to have known what was going on. As to whether Mr Foo has any liability to the defendants or any of them in respect of his acts or omissions as a director of the Company, that is something that I will deal with when I come to consider the third party actions.

Reliefs

287 Sakae seeks a number of reliefs for the unfair prejudice that the defendants have caused it and for their oppressive actions. These reliefs are

extensive and some of them are unusual. The court has wide powers under s 216 (2) to bring to an end to or remedy the matters complained of by "making such order as it thinks fit" and "without prejudice to the generality of" its remedial powers the court's order may, among other things:

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) authorise civil proceedings to be brought in the name of or on behalf of the company by any such person or persons and on such terms as the court may direct;

(c) provide for the purchase of the shares of the company by other members or by the company itself; and

(d) provide that the company be wound up.

288 Of the reliefs specifically mentioned in s 216(2), Sakae has asked for a winding-up order or, in the alternative, that GREIC and/or Andy Ong be ordered to buy Sakae's shares in the Company. Sakae has itself categorised the other reliefs that it is seeking into the following classes:

(a) Declarations that certain agreements are void and of no effect.

(b) Reliefs against directors of the Company.

(c) Reliefs against the third party recipients of money wrongfully paid out by the Company.

The legal difficulties arise primarily in relation to the reliefs that fall within classes (b) and (c) above because these remedies are remedies that the Company, in an action against the directors and third party recipients, would be able to enforce. The defendants say that these remedies are not equally available to a shareholder like Sakae. Sakae does not dispute that it must show that it has *locus standi* to obtain the various reliefs in the sense that it had real interest in bringing the action and a personal legal right that is enforceable against the adverse party to the litigation. Disagreeing with the defendants, however, Sakae maintains that it has such a right in connection with these claims.

289 I think that the best way of approaching this issue is to consider each claim in turn and the reliefs that have been specifically prayed for in relation to such claim. A granular analysis may be more helpful in deciding what remedies Sakae is entitled to rather than making statements of principle and subsequently trying to fit different fact situations to the principles. But first I will deal with the remedies that are clearly available under s 216.

Winding up or a buy-out?

290 Sakae's Statement of Claim in Suit 1098 contains 49 sub-paragraphs setting out the reliefs that Sakae would like. Number 46 on the list of reliefs sought is an order that GREIC and/or ERC Holdings and/or their nominees buy Sakae's entire shareholding in the Company. It is only in sub-paragraph 47 that Sakae, as an alternative to sub-paragraph 46, asks for an order that the Company be wound up pursuant to s 216(2)(*f*) of the Companies Act. In its closing submissions, however, Sakae has muted its claim for a buy-out and is now seeking a winding up order as its primary remedy.

291 Sakae's explanation is that this change in position is due to circumstances that emerged at the trial. It submits that it became clear at the trial that the AO Defendants have not been forthcoming to Sakae or to the court and that they have suppressed highly material documents. Mr Ong also avoided taking the stand and thereby avoided having to answer questions about the Company's financial position. Sakae submits that it is unsafe for a valuation for the purposes of a buy-out to be conducted on the basis of the selective information that the AO Defendants have chosen to disclose. There is ample reason to suspect that the Company has hidden assets and/or liabilities and, in these circumstances, a winding up order is more appropriate. The winding up order should only be made on the basis that moneys have been misapplied and/or wrongfully paid out of the Company are first restored to the Company.

292 Sakae's submissions on why the proper relief would be a winding up order rather than a buy-out order run to 25 paragraphs over several pages. It is significant, in my view, that the AO Defendants have made no attempt to deal with these submissions head-on. Nor have they proposed a buy-out. They prefer to rely on the general defences to defeat the claims and have no useful suggestion to make as to what should be done with the Company in the event that the court finds that there has been oppression.

293 In my judgment, the evidence before me compels the conclusion that winding up rather than a buy-out is the correct remedy. I have come to this conclusion for the following reasons:

(a) The relationship between the shareholders of the Company has irretrievably broken down and there is no trust and confidence between

them at all. As a result, the Company cannot function; the board has not been able to make any decision on any matter, including routine matters.

(b) The Company is an investment-holding company which was set up to hold most of the units in Bugis Cube as its single property investment. Most of that investment has since been sold. The Company is hardly operational. The JVA itself contemplates that if the whole of the undertaking of the Company is sold as a going-concern, the Company would thereafter be wound up. The situation that exists now is equivalent to the situation that would exist had the undertaking been sold as a going-concern. There is no reason to keep the Company alive. The remaining units in Bugis Cube can easily be disposed of by the liquidator. It was never intended by the shareholders that the Company was to be a long-term landlord of a few units in Bugis Cube.

(c) If a buy-out were to be ordered, there would be difficulties in valuing the Company's shares. The Company has $96m in its bank account but it is not clear that those funds represent the total value of the Company. From the evidence given at the trial, it is apparent that the Company's finances have been manipulated for the benefit of other parties and therefore its current financial position is unclear and cannot be taken at face value. Detailed accounting investigations would have to be done to determine the value of the shares.

(d) It is likely that obtaining documents to enable a proper valuation of the Company would be a time-consuming and expensive process. Not only are most of the Company's documents in the

possession of the CAD but the AO Defendants have not been forthcoming with documents even though some of the documents that are with the CAD would probably also be in the possession of one or more of the other defendants. The defendants have been economical with disclosure and documents which could have been disclosed earlier were only disclosed in the course of the trial in order to respond to documents that were found when Sakae's solicitors visited the CAD. Such behaviour does not bode well for the full disclosure needed for valuation.

(e) If the Company is wound up, the liquidator, as the legal representative of the Company, would be in the best position to obtain documents and to ascertain the value of the Company and to carry out all necessary investigations. It has been held that a winding up order is more appropriate than a buy-out order in circumstances where it is necessary to carry out inquiries into the value of the Company and take a full account in order to ascertain all its assets and liabilities, and also take appropriate steps to redress or claim compensation for all wrongs done to the Company by any of its directors (see *Re Full Cup International Trading Ltd* [1995] BCC 682). This is certainly such a case.

294 As noted earlier, Sakae submits that the winding up order should only be made on the basis that the moneys that have been misapplied or wrongfully paid out of the Company are first restored to the Company. I of course agree that such moneys should be returned, but I do not agree that the return has to be effected before winding up can commence. I think that if the Company is wound up now, the liquidator can look into the recovery of such moneys

whether by way of enforcement of this judgment or otherwise. The Company has been moribund since the Suit 1098 started; there is no reason to prolong that state of affairs.

Other reliefs

295 I will now discuss the other reliefs which Sakae has asked for. In this section of the judgment, the sub-headings follow in large part those set out in Sakae's Statement of Claim for Suit 1098 so as to make for easier cross-referral.

As regards the "Purported Management Fees" paid under the Sham Addendum

296 In its Statement of Claim, Sakae prays for the following reliefs in relation to the excessive management fees paid to GCM:

(a) A declaration that the Sham Addendum is void and of no effect.

(b) A declaration that Andy Ong and/or Ong Han Boon and/or Mr Ho are jointly and severally liable to account to the Company for the sum of $2,826,335.17 or such other sum as the court thinks fit.

(c) An order that the sum of $2,826,335.17 or such other sum as the court thinks fit be repaid by Andy Ong and/or Ong Han Boon and/or Mr Ho to the Company.

(d) Further, or alternatively, a declaration that GCM is as constructive trustee liable to account to the Company for the sum of $2,826,335.17 or such other sum as the court thinks fit.

(e) An order that the sum of $2,826,335.17 or such other sum as the court thinks fit be repaid by GCM to the Company.

(f) A declaration that the Company is entitled to trace the sum of $2,826,335.17 into, and claim a proprietary interest in, GCM's assets acquired directly or indirectly with the aforesaid sum and to recover the same.

297 Under s 216 (2)(a) as mentioned earlier, the court has the power to cancel or vary any transaction. I have already found the Sham Addendum to be a fraudulent or fictitious document and, even if it had been truly executed when it purported to be, its conclusion was procured by a breach of fiduciary duty and of the agreement with Sakae. In the circumstances, there will be a declaration that the Sham Addendum is void and conferred no legal right on GCM to receive the elevated fees embodied in the Sham Addendum.

298 The reliefs asked for in sub-paragraphs 293(c) to (f) above are clearly remedies which the Company could attempt to obtain if it was the plaintiff in either a normal or derivative action. Putting aside sub-paragraph 293(f) for the moment as that raises issues of its own, I need to consider whether Sakae in this oppression action can ask for these reliefs which enure to the Company rather than to its shareholders.

299 As I mentioned earlier, the powers of the court to remedy or end oppression under s 216 have been given a wide interpretation by the courts. In *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304, our Court of Appeal held that the section was wide enough to cover an order to make good loss suffered by the company. In *Low Janie v Low Peng Boon and others*

[1999] 1 SLR(R) 337, the company was ordered to be wound up because of the oppressive actions of one of the directors and, as a consequential order, that director was ordered to make restitution in respect of unauthorised expenses that he had withdrawn from the company and bonuses that he had received from a subsidiary in so far as they were attributable to the failure of the company to comply with its shareholders' resolution. Another director, who had been party to the oppression, was ordered to make restitution of an amount that had been paid for the advertisement expenses of a subsidiary company. The Court of Appeal has therefore recognised that errant directors can be required to repay the company amounts misappropriated or misused by them notwithstanding that the relief is given in an oppression action rather than in an action brought by the company itself.

300 This position is also recognised abroad. In *Re Chime Corp Ltd* [2004] 3 HKLRD 922 ("*Re Chime Corp*"), the Court of Final Appeal of Hong Kong, after a survey of case law in several jurisdictions including Singapore, held that in a strict sense, a court had jurisdiction on an unfair prejudice action to deal with and dispose of a cause of action for damages or restitution that was vested in the company. Accordingly, in the strict sense, there was jurisdiction in such a case to order a respondent against whom a breach of duty to the company had been established to pay compensation, or to make restitution to the company itself. The court cautioned that possession of the jurisdiction was not enough. It was necessary also to show, the court said, that the claim for the remedy in question was one that, as a matter of proper practice, the court should give, if the relevant underlying allegations were made good. Further, it was held that as a general rule, the court should not in an unfair prejudice payment petition make an order for payment to be made by a respondent

director to the company unless the order corresponded with the order to which the company would have been entitled had the allegation in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company).

301 In *Gamlestaden Fastigheter AB v Baltic Partners Ltd and others* [2008] 1 BCLC 468, the Privy Council, sitting on an appeal from the Court of Appeal of Jersey, followed *Re Chime Corp*. The Privy Council was considering the question of whether a cause of action allegedly vested in the company can be prosecuted to judgment in an unfair prejudice application. It was dealing with Art 143(1) of the Companies (Jersey) Law 1991, a provision that empowers the Jersey court to "make such order as it thinks fit … in respect of the matters complained of" in relation to an oppression action under Art 141 of the same law. The language of Arts 141 and 143 is very similar to that of s 216 in that, apart from granting the court power to make orders that it thinks fit in an oppression or unfair prejudice case, the court's power to make certain types of order including a winding up order are also spelt out. The Privy Council at [28] noted that in *Re Chime Corp*, it was held that the court had power on an unfair prejudice application to make an order for the payment of damages or compensation to the company. No reason had been given to the Privy Council why that decision should not be followed and, accordingly, in the case before it, the Privy Council considered there could be no objection to the plaintiff's prayer in its oppression application for an order that the directors pay damages to the company for breach of duty.

302 The principle that I draw from the above is that in an oppression action, the plaintiff shareholder can ask for, and the court can grant, relief in

the form of orders against the delinquent directors to repay moneys to the company which, in breach of duty, they have taken out or caused to be paid out. The payment order must correspond with the order which the company would have been entitled to had the action been prosecuted in its name. The authorities do not, however, go so far as to permit the shareholders to ask for orders directly against the third parties who may have received moneys from the company by reason of a breach of duty on the part of the directors. It would seem that in such cases, the remedy may be to allow the shareholder to prosecute a derivative action in the company's name against the wrongful recipient of funds as contemplated by s 216(2)(c). The only case that hints at such a possibility in an oppression action is *Lowe v Fahey* [1996] 1 BCLC 262, an authority I discuss below.

303 If I have correctly distilled the principles set down by the cases cited, then I may only make payment orders against the errant directors. In this case, that would mean Mr Ong, Ong Han Boon and Mr Ho. The second limitation is that I can only make such payment orders if the company itself could have obtained them. In relation to the excessive management fees, I have found at [69] above that Mr Ong and Ong Han Boon were in breach of their duty to the Company in allowing fees in excess of those agreed in the SMA to be paid to GCM and in procuring the execution of the Sham Addendum. As for the amount of excess fees paid, Sakae has calculated this as being $2,826,335.17. The defendants have not contested the figure. In view of their breach of duty, the Company could recover $2,826,335.17 from Mr Ong and Ong Han Boon and I therefore declare that they are jointly and severally liable to pay the said sum to the Company. I further order them to do so. As regards Mr Ho, in view of my findings in [73] above, there is no basis on which to make a similar

order against him. I must also point out that the payment order here is ancillary to the winding up order made, because in order for the liquidation to be properly and completely carried out, the Company should be in possession of all its assets including money that belonged to it but had been wrongfully paid out at the instance of the errant directors.

304 As regards GCM, the Sham Addendum was signed on its behalf by Ong Han Boon. He was concurrently a director of the Company and must have known that it was a breach of his duty to the Company to sign that document. This knowledge has to be imputed to GCM and I therefore find that GCM was a knowing recipient of excessive fees to which it was not entitled. As GCM is a stranger to the Company (in the sense that it is not an officer or member of the Company), however, its receipt of these funds was not in breach of a fiduciary duty to the Company, and therefore it would seem that I cannot in this oppression action order it directly to repay the excess amount to the Company. That would be an order to be made in a recovery action by the Company against GCM.

305 Sakae cites one authority which it says supports its position that in an oppression action, the minority shareholder may seek an order against the third party in order to assert trust and/or tracing claims where the third parties are at law liable for knowing receipt. That case is *Lowe v Fahey* [1996] 1 BCLC 262 ("*Lowe*"). This case was a petition for relief against oppression presented in the High Court of England. The petitioner was a shareholder of the company concerned. There were four respondents: the company concerned, Mrs Fahey (the other shareholder) and Mr Fahey (her husband, who was one of the directors of the company), and another company, Brickfield, which was

controlled by Mr and Mrs Fahey. The petitioner alleged that the Faheys had used Brickfield to appropriate profits from developments which should have gone to the company. She sought, among other relief, payment to the company by Brickfield of all such sums as may be found due to the company upon the taking of an account. Brickfield applied for an order that the petition be struck out against it on the basis that it was not a proper respondent and/or there was no reasonable cause of action against it.

306 The judge dismissed the application on the basis that since the claim against Brickfield formed an integral part of the claims against Mr & Mrs Fahey, the petitioner was entitled to join Brickfield as a respondent to the petition and seek the relief claimed. Sakae adopts that decision and relies, in particular, on the following passage (at pp 267–268) from the judgment of Mr Charles Aldous QC:

> In *Re Little Olympian Each-Ways Ltd* Lindsay J, after reviewing the language of ss 459 and 461, as well as their legislative history, stated (at 424):
>
> > 'The impression given both in the sections and in the rules is that the greatest possible flexibility was intended by the legislature to be given to the courts. Thus s 459 does not, for example, require that it is by a respondent or by the respondents to the petition that the company's affairs are being or have been conducted in the manner complained of. It does not require that the respondent to the petition should be limited to members of the company or to its directors or to those conducting its affairs …'
>
> Lindsay J, after reviewing the relevant authorities (including the decision of Hoffmann J), concluded that *as a matter of jurisdiction the language of s 461(1), which states that the court 'may make such order as it thinks fit for giving relief in respect of the matters complained of' confers a very wide jurisdiction. I agree.* I shall not repeat his analysis leading to such conclusion. In my judgment, *where* for example *the unfairly prejudicial conduct involves the diversion of company funds, a*

> *petitioner is entitled as a matter of jurisdiction to seek an order under s 461 for payment to the company itself not only* against *members*, for members or directors allegedly involved in the unlawful diversion*, but also against third parties who have knowingly received or improperly assisted in the wrongful diversion*. This is not to say that in a case where the only substantive relief being sought was a claim on behalf of the company against such a third party that a claimant could always proceed by petition instead of derivative action.
>
> [emphasis added]

307 The case of *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 ("*Little Olympian*") relied on in *Lowe* was a case in which, rather ironically, Mr Charles Aldous QC appearing as counsel persuaded the judge that he should not add a third party (referred to as "OAG") to an oppression petition because the court would not make a buy-out order against OAG of the kind that the petitioner sought. It should be emphasised that in that case Lindsay J, although holding that in an appropriate case, relief can be sought against a non-member other than the company itself, or against the party not involved in the acts complained of, held further that if the relief sought against that third party was such that the court would not make such an order, then the third party should not be joined to the petition as a respondent. He explained (at p 432):

> Although the court *could*, if it chose, make a buy-out order against OAG of the kind which the petitioner seeks, it is on the case put in the amended petition, even if wholly true, plain and obvious, in my judgment, that no court *would* make such an order. Had OAG been a respondent from the start it could, in my view, have successfully moved to have the buy-out provisions and its role as a respondent struck out. It not yet being a respondent, it would be an abuse of process were it to be required, against its will, to be a respondent obliged to resist relief which would in practice never be granted. [emphasis in original]

308 In my view, the observations made in the *Lowe* and *Little Olympian* cases have to be considered in the context of the legal position in Singapore with regard to the difference between the personal remedies available in an oppression action and the corporate remedies available in a derivative action. In the *Ng Kek Wee* case, the Court of Appeal was firm that s 216 cannot be used to "vindicate essentially corporate wrongs" (at [63]). In the following paragraphs, the Court of Appeal explained its holding:

> 64. We do not think the latter should be permitted, for two broad reasons. First, an overly permissive interpretation of s 216 of the Companies Act would run counter to our present legislative scheme which provides for the commencement of a statutory derivative action pursuant to s 216A of the Companies Act. In "A Reconsideration of the Shareholder's Remedy for Oppression in Singapore" (2013) CLWR 42 1 (61), Assoc Prof Pearlie M C Koh observes that when the Companies Act was amended to include s 216A, the marginal note to s 216 which then read "Remedies in cases of oppression or injustice" was amended to read "*Personal* remedies in cases of oppression or injustice". We agree with her that this was indicative of the legislative intention to clarify the distinction between the action for *personal* relief under s 216 of the Companies Act and the action for *corporate* relief under s 216A of the Companies Act. The distinction between the two is further highlighted by the inclusion of s 216(2)(*c*) of the Companies Act which provides that the court may, as a remedy in a *personal* action, "authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct", *ie*, a derivative action. Were it permissible for s 216 of the Companies Act to be used to vindicate essentially corporate claims, s 216(2)(*c*) of the Companies Act would be rendered nugatory. It is further pertinent to note that there are standing requirements under s 216A(3) of the Companies Act that must be satisfied before a complainant can apply to court for leave to commence a statutory derivative action. These requirements are important built-in safeguards that ensure that any litigation brought by a shareholder to pursue corporate claims is guided by the legitimate interests of the company and would result in an increase in the corporate value. In our judgment, Parliament could not have intended

> for shareholders to sidestep these requirements by characterising a claim for corporate relief as a personal claim.
>
> 65. Further, and related to the above, allowing an essentially corporate claim to be pursued under s 216 of the Companies Act would be an abuse of process as it amounts to an improper circumvention of the proper plaintiff principle which, far from being a legalistic procedural obstacle, is the consequence of the fundamental doctrine of separation of legal personality that underpins company law. Where a wrong has been done to the company, the interests of other shareholders of the company as well as the company's creditors will have been similarly affected. The claimant shareholder should not be allowed to proceed by way of a *personal* action and recover at the expense of these other similarly affected parties. Related to this is the danger that the defendant may face a multiplicity of suits from different claimants for essentially the same wrong done to the company. This is evidently problematic and economically inefficient.
>
> [emphasis in original]

309 Whilst Sakae has brought forward authorities that show that the court has power to join third parties to oppression actions, it has not been able to produce any case in which a direct remedy against the third party has been awarded to the plaintiff. I bear this in mind, having regard also to the Court of Appeal's observations in *Ng Kek Wee*. In the present case, in view of the fact that as far as the overpayment of management fees to GCM is concerned, such overpayment can be recovered from Mr Ong and Ong Han Boon, there is no need for the court to make a declaration against GCM that it is a constructive trustee in respect of the sum of $2,826.335.17 or order it to pay that sum to the Company. In such circumstances, I do not believe that a court should make a payment order against GCM. In any event, if Mr Ong and Ong Han Boon do not pay up, the liquidator of the Company can decide whether to pursue them and/or GCM.

310 The final relief that Sakae seeks in respect of this head of claim is a declaration that the Company is entitled to trace the sum of $2,826.335.17 into, and claim a proprietary interest in, GCM's assets acquired with the sum. This relief is even more clearly a corporate relief which, if it is to be granted, would be granted to the Company as the proper plaintiff rather than to Sakae. I have doubts about this relief as well because there is no evidence that the sum of $2,826.335.17 was invested either wholly or partially in any assets that GCM may own. There is no evidence at all as to how the money was applied and Sakae is being wholly speculative in asking for this relief.

311 In the paragraphs above, I have set out my analysis of Sakae's claims for relief against GCM which, although tainted by Andy Ong's knowledge of his wrongdoing in regard to the assets of the Company, is nevertheless a stranger to the Company. I have also expressed the view that to the extent that Sakae can get an order against Mr Ong or another delinquent director, the court should not order relief against the stranger as well. Sakae has made similar claims against other members of the ERC Group and my analysis in this section must be understood as applicable to such claims as well.

As regards the sale by ERC International of TYN House

312 The reliefs that Sakae has asked for under this rubric relate to the claim discussed in [75]–[86] above. In those paragraphs, I have found that Andy Ong's conduct in relation to the TPAP reflected his unfair and self-serving approach to the management of the affairs of the Company. That finding cannot, however, support a declaration that the TPAP was void and of no effect since it was granted by a third party to DBS Bank who was a *bona fide* purchaser for value without notice. I have also found that the purchase of TYN

House by ERC International did not result from a wrongful diversion of a corporate opportunity available to the Company.

313 In the light of my findings in [75]–[86] above, Sakae is not entitled to any of the reliefs asked for in respect of the TPAP and the purchase of TYN House.

As regards the "Purported ERC Unicampus Loan Agreement"

314 Sakae claims eight reliefs in respect of the "Purported ERC Unicampus Loan Agreement" which is the matter I deal with at [88]–[102] above and for which I have used the terms "First Loan" and "First Loan Agreement". Some of these are straightforward and others are objectionable as either being duplicative and unnecessary or as being reliefs that can only be claimed by the Company itself. I have discussed the legal issues surrounding such reliefs above and see no need to repeat the same.

315 My finding at [101] above is that the conduct of Mr Ong and Ong Han Boon in relation to the First Loan and First Loan Agreement was oppressive. They also breached their fiduciary duty to the Company. As regards Mr Ho, while he was in breach of fiduciary duty, I have found that his actions were not oppressive. It would therefore be inappropriate for me to order a remedy against him for a claim founded on oppression (although it will remain open to the liquidator to consider whether to seek recourse in respect of Mr Ho's breach of fiduciary duty). I have also found that the First Loan has not been repaid in full and that *prima facie* $7.9m of the First Loan remains outstanding.

316 In the light of my findings in respect of this claim, there shall be the following orders:

(a) There shall be a declaration that the First Loan Agreement is void and of no effect.

(b) There shall be a declaration that Mr Ong and Ong Han Boon are jointly and severally liable to account to the Company for the sum of $7.9m.

(c) Mr Ong and Ong Han Boon shall pay such sum to the Company.

317 It is undisputed that the Company lent ERC Unicampus $10m. I have found that $7.9m remains outstanding and therefore ERC Unicampus still owes the Company that sum. I decline, however, to make a declaration that ERC Unicampus is a constructive trustee of the sum for the Company and that it holds the proceeds of sale of Big Hotel or any part of the same on trust for the Company to the extent of the contribution made by the Company to the purchase of Big Hotel. To make it clear, the reason for my refusal is not that I do not consider the Company entitled to such relief but that the same can only be granted in an action commenced by the Company. Indeed, on the evidence before me, it seems plain that ERC Unicampus must have been a knowing recipient of the money from the Company which was funnelled to it by Mr Ong and Ong Han Boon in breach of their fiduciary duty to the Company.

As regards the "Purported Lease Agreement"

318 The "Purported Lease Agreement" referred to in the Statement of Claim is what I have termed "the Lease Agreement". Sakae has asked for seven reliefs in respect of the Lease Agreement and the payment of $16m as compensation for its termination to ERC Institute.

319 In the light of my findings in respect of this claim, there shall be the following orders:

(a) There shall be a declaration that the Lease Agreement is void and of no effect.

(b) There shall be a declaration that Mr Ong and Mr Ho are jointly and severally liable to account to the Company for the sum of $16m.

(c) Mr Ong and Mr Ho shall make payment to the Company of the sum of $16m.

320 For reasons that I have given in relation to the excessive management fee claim, I decline to make a declaration that ERC Holdings and/or ERC Institute and/or ERC International and/or ERC Unicampus are, as constructive trustees, liable to account to the Company for the sum of $16m. I also decline to order that ERC Holdings and/or ERC Institute and/or ERC International pay the said sum to the Company. Further, I will not make an order that the Company is entitled to trace the sum of $16m into the assets of ERC Holdings/ERC Institute or ERC International to the extent that such assets have been acquired by the use of that sum or part thereof. Again, this is not because I do not consider that the Company has such remedies available to it –

on the contrary, I think it quite clear that the Company does – but simply because I do not think that Sakae, as shareholder, is entitled to ask for the remedy.

As regards the "Purported Consultancy Agreement"

321 The "Purported Consultancy Agreement" is the document that I referred to as the Consultancy Agreement in [132]–[147] above. Sakae has asked for six reliefs in respect of the Consultancy Agreement and payments made by the Company pursuant to it.

322 In the light of my findings in [132]–[147] above, I make the following orders:

(a) There will be a declaration that the Consultancy Agreement is void and of no effect.

(b) There will be a declaration that Mr Ong and Mr Ho are jointly and severally liable to account to the Company for the sum of $160,500.

(c) Mr Ong and Mr Ho shall pay the said sum of $160,500 to the Company.

323 I decline to make a declaration that ERC Consulting is a constructive trustee or that the Company is entitled to trace the sum of $150,000 into assets of ERC Consulting. These reliefs are corporate reliefs and the tracing order would be wholly speculative.

As regards the "2nd Purported ERC Unicampus Loan Agreement"

324 The "2nd Purported ERC Unicampus Loan Agreement" is what I have referred to in [149]–[173] above as the "Unicampus Loan Agreement". Sakae has asked for six reliefs in respect of this claim.

325 In the light of my finding that, in respect of this claim, oppression was not made out and that the Unicampus Loan has been repaid in full, none of the reliefs asked for can be granted.

As regards the "Purported Share Option Agreement"

326 In Suit 1098, Sakae seeks two ancillary reliefs with regard to this head of claim:

(a) A declaration that the Purported Share Option Agreement is void and of no effect.

(b) An order that the Company repay to Sakae the sum of $2,641,975.

327 In Suit 122, Sakae claims against Mr Ong:

(a) A declaration that he has breached his fiduciary duty to Sakae.

(b) Further, or alternatively, a declaration that he committed the tort of inducement of breach of contract by causing the Company to breach the JVA by entering into the Purported Share Option Agreement.

(c) The sum of $2,641,975.

328 The "Purported Share Option Agreement" referred to in the Statements of Claim in both Suit 122 and 1098 was what I have called the Five-paged SOA. The term did not encompass the One-paged SOA as Sakae was not aware of this document on the dates it drafted and filed the Statement of Claim in either action.

329 As regards Suit 122, I declare that Mr Ong breached his fiduciary duty as a director of Sakae for the reasons given in [213] above. I further order him to pay Sakae the sum of $2,641,975 and interest thereon from the date of the writ.

330 As regards Suit 1098, there will be a declaration that there was no share option agreement made between the Company and ERC Holdings in 2010. I do not order the Company to repay Sakae the sum of $2,641,975 as the Company has issued and allotted shares to Sakae in consideration of that payment.

As regards the "Purported PMA"

331 By the term the "Purported PMA" in the Statement of Claim, Sakae referred to what I have termed the "May PMA" in [215]–[246] above. Sakae has asked for four reliefs in respect of the May PMA and the payment of $8m made to Andy Ong purportedly pursuant to the May PMA.

332 In the light of my findings in [215]–[261] above, there shall be the following orders:

(a) There shall be a declaration that the May PMA is void and of no effect.

(b) There shall be a declaration that Mr Ong and Mr Ho are jointly and severally liable to account to the Company for the sum of $8m.

(c) Mr Ong and Mr Ho shall pay the sum of $8m to the Company without prejudice to Andy Ong's right to recover from the Company any amount which he can prove he has paid to subcontractors in respect of the refurbishment works done in Bugis Cube for which the Company is liable.

333 I decline to make a declaration that the Company is entitled to trace the sum of $8m into and claim a proprietary interest in Mr Ong's assets acquired with the aforesaid sum. There is no evidence of any such asset having been acquired with the $8m and this is a speculative claim.

Conclusion

334 For the reasons given above, there will be judgment for the plaintiff against Andy Ong, Ong Han Boon and Mr Ho. I will hear the parties on the exact form of the orders to be made arising out of this judgment. I also have to appoint a liquidator and I invite Sakae to put forward its nomination for a private liquidator as the complexity of the liquidation of the Company would perhaps be best handled by a private liquidator. I will also hear the parties on costs.

335 It will not have escaped the parties' notice that I have not, in this judgment, dealt with the third party claims brought by various defendants against Mr Foo. In the interests of an earlier finalisation of the main dispute, I have decided to issue this judgment first and deal with the third party claims in a separate judgment to be issued hereafter.

Judith Prakash
Judge of Appeal

Davinder Singh SC, Jaikanth Shankar, Zhuo Jiaxiang, Navin Shanmugaraj, Samantha Tan, V Kumar Sharma and Aloysius Tan (Drew & Napier LLC) for the plaintiff;
R Chandra Mohan, Vikram Nair, Jonathan Yuen, Tan Ruo Yu, Doreen Chia and Khelvin Xu (Rajah & Tann Singapore LLP) for the first to third, fifth, seventh to ninth and 11th defendants;
Samuel Chacko, Lim Shack Keong, Charmaine Chan-Richard and Cara Soo Min (Legis Point LLC) for the fourth defendant;
Siraj Omar and Alexander Lee (Premier Law LLC) for the third party.
