IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 33

Civil Appeal No 86 of 2017

Between

HO YEW KONG

… *Appellant*

And

SAKAE HOLDINGS LTD

… *Respondent*

Civil Appeal No 87 of 2017 and Summons No 126 of 2017

Between

(1) ERC HOLDINGS PTE LTD
(2) ONG SIEW KWEE
(3) ONG HAN BOON (WANG HANWEN)
(4) GRYPHON CAPITAL MANAGEMENT PTE LTD
(5) ERC UNICAMPUS PTE LTD
(6) ERC INSTITUTE PTE LTD
(7) ERC CONSULTING PTE LTD

… *Appellants*

And

SAKAE HOLDINGS LTD

… *Respondent*

Version No 1: 27 Oct 2020 (22:40 hrs)

Civil Appeal No 103 of 2017

Between

(1) ONG SIEW KWEE
(2) ONG HAN BOON (WANG HANWEN)

… *Appellants*

And

DOUGLAS FOO PEOW YONG

… *Respondent*

Civil Appeal No 104 of 2017

Between

HO YEW KONG

… *Appellant*

And

DOUGLAS FOO PEOW YONG

… *Respondent*

Court of Appeal Originating Summons No 13 of 2017

Between

ONG SIEW KWEE

… *Applicant*

And

(1) SAKAE HOLDINGS LTD
(2) DOUGLAS FOO PEOW YONG

… *Respondents*

Version No 1: 27 Oct 2020 (22:40 hrs)

In the matter of 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 (WANG HANWEN)
(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

Version No 1: 27 Oct 2020 (22:40 hrs)

In the matter of Suit No 122 of 2013

Between

SAKAE HOLDINGS LTD

… *Plaintiff*

And

ONG SIEW KWEE

… *Defendant*

And

DOUGLAS FOO PEOW YONG

… *Third Party*

JUDGMENT

[Civil Procedure] — [Appeals] — [Notice] — [Extension of time]

[Civil Procedure] — [Pleadings] — [Submission of no case to answer]

[Civil Procedure] — [Third party proceedings] — [Contribution]

[Companies] — [Directors] — [Duties]

[Companies] — [Oppression] — [Minority shareholders]

Version No 1: 27 Oct 2020 (22:40 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Ho Yew Kong
v
Sakae Holdings Ltd and other appeals and other matters

[2018] SGCA 33

Court of Appeal — Civil Appeals Nos 86, 87, 103 and 104 of 2017, Summons No 126 of 2017 and Originating Summons No 13 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
28 November 2017

29 June 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The present matters arise out of the decisions made in two consolidated actions, Suits Nos 1098 and 122 of 2013 ("Suit 1098" and "Suit 122" respectively; and collectively, either "the two Suits" or "both Suits"), both of which were commenced by Sakae Holdings Ltd ("Sakae"). In Suit 1098, Sakae sought relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed), alleging that Ong Siew Kwee ("Andy Ong"), Ong Han Boon and Ho Yew Kong ("Ho"), as well as various companies owned and controlled by Andy Ong, had engaged in acts that were oppressive to it as a minority shareholder of a joint venture company, Griffin Real Estate Investment Holdings Pte Ltd ("the Company"). The alleged oppressive acts consisted of seven transactions by which (among other things) a substantial amount of money was diverted from the Company to

Version No 1: 27 Oct 2020 (22:40 hrs)

entities that were either directly or indirectly related to Andy Ong. A total of 11 defendants were involved in Suit 1098. As for Suit 122, it involved a claim by Sakae against Andy Ong alone for breach of the fiduciary duties which he owed as a director of Sakae and for the tort of inducing a breach of contract by the Company, both in relation to one specific transaction out of the seven impugned transactions. Third party proceedings were subsequently commenced in both Suits by nine of the defendants against Douglas Foo Peow Yong ("Foo"), who was the chairman of Sakae's board at all material times. In the third party proceedings, these nine defendants sought indemnification against or contribution in respect of any liability that they might incur arising from Sakae's claims against them.

2 The High Court judge who presided over the trial ("the Judge") dealt with the matters raised in the two Suits in two separate judgments. The first judgment, *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 73 ("the Main Judgment"), which was issued on 7 April 2017, dealt with Sakae's claims in the two Suits; while the second judgment, *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 100 ("the Third Party Judgment"), which was issued on 4 May 2017, dealt with the third party claims. In the Main Judgment, the Judge allowed most of Sakae's claims, finding that six of the seven impugned transactions were oppressive to Sakae and that Andy Ong had breached the fiduciary duties which he owed as a director of Sakae. The Judge also ordered the Company to be wound up. In the Third Party Judgment, the Judge dismissed the third party claims against Foo and ordered indemnity costs against Andy Ong, Ong Han Boon and Ho.

Version No 1: 27 Oct 2020 (22:40 hrs)

3 Civil Appeals Nos 86 and 87 of 2017 ("CA 86" and "CA 87" respectively; and collectively, "the Main Appeals") are appeals by Ho (in CA 86) and seven of the other defendants in Suit 1098 (in CA 87) against the Judge's findings in the Main Judgment; while Civil Appeals Nos 103 and 104 of 2017 ("CA 103" and "CA 104" respectively; and collectively, "the Third Party Appeals") are appeals by Andy Ong and Ong Han Boon (in CA 103) and Ho (in CA 104) against the Judge's findings in the Third Party Judgment. There is also an application by Andy Ong in Court of Appeal Originating Summons No 13 of 2017 ("OS 13") for a retroactive extension of time to file an appeal against the findings made by the Judge (in both the Main Judgment and the Third Party Judgment) in respect of Suit 122, having filed notices of appeal only in respect of Suit 1098.

4 The present appeals raise (among other issues) two matters of legal significance in relation to oppression actions brought under s 216 of the Companies Act ("s 216"). The first, which lies at the heart of the Main Appeals, is the question concerning the sometimes fine and elusive distinction between *personal* wrongs against shareholders of a company and *corporate* wrongs against the company, as well as the related questions of who may seek relief in circumstances where both types of wrongs have been committed and what sort of relief may be sought. One view is that the proper remit of an oppression action under s 216 should be tightly circumscribed such that it is confined to claims for relief which are solely for *personal* wrongs committed against shareholders. As against this, *corporate* wrongs, which are wrongs committed in substance against the company rather than against its shareholders, should be remedied by way of a statutory derivative action under s 216A of the Companies Act ("s 216A"). In broad terms, this was the position that we took in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*"). Whilst this view

Version No 1: 27 Oct 2020 (22:40 hrs)

is theoretically sound in principle, it can sometimes be challenging to apply in practice, as has proved to be the case in the matters that are now before us. The second issue of legal significance is the question of whether a breach of the duty of care, skill and diligence (as opposed to the fiduciary duties) that a director owes a company would suffice to support a finding of commercial unfairness for the purposes of an oppression action under s 216. In this judgment, we address these issues, among various others.

5 Having considered all the pertinent facts and submissions, we allow Ho's appeal in CA 86 and accordingly make no order for Ho's appeal in CA 104, save that we set aside the Judge's order of indemnity costs against Ho in respect of the third party proceedings; and we dismiss in the main CA 87 (save on some limited issues) and CA 103 in its entirety. We agree with many of the Judge's findings, particularly on the facts; and where we have disagreed with any of them, we have explained our reasons in this judgment. We begin by setting out the parties and the relevant background facts. We then outline the key aspects of the parties' cases and the Judge's findings in both the Main Judgment and the Third Party Judgment before assessing these findings and explaining our decision on the issues before us.

Background

6 The genesis of the present dispute is the joint venture agreement ("the JVA") that was entered into between the Company, Sakae and Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"). Under the JVA, the Company was intended to be the vehicle through which the parties would invest in units at Bugis Cube, a shopping mall located at 470 North Bridge Road, Singapore.

Version No 1: 27 Oct 2020 (22:40 hrs)

The parties

7 Sakae (the sole respondent in the Main Appeals) is a listed company, and Foo (the sole respondent in the Third Party Appeals) is the chairman of its board. Foo and Andy Ong (the second appellant in CA 87 and the first appellant in CA 103) were friends who had known each other for more than 20 years. In July 2003, Foo suggested that Andy Ong be appointed as an independent director of Sakae. The appointment was duly made and Andy Ong remained an independent director of Sakae until 18 March 2013.

8 GREIC is an investment holding company whose shareholders at all material times included Andy Ong and his two associates, Ong Han Boon (the third appellant in CA 87 and the second appellant in CA 103) and Ho (the sole appellant in CA 86 and CA 104). At the time of the trial, Ho was the sole director of GREIC.

9 ERC Holdings Pte Ltd ("ERC Holdings") is a company which is 86.85% owned by Andy Ong, who is also its chief executive officer and founder. ERC Holdings is the ultimate holding company of a group of companies, including the following:

(a) Gryphon Capital Management Pte Ltd ("GCM") (the fourth appellant in CA 87), a company established to manage the Company's real estate investment. Its directors at all material times were Andy Ong and Ong Han Boon. Sakae acquired 20% of the shares in GCM at the time the JVA was entered into.

(b) ERC Unicampus Pte Ltd ("ERC Unicampus") (the fifth appellant in CA 87), an investment holding company. Ho was the sole director of ERC Unicampus until 12 July 2013, when he was replaced

Version No 1: 27 Oct 2020 (22:40 hrs)

by Ong Han Boon, who remained the sole director at the time of the trial.

(c) ERC Institute Pte Ltd ("ERC Institute") (the sixth appellant in CA 87), a professional training and consultancy company. At all material times, its directors were Andy Ong and Ong Han Boon.

(d) ERC Consulting Pte Ltd ("ERC Consulting") (the seventh appellant in CA 87), a company providing business consulting and education services. Andy Ong was one of its two directors at all material times.

These companies, together with ERC Holdings, are referred to as "the ERC Group". Andy Ong allegedly controls all the companies in the ERC Group.

The JVA

10 Sometime in late 2009, Andy Ong made a proposal to Foo that they come together to acquire more than 90% of the units in Bugis Cube. By doing so, they stood to be able to redevelop Bugis Cube and then sell the entire project at a profit. Foo agreed and suggested that some of the funding be provided by Sakae. Following this, on 3 September 2010, Sakae entered into the JVA with the Company and GREIC for the purposes proposed by Andy Ong. Sakae was the minority shareholder in the Company, holding 24.69% of the Company's issued share capital, while GREIC held the remaining 75.31%.

11 The JVA included the following provisions:

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

Version No 1: 27 Oct 2020 (22:40 hrs)

(b) For certain defined matters ("Shareholder Reserved Matters"), the Company could act only if it obtained the prior unanimous approval of all its shareholders in a general meeting, who were required to act reasonably and in the best interests of the Company and the shareholders when exercising their voting rights.

(c) For other defined matters ("Board Reserved Matters"), the Company could act only if it obtained the prior majority approval of its directors, who were required to exercise their voting rights reasonably and in the best interests of the Company and the shareholders.

(d) Any director or shareholder with a direct or indirect interest in any matter that would require either shareholder approval or board discussion, not limited to Shareholder Reserved Matters and Board Reserved Matters, was obliged to declare that interest and was not entitled to participate in any discussion or vote on that matter.

Notwithstanding the provision in the JVA that the Company would have four directors, at the time of the trial, Foo and Ho were the only two appointed directors of the Company.

The impugned transactions

12 Throughout the course of the following years, Sakae and Foo evidently left the management of the Company to Andy Ong and GCM. As a result, Andy Ong was apparently able to and did divert (with the involvement of Ong Han Boon and/or Ho) the Company's assets to companies in the ERC Group by way of the seven transactions mentioned at [1] above. These transactions consisted of:

Version No 1: 27 Oct 2020 (22:40 hrs)

(a) the Company's payment of excessive management fees to GCM ("Transaction 1(a)") and the assignment of those management fees by GCM pursuant to the "Third Party Assignment of Proceeds" ("TPAP") ("Transaction 1(b)");

(b) the Company's grant of the "First Loan" to ERC Unicampus and its entry into the "First Loan Agreement" ("Transaction 2");

(c) the wrongful diversion of $16m from the Company to companies in the ERC Group and the execution of the "Lease Agreement" ("Transaction 3");

(d) the Company's execution of the "Consultancy Agreement" with ERC Consulting ("Transaction 4");

(e) the Company's grant of the "Second Loan" to ERC Unicampus and its execution of the "Second Loan Agreement" ("Transaction 5");

(f) the Company's grant of the "Share Option Agreement" in favour of ERC Holdings ("Transaction 6"); and

(g) the Company's unauthorised payment of $8m to Andy Ong and its execution of the "Project Manager Agreement" ("the PMA") with him ("Transaction 7").

We briefly elaborate on each of these transactions below.

Transactions 1(a) and 1(b): The payment of excessive management fees to GCM and the TPAP

13 Transaction 1(a) involved the Company entering into a Management Agreement ("the MA") with GCM on 23 February 2010, pursuant to which

Version No 1: 27 Oct 2020 (22:40 hrs)

GCM was appointed to manage the Company's real estate investment. Management fees were payable by the Company to GCM under the MA, and these amounted to $460,000 (plus GST) yearly and such amount of the Company's profits as was to be determined between the Company and GCM on an annual basis. The defendants in Suit 1098 also produced an addendum to the MA dated 1 May 2010 ("the Addendum") which purportedly required the payment of management fees of around $2.8m to GCM. This document was signed by Andy Ong purportedly acting for and on behalf of the Company. In 2011 and 2012, Andy Ong and Ong Han Boon, who were then directors of the Company, caused the Company to pay GCM a sum of $2,826,335.17 pursuant to the Addendum.

14 As for Transaction 1(b), in August 2012, Andy Ong represented to DBS Bank Ltd ("DBS") that GCM was entitled to management fees from the Company calculated in accordance with the terms of the MA and the Addendum. In September 2012, GCM and DBS entered into the TPAP, under which the management fees due to GCM from the Company were assigned to DBS. DBS agreed, on the security of the TPAP, to make credit facilities ("the DBS Loan") available to one of Andy Ong's companies, ERC International Pte Ltd ("ERC International"). (ERC International, which is now known as TYN Investment Pte Ltd, is the tenth defendant in Suit 1098; it was previously wholly owned by ERC Holdings.) ERC International drew on the DBS Loan to pay a sum of about $60m to purchase a property at 101 Penang Road. Ultimately, the TPAP caused no loss to the Company because the DBS Loan was fully repaid and the TPAP was discharged.

Version No 1: 27 Oct 2020 (22:40 hrs)

Transaction 2: The First Loan and the First Loan Agreement

15 Transaction 2 concerned a loan of $10m that the Company extended to ERC Unicampus through the First Loan Agreement. In 2011, Andy Ong and Ong Han Boon, the then directors of the Company, arranged for the First Loan, under which the Company extended a sum of $10m to ERC Unicampus to fund the latter's purchase of a property that was later named "Big Hotel". At the trial, whether or not the First Loan had been repaid and, if so, the extent of the repayment made were in dispute.

Transaction 3: The wrongful diversion of $16m to the ERC Group and the Lease Agreement

16 Transaction 3 related to the Company's payment of $16m to ERC Institute in September 2012 as compensation for the early termination of the Lease Agreement. Under that agreement, which was dated 1 March 2012, the Company agreed to let the third to sixth floors of Bugis Cube to ERC Institute. The term of the lease was three years, with an option to renew it for two additional terms of three years each. The Lease Agreement bore the signatures of Ho and Ong Han Boon for and on behalf of the Company and ERC Institute respectively.

17 Barely three months after the Lease Agreement was signed, the Company purportedly terminated it by way of a letter dated 30 May 2012. This letter was produced only during the trial. An identically worded letter dated 31 July 2012 had earlier been disclosed before the trial began. Supposedly as compensation for the early termination of the Lease Agreement, the Company paid ERC Institute $16m. The bulk of the compensation amount was paid on 13 September 2012, with $14.3m being disbursed to ERC International and

Version No 1: 27 Oct 2020 (22:40 hrs)

$1.5m to ERC Unicampus. The remaining $200,000 was to be paid to ERC Holdings as and when required.

Transaction 4: The Consultancy Agreement

18 Transaction 4 involved the Company's entry on 4 May 2012 into the Consultancy Agreement with ERC Consulting, under which the latter was to be paid a consultancy fee of $150,000 to conceptualise the sale of Bugis Cube and coordinate promotional activities to effect the sale. The Consultancy Agreement was purportedly signed by Ho on behalf of the Company and by Ong Siew Bok (Andy Ong's brother) on behalf of ERC Consulting. Ong Siew Bok was at all material times accustomed to act in accordance with Andy Ong's directions.

19 It turned out that earlier, on 2 May 2012, the Company had already engaged Knight Frank Pte Ltd ("Knight Frank") as the "Sole Marketing & Sales Agent" to handle the sale of Bugis Cube, and Knight Frank was named as the "Sole Marketing Agent" in the advertisements which were printed to promote the launch event held in June 2012 for the sale. Nonetheless, the Company paid a total of $160,500 to ERC Consulting on 24 December 2012 as "Marketing Consultancy" fees for the sale of Bugis Cube.

Transaction 5: The Second Loan and the Second Loan Agreement

20 Transaction 5 involved the Company's entry into the Second Loan Agreement on 7 May 2012 to extend a further loan of $10m to ERC Unicampus. This agreement was signed by Ho for and on behalf of the Company, and by Andy Ong for and on behalf of ERC Unicampus. It was common ground that the following events occurred on 4 May 2012: (a) Foo and Ho, as directors of the Company, passed a board resolution approving the Second Loan and another board resolution calling for an extraordinary general meeting ("EGM") to be

Version No 1: 27 Oct 2020 (22:40 hrs)

held on 7 May 2012; (b) Ho issued a notice to inform the Company's shareholders (namely, Sakae and GREIC) of the EGM; and (c) Foo and Ho, as corporate representatives of the respective shareholders, acknowledged the said notice. At the EGM, the Company's shareholders passed a resolution approving the Second Loan Agreement. It was also undisputed that the Second Loan was subsequently repaid in full (see the Main Judgment at [151]).

Transaction 6: The Share Option Agreement

21 Transaction 6, which is the sole transaction relied on by Sakae in Suit 122, concerned the Company's alleged grant of an option to ERC Holdings in September 2010 to subscribe for 8.8 million of the Company's ordinary shares at a price of $8.8m ("the ERC Option"). It was common ground that on 24 May 2012, ERC Holdings paid the Company $8.8m in the purported exercise of this option. However, Andy Ong only informed Foo two weeks later on 6 June 2012 that ERC Holdings intended to exercise the option.

22 According to Sakae, Foo, upon being informed of the ERC Option on 6 June 2012, told Andy Ong that he would not approve the issue of new shares in the Company to ERC Holdings. However, Andy Ong insisted that the option would be exercised by ERC Holdings and informed Foo that if Sakae wished 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. In order to maintain Sakae's shareholding in the Company, Foo yielded to Andy Ong's demand and signed a series of documents dated 31 May 2012 and 1 June 2012 authorising and approving the allotment of 8,058,025 shares to ERC Holdings; he also caused Sakae to pay a sum of $2,641,975 to the Company for an additional 2,641,975 shares. The agreements and understandings relating to ERC

Version No 1: 27 Oct 2020 (22:40 hrs)

Holdings' subscription for shares in the Company are collectively referred to as the "Share Option Agreement".

23 As a result of the issuance of new shares to ERC Holdings and Sakae, at the time of the trial, GREIC held 45.35% of the Company's issued share capital, ERC Holdings held 29.96%, while Sakae continued to hold 24.69%.

Transaction 7: The payment of $8m to Andy Ong and the PMA

24 Transaction 7 involved the Company's payment of $8m to Andy Ong on 24 May 2012 and its execution of the PMA with him.

25 According to the appellants in CA 87 ("the CA 87 appellants"), this payment was a valid payment to Andy Ong for work to be done on the Company's behalf pursuant to the PMA dated 4 May 2012, which was signed by Ho for and on behalf of the Company, and by Andy Ong on his own behalf. The stated purpose of the PMA was to appoint Andy Ong as the project manager (cl 2) to ensure that the works needed to renovate and refurbish the Company's units at Bugis Cube would be completed to the Company's satisfaction (cll 4 and 8). Clause 9 of the PMA fixed the "Contract Sum" at $8m.

26 Sakae contends that Andy Ong caused the Company to pay him the $8m without any justification and without its (Sakae's) knowledge or consent. The PMA, Sakae submits, is a sham agreement which was drawn up much later than 4 May 2012, but backdated to that date so as to provide a fictitious basis for making the $8m payment to Andy Ong, and thereby conceal the fact that that payment had nothing to do with the refurbishment of the Company's units at Bugis Cube but in fact went towards helping to fund ERC Holdings' exercise of the ERC Option on 24 May 2012. Sakae found out about the $8m payment only in November 2012 when its Chief Financial Officer discovered, while

Version No 1: 27 Oct 2020 (22:40 hrs)

inspecting the Company's records, that a payment of $8m to Andy Ong had been recorded as a reimbursement to him for sums which he had paid to a "project manager" appointed to carry out the refurbishment of the Company's units at Bugis Cube. As for the PMA, it was disclosed only in February 2013 when Andy Ong and Ho filed affidavits to resist Sakae's application in Originating Summons No 124 of 2013 ("OS 124") for leave to bring a derivative action in the Company's name against them pursuant to s 216A (this action was subsequently discontinued by Sakae in May 2013).

The commencement of legal proceedings by Sakae

27 On 25 October 2012, Foo, who by then had serious concerns over various transactions undertaken by the Company, convened a Sakae board meeting to table his concerns. After receiving answers that were unsatisfactory, Foo caused investigations to be carried out into the Company's financial affairs. The seven transactions enumerated above were then uncovered.

28 This led Sakae to commence the two Suits, which were later consolidated. Andy Ong, Ong Han Boon and Ho, along with six of the other defendants in Suit 1098, in turn commenced third party proceedings against Foo in both Suits, claiming either indemnification against or contribution from Foo in respect of any liability that they might incur arising from Sakae's claims against them.

The parties' cases below

29 In Suit 1098, Sakae sought relief from oppression pursuant to s 216 as follows:

Version No 1: 27 Oct 2020 (22:40 hrs)

(a) against Andy Ong, Ong Han Boon and Ho, as directors of the Company, for the wrongful diversion of the Company's assets to the ERC Group by way of the seven impugned transactions, all of which, according to Sakae, were undertaken without its knowledge; and

(b) against the ERC Group, for the repayment of moneys that were diverted from the Company and for declarations that there were constructive trusts on the assets which the ERC Group had purchased using moneys obtained from the Company. These orders were sought in favour of only the Company.

30 In Suit 122 (which, as mentioned at [21] above, concerned Transaction 6 alone), Sakae sued Andy Ong for breaching the fiduciary duties which he owed Sakae as a director of Sakae and for inducing the Company to breach the JVA as a result of its entry into the Share Option Agreement. (The latter head of claim was based on cl 11.1(c) of the JVA, which stated that the Company was not to "create, allot, issue, purchase, redeem, [or] grant … options over any of [its] Shares or otherwise reorganise [its] share capital … in any way" without the prior unanimous approval of all its shareholders.) Sakae pleaded that "[b]ut for" Andy Ong's conduct in "inducing, causing and/or procuring" the Company to enter into the Share Option Agreement, it would not have paid the sum of $2,641,975 to subscribe for an additional 2,641,975 shares in the Company.

31 At the close of Sakae's case at the trial, all the defendants other than Ho (referred to collectively as "the AO Defendants" where appropriate to the context; for the purposes of these appeals, the AO Defendants are the appellants in CA 87 and CA 103) made a submission that Sakae had failed to mount a case to answer (a "'no case to answer' submission"), and in support of this, they elected not to adduce evidence. As for Ho, he chose to mount a positive defence

Version No 1: 27 Oct 2020 (22:40 hrs)

and, to this end, adduced evidence, including his own testimony. His principal defence at the trial (apart from the general defences raised by the AO Defendants as outlined at [32] below) was that he had at all times acted in accordance with a norm accepted by the shareholders and directors of the Company ("the Established Norm"). In essence, the Established Norm concerned the practice of leaving the management of the Company largely to Andy Ong and his subordinates and staff at GCM.

32 The defendants, in common, relied on the following general defences at the trial:

(a) Sakae's claims in Suit 1098 were essentially claims in respect of corporate wrongs and could not, as a matter of law, be brought against the defendants because of the proper plaintiff rule and the reflective loss principle. Specifically, the proper plaintiff in this case was the Company. Further, any loss asserted by Sakae was not distinct from the Company's loss and merely reflected the loss sustained by the Company to the extent of Sakae's shareholding in the Company.

(b) In any case, Sakae was in a position to resist the alleged oppressive acts. The defendants maintained that they in fact never had or exercised any dominant power over Sakae, and this was fatal to Sakae's oppression claims.

(c) The JVA provided remedies for any breach of its terms. Sakae had specifically negotiated for those remedies and should be confined to them. Suit 1098, which was for remedies under s 216, was therefore ill-conceived.

Version No 1: 27 Oct 2020 (22:40 hrs)

(d) Sakae was in a position to remedy the alleged oppression by self-help measures that could have been but were not taken after the impugned transactions occurred.

(e) Sakae knew, ought to have known, or was in a position to find out about the impugned transactions. Its neglect in safeguarding its own interests could not give rise to claims of the sort made against the defendants.

33 In relation to their third party claims against Foo in Suit 1098, Andy Ong, Ong Han Boon and Ho sought either indemnification against or contribution from Foo in respect of any liability that they might incur to Sakae in that suit on the basis that Foo was himself in breach of the fiduciary duties which he owed the Company as a director of the Company, and his breach had contributed, either wholly or partially, to the seven transactions upon which Sakae's claims in that suit were based. A similar claim for either indemnification or contribution was made by Andy Ong against Foo in Suit 122. Subsequently, Andy Ong, Ong Han Boon and Ho dropped their claims for indemnification during the closing submissions at the trial and pursued only their claims for contribution.

34 In his defence to the third party claims brought against him, Foo contended that the claims by Andy Ong and Ong Han Boon specifically should be dismissed for want of evidence as they never in fact opened their case against him and did not adduce any evidence to support their respective claims. Alternatively, it was contended that unlike Andy Ong, Ong Han Boon and Ho, Foo was not liable to Sakae because he was unaware of and did not authorise the impugned transactions. In any event, Foo submitted, the court should exercise its discretion under s 16(2) of the Civil Law Act (Cap 43, 1999 Rev

Version No 1: 27 Oct 2020 (22:40 hrs)

Ed) to exempt him from liability to make contribution because he had not profited from any of those transactions.

The decision below

The Main Judgment

35 In the Main Judgment, the Judge first dealt with the AO Defendants' "no case to answer" submission, and as a preliminary matter, considered the question of what evidence she could have regard to in arriving at her decision on the two Suits. On this, she held that while the AO Defendants could not adduce their own evidence to rebut Sakae's case, they could rely on the evidence adduced by Ho (who had not made a "no case to answer" submission). The parties do not challenge this ruling on appeal.

36 The Judge then turned to Andy Ong's status in the Company and found that he was a *de jure* director from March 2008 until 9 March 2012, following which he remained a shadow director until March 2015. As for his two associates, she found that Ong Han Boon was exclusively a *de jure* director of the Company from 29 October 2010 till 9 March 2012, and Ho was exclusively a *de jure* director from 3 February 2012 till March 2015 (at [37]–[45]). These findings are also not contested on appeal.

37 Turning to the individual transactions complained of, the Judge made the following findings:

> (a) In respect of Transaction 1(a), the Addendum was "an *ex post facto* fabrication designed to cloak unauthorised payments [of excessive management fees] with some semblance of legitimacy". Neither the Addendum nor the management fees paid thereunder were authorised

Version No 1: 27 Oct 2020 (22:40 hrs)

by the board or the shareholders of the Company (at [61]). This constituted conduct that was oppressive to Sakae as a minority shareholder of the Company (at [68]). Andy Ong and Ong Han Boon acted in breach of their fiduciary duties to the Company by preparing the Addendum and facilitating the payments made thereunder (at [69]). However, there was insufficient evidence to show that Ho committed a similar breach of duty (at [73]).

(b) In respect of Transaction 1(b), although the TPAP caused no loss to the Company, the conduct of Andy Ong and Ho in relation to this transaction was oppressive to Sakae (at [79]). Andy Ong breached his fiduciary duties to the Company by placing himself in a position of conflict of interest, while Ho breached his fiduciary duties to the Company by consenting to the transaction without having exercised due or, for that matter, any diligence (at [79]). However, Ong Han Boon was not in breach of any fiduciary duties to the Company as he was not a director of the Company at the time of that transaction (at [80]).

(c) In respect of Transaction 2, the First Loan was unauthorised and there was a *prima facie* case that $7.9m of the amount loaned remained outstanding (at [92] and [99]). The act of entering into the First Loan Agreement was oppressive to Sakae and disclosed a clear breach by Andy Ong and Ong Han Boon of their fiduciary duties to the Company (at [101]). Ho too breached his fiduciary duties to the Company by helping to disguise Andy Ong's involvement in this loan. Ho's actions were not, however, oppressive to Sakae because they had no real impact on the transaction itself, but had simply been undertaken in order to conceal Andy Ong's involvement (at [102]).

Version No 1: 27 Oct 2020 (22:40 hrs)

(d) In respect of Transaction 3, the Lease Agreement was a sham concocted in order to divert funds from the Company (at [112] and [123]). The execution of the Lease Agreement and the diversion of $16m from the Company under the guise of a payment to compensate ERC Institute for the premature termination of the Lease Agreement constituted conduct that was oppressive to Sakae (at [126] and [130]). Andy Ong breached the fiduciary duties which he owed the Company by procuring the transaction, pursuant to which $16m was misappropriated from the Company for the benefit of companies in the ERC Group, in which he had a "sizeable interest" (at [127]). Ho similarly breached his fiduciary duties to the Company by facilitating the wrongful diversion of funds (at [128]). However, Ong Han Boon did not act in breach of any fiduciary duties to the Company because he was no longer a director of the Company by the time of Transaction 3 (at [129]).

(e) In respect of Transaction 4, the Consultancy Agreement was a sham that was created and backdated in an attempt to justify paying ERC Consulting a fee that was "far in excess" of anything which it could legitimately have claimed (at [143]). The execution of the agreement was oppressive to Sakae (at [147]). Andy Ong breached his fiduciary duties to the Company by placing himself in a situation of a clear conflict of interest which was not disclosed to the Company's board (at [145]), while Ho breached his fiduciary duties to the Company by signing the Consultancy Agreement on Andy Ong's instructions without making any independent inquiry as to whether it was in the Company's interests to commit itself to the obligations under that agreement (at [145]). However, Ong Han Boon did not breach any fiduciary duties to the Company because he was no longer a director of the Company by the

Version No 1: 27 Oct 2020 (22:40 hrs)

time of Transaction 4, and in any case, there was no evidence of his involvement in this transaction (at [146]).

(f) In respect of Transaction 5, although there was *prima facie* evidence that the Second Loan was a sham (at [168]), there was on the whole no evidence that the Second Loan Agreement was unauthorised by and oppressive to Sakae (at [169]). Notwithstanding that, the Judge found that Andy Ong acted in breach of the fiduciary duties which he owed as a shadow director of the Company by failing to specifically bring Transaction 5 to Foo's attention and failing to disclose his conflict of interest (at [169]). Ho too acted in breach of the fiduciary duties which he owed the Company by failing to apply his mind to the nature and import of the transaction that he was asked to endorse (at [171] and [173]). However, Ong Han Boon was not in breach of any fiduciary duties to the Company because he was no longer a director of the Company by the time of Transaction 5 (at [172]). In the light of her finding that there was no oppression arising from this transaction, the Judge did not make any orders in respect of it (at [325]). She explained, however, that the breach of fiduciary duties by Andy Ong and Ho in relation to Transaction 5 lent context to and strengthened her conclusion, in respect of the other impugned transactions, that Andy Ong and his associates had conducted themselves in a way which was oppressive to Sakae (at [173]).

(g) In respect of Transaction 6, the Share Option Agreement was a sham. There was no evidence of any valid share option agreement, whether written or oral, existing between the Company and ERC Holdings in June 2012 (at [210]). Although Sakae's subsequent subscription for the additional 2,641,975 shares in the Company was

Version No 1: 27 Oct 2020 (22:40 hrs)

undertaken voluntarily in order to maintain its original shareholding percentage, the execution of the Share Option Agreement was nonetheless oppressive to Sakae (at [211]). Where Suit 1098 was concerned, Andy Ong and Ong Han Boon acted in breach of their fiduciary duties to the Company in relation to Transaction 6 by making it appear that the Company was bound by a non-existent share option agreement in favour of ERC Holdings (at [211]). However, Ho was not in breach of his fiduciary duties to the Company because he did not know about the creation of the purported share option, and there was nothing to put him on notice (at [212]). Where Suit 122 was concerned, Andy Ong breached the fiduciary duties which he owed Sakae in relation to Transaction 6 by placing himself in a position where those duties were in conflict with his own interest in ERC Holdings. As for the tort of inducing a breach of the JVA by the Company (the other head of claim pleaded by Sakae in Suit 122), the Judge declined to make any ruling on it given her finding that the ERC Option was not a valid share option (at [213]).

(h) In respect of Transaction 7, the PMA was a sham that was designed to conceal the true nature of the $8m payment by the Company to Andy Ong (at [238] and [245]). The execution of this agreement and the unauthorised $8m payment were oppressive to Sakae in that the Company's funds were diverted and misapplied to enable ERC Holdings to exercise its purported share option under the Share Option Agreement (at [246]). Andy Ong acted in breach of the fiduciary duties which he owed the Company by taking the said sum of $8m from the Company (at [246]), while Ho was in breach of his fiduciary duties by signing the PMA and backdating it to 4 May 2012 as well as by facilitating the $8m payment to Andy Ong (at [261]).

Version No 1: 27 Oct 2020 (22:40 hrs)

38 In short, Sakae succeeded in its oppression claims in Suit 1098. The Judge found that apart from Transaction 5, the other six impugned transactions were oppressive to Sakae. Further, Andy Ong was found to be in breach of his fiduciary duties to the Company in relation to all the transactions (and also, for the purposes of Suit 122, in breach of his fiduciary duties to Sakae in relation to Transaction 6); Ong Han Boon was found to be in breach of his fiduciary duties to the Company in relation to Transactions 1(a), 2 and 6; and Ho was found to be in breach of his fiduciary duties to the Company in relation to Transactions 1(b), 2, 3, 4, 5 and 7. As will be evident from [41] below, not all of these breaches were met with corresponding orders as where the breaches did not result in any actionable act of oppression, no orders were made by the Judge in Suit 1098 in respect of the defendant in question.

39 The Judge also rejected the general defences raised by the defendants for the following reasons:

(a) Sakae's oppression action in Suit 1098 was properly constituted even though it was premised primarily on misconduct by Andy Ong, Ong Han Boon and Ho, as directors of the Company, in relation to the Company. This was because an action under s 216 could be brought where the plaintiff shareholder was relying on the unlawfulness of an errant director's conduct as evidence of the manner in which the director had conducted the company's affairs in disregard of the plaintiff's interests as a minority shareholder and where the plaintiff's complaints could not be adequately addressed by the available remedies in favour of the company alone (at [46], [71] and [263]).

(b) Although Sakae had equal representation on the Company's board, the defendants had dominant power over Sakae because Sakae

Version No 1: 27 Oct 2020 (22:40 hrs)

had no power to remove the directors appointed by the defendants if those directors acted oppressively without regard for its interests (at [268]).

(c) The contractual remedies provided under the JVA did not preclude Sakae from bringing an oppression action because: (i) the JVA did not expressly exclude such an action; (ii) the contractual remedies would not, in any event, adequately address the consequences of the oppression complained of; and (iii) the availability of a contractual remedy in favour of a minority shareholder was not, in principle, an impediment to an oppression action (at [273]–[275]).

(d) There were in fact no self-help remedies that Sakae could avail itself of (at [281]).

(e) Sakae did not know about the impugned transactions at all material times (at [62], [76], [94], [125], [144], [167], [211] and [231]). In any case, Sakae could not be expected to have known about those transactions because it did not, as a shareholder of the Company, have a duty to investigate what was going on in the Company or to scrutinise its accounts (at [285]).

40 As for Ho's reliance on the Established Norm, the Judge rejected this defence because it was not supported, whether by Ho's own pleaded case or the evidence adduced or the applicable case law (at [254]–[256]).

41 In respect of the reliefs sought by Sakae in the two Suits, the Judge held that while the court could grant a plaintiff shareholder relief in the form of orders against errant directors to repay the company moneys that they had taken from or caused to be paid out by the company in breach of their fiduciary duties, the

Version No 1: 27 Oct 2020 (22:40 hrs)

court could not make payment orders against third parties who might have received moneys from the company pursuant to the directors' breaches (at [302]). Thus, payment orders could only be made if they were sought against the errant directors and if the company itself could have obtained those orders (at [303]). Accordingly, the Judge made the following orders:

(a) In respect of Sakae's oppression claims in Suit 1098, the Company was to be wound up (rather than an order for Sakae's shares in the Company to be bought out) (at [293]).

(b) For Transaction 1(a), Andy Ong and Ong Han Boon were jointly and severally liable to pay the Company the sum of $2,826,335.17 in respect of the excessive management fees that were paid to GCM (at [303]).

(c) For Transaction 2, Andy Ong and Ong Han Boon were jointly and severally liable to pay the Company the sum of $7.9m in respect of the First Loan and the First Loan Agreement (at [315]–[316]).

(d) For Transaction 3, Andy Ong and Ho were jointly and severally liable to pay the Company $16m in respect of the Lease Agreement and the payment that was made to ERC Institute (at [318]–[319]).

(e) For Transaction 4, Andy Ong and Ho were jointly and severally liable to pay the Company the sum of $160,500 in respect of the Consultancy Agreement (at [321]–[322]).

(f) For Transaction 6, Andy Ong was liable to pay Sakae the sum of $2,641,975 and interest thereon from the date of the writ in Suit 122 (at [329]).

Version No 1: 27 Oct 2020 (22:40 hrs)

(g) For Transaction 7, Andy Ong and Ho were jointly and severally liable to pay the Company the sum of $8m in respect of the PMA (at [332]).

42 For Transaction 1(b), Sakae sought a declaration that the TPAP was void, but the Judge did not accede to this because the TPAP had been granted to DBS, which was a *bona fide* purchaser for value without notice, and the court had no power to grant any remedies affecting third parties in an oppression action (at [309] and [312]). As for Transaction 5, in the light of the Judge's finding that this transaction was not oppressive to Sakae (see [37(f)] above), no orders were made in respect of it (at [325]).

43 In short, payment orders were made against Andy Ong in respect of the six transactions referred to at [41(b)]–[41(g)] above; payment orders were made against Ong Han Boon in respect of the two transactions referred to at [41(b)] and [41(c)] above; and payment orders were made against Ho in respect of the three transactions referred to at [41(d)], [41(e)] and [41(g)] above.

The Third Party Judgment

44 As a preliminary matter in the Third Party Judgment, the Judge held that the third party claims brought against Foo by Andy Ong and Ong Han Boon could not be dismissed solely on the basis that they had not adduced any evidence themselves, but had instead relied on the evidence adduced by Sakae and Ho in respect of Sakae's claims in the two Suits, including the evidence of Foo himself (at [21]–[24]).

45 In respect of Suit 1098, the Judge held that the third party claims were not well founded under s 15(1) of the Civil Law Act because the three-step test which this court set out in *Tan Juay Pah v Kimly Construction Pte Ltd and*

Version No 1: 27 Oct 2020 (22:40 hrs)

others [2012] 2 SLR 549 ("*Tan Juay Pah*") at [49] had not been satisfied. This finding rested on the following grounds:

(a) The sums that Andy Ong, Ong Han Boon and Ho were to pay pursuant to the Main Judgment would go directly to the Company and not to Sakae; the damage suffered by Sakae by reason of their misconduct (intangible loss of the basis on which it had invested in the Company) was distinct from the damage suffered by the Company (financial loss by reason of the transactions that Sakae complained of) (at [29]).

(b) Even if the sums that Andy Ong, Ong Han Boon and Ho were to pay the Company represented the damage that Sakae had suffered, they could not obtain contribution from Foo because there was no liability to Sakae that could be attributed to Foo as a director of the Company even if he were in breach of his fiduciary duties to the Company. The language of s 216 required that there must be "active conduct of the Company's affairs and active exercise of powers in a manner which oppresse[d] Sakae or unfairly disregard[ed] or prejudice[d] it", whereas the complaint against Foo was "not that he actively did something but that he did nothing" (at [31]). In any event, the plaintiff shareholder in a s 216 action could not complain that oppression arose from a director's inaction except, perhaps, in a situation where the inactive director was aware of and acquiesced in the wrongdoing of other directors by not alerting the shareholder to what was going on. This was not the case here (at [30]–[31]).

(c) It could not be established that Foo was liable to Sakae in respect of the very "same damage" as Andy Ong, Ong Han Boon and Ho. Foo

Version No 1: 27 Oct 2020 (22:40 hrs)

was not liable to Sakae for oppression, whereas the whole rationale of Sakae's oppression action in Suit 1098 was to obtain a remedy that would allow it to extricate itself from a situation which was commercially unfair to it. Although Sakae did make various claims in that suit for sums to be repaid by Andy Ong, Ong Han Boon and Ho, those claims were for orders that the sums be repaid to the Company, and not to Sakae (at [32]).

46 The Judge further held that even if the requirements under s 15(1) of the Civil Law Act were satisfied, Foo should be exempted under s 16(2) of that Act from liability to make contribution because the wrongs for which Andy Ong, Ong Han Boon and Ho were seeking contribution were not mere negligent wrongs but deliberate wrongs; the law should not require Foo to contribute to damage arising out of the deliberately wrongful acts of Andy Ong, Ong Han Boon and Ho (at [35]–[36] and [38]). Further, Ho could not rely on the Established Norm defence to claim any contribution from Foo: Ho knew that Foo had left the management of the Company to Andy Ong, and hence, if he was aware that Andy Ong was not acting in the Company's interests, he had a duty to alert Foo to what was going on (at [40]).

47 In respect of Suit 122, the Judge held that Andy Ong's claim for contribution from Foo likewise failed because Foo had not breached any fiduciary duties to Sakae in relation to Transaction 6. In any event, it would have been inequitable to order Foo to contribute to Andy Ong's liability because Andy Ong alone stood to gain from that transaction (at [45]).

48 Finally, the Judge held that Andy Ong, Ong Han Boon and Ho were to bear Foo's costs in the third party proceedings on an indemnity basis on the ground that it had been found, in respect of Sakae's claims in the two Suits, that

Version No 1: 27 Oct 2020 (22:40 hrs)

the three of them had orchestrated the impugned transactions to benefit Andy Ong at the expense of the Company and Sakae. In the circumstances, their conduct in bringing third party claims against Foo and subjecting him to the costs and stress of defending himself was a plain instance of conducting a case in bad faith (at [52]).

The issues to be determined by this court

49 As mentioned earlier, there are before us the Main Appeals, the Third Party Appeals and OS 13. In OS 13, the sole issue for our determination is whether Andy Ong was correct to file a single notice of appeal even though he was appealing against the findings made by the Judge in respect of both Suits.

50 In relation to the Main Appeals, the issues to be determined are:

(a) whether Sakae's oppression claims in Suit 1098 concerned personal wrongs against Sakae for which relief under s 216 could be granted;

(b) whether Andy Ong, Ong Han Boon and Ho were liable under s 216 for the commercial unfairness perpetrated against Sakae;

(c) even if the impugned transactions were oppressive to Sakae, whether they were actionable under s 216 having regard to whether:

(i) Sakae could have availed itself of the contractual remedies provided under the JVA;

(ii) Sakae had, but failed to exercise, the ability to resist the oppressive conduct which it complained of;

Version No 1: 27 Oct 2020 (22:40 hrs)

(iii) Sakae knew, ought to have known or was in a position to find out about each of the impugned transactions at the material time; and

(iv) Sakae was subject to "overbearing conduct" during the discussions on some of the impugned transactions at the board meetings of the Company held on 3 and 11 April 2013; and

(d) in respect of Sakae's breach of fiduciary duty claim against Andy Ong in Suit 122, whether the execution of the Share Option Agreement in Transaction 6 constituted a breach of Andy Ong's fiduciary duties to Sakae.

In addition, given the evidential importance of the Judge's ruling that the AO Defendants could rely on the evidence adduced by Ho even though they had elected and undertaken not to adduce evidence pursuant to their "no case to answer" submission, we also address this issue even though, as mentioned at [35] above, the Judge's ruling in this regard is not contested on appeal.

51 In respect of the Third Party Appeals, the primary issue to be determined is whether the third party claims against Foo should have been allowed having regard to ss 15 and 16 of the Civil Law Act.

52 There were two aspects of CA 87 that were uncontested and hence were resolved immediately at the hearing before us. First, GCM, the fourth appellant in CA 87, applied on the instructions of its liquidators to withdraw its appeal. Second, Sakae applied by way of Court of Appeal Summons No 126 of 2017 ("SUM 126") for leave to adduce further evidence and file a second supplemental core bundle. As both of these matters were not contested, we granted the applications.

Version No 1: 27 Oct 2020 (22:40 hrs)

Our decision

Overview

53 In our judgment, no order should be made in respect of OS 13. As for the Main Appeals, we allow Ho's appeal in CA 86 and allow in part the appeal in CA 87 only in respect of Transaction 6. Where the Third Party Appeals are concerned, we dismiss the appeal in CA 103 in respect of the third party claims under Suit 1098 (albeit for reasons different from those given by the Judge), and make no order in respect of the third party claim under Suit 122. As for CA 104, we make no order, save that we set aside the Judge's order of indemnity costs against Ho. As we have substantially dismissed the appeals, where we have done so for reasons that essentially mirror the reasons given by the Judge, we generally do not repeat her analysis in this judgment.

OS 13: Andy Ong's application for a retroactive extension of time to appeal in respect of Suit 122

54 We deal first with Andy Ong's application in OS 13 for a retroactive extension of time to file an appeal against the findings made by the Judge (in both the Main Judgment and the Third Party Judgment) in respect of Suit 122. In our judgment, Andy Ong was correct to file a single notice of appeal against each of the two judgments that the Judge issued. We therefore make no order in respect of OS 13.

55 Before we explain our decision, it would be helpful to briefly set out the relevant procedural history leading to the present appeals. The two Suits were consolidated at the pre-trial stage, with the court documents in both Suits directed to be filed only under Suit 1098. The two Suits were then heard together by the Judge at a single trial. The Main Judgment was issued on 7 April 2017 in respect of the claims brought by Sakae in both Suits; while the Third Party

Version No 1: 27 Oct 2020 (22:40 hrs)

Judgment, which likewise covered both Suits, was issued on 4 May 2017 in respect of the third party claims against Foo. A single judgment (HC/JUD 324/2017) was extracted for both Suits in respect of the orders made in the Main Judgment, and similarly, a single judgment (HC/JUD 321/2017) was extracted for both Suits in respect of the orders made in the Third Party Judgment. The AO Defendants, who include Andy Ong, filed a notice of appeal (CA 87) on 5 May 2017 against the Judge's findings in the Main Judgment, and Andy Ong and Ong Han Boon filed a notice of appeal (CA 103) on 22 May 2017 against the Judge's findings in the Third Party Judgment. Both notices of appeal were expressed to be against the findings made in respect of Suit 1098.

56 At a hearing before the Judge on 16 May 2017, Sakae maintained that Andy Ong was required to file a separate notice of appeal in respect of the findings made in Suit 122 insofar as those findings were to be challenged before this court. Andy Ong disagreed and wrote to the Registry of the Supreme Court ("the Registry") on 17 May 2017 seeking confirmation that CA 87 would take effect as an appeal against the findings made in both Suits. The issue was canvassed at a case management conference on 6 June 2017, but the assistant registrar who heard the matter considered that he was not in a position to make a ruling. After taking other steps which are not relevant for present purposes, Andy Ong filed OS 13 on 30 June 2017.

57 In our judgment, OS 13 is unnecessary because Andy Ong was only required to file a single notice of appeal against each of the two judgments issued by the Judge, and each notice of appeal would cover the findings made in the particular judgment concerned in respect of *both* Suits.

58 Sakae submits, among other things, that a separate notice of appeal should have been filed for each of the two Suits because the law states that

Version No 1: 27 Oct 2020 (22:40 hrs)

where a party wishes to appeal against orders made in different actions, a notice of appeal is required in respect of the orders made in each action even if the actions were heard together: see *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 ("*Linda Lai*") at [24], *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576 ("*Tang Liang Hong*") at [37] and *Singapore Civil Procedure 2018* vol II (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2018) ("*Singapore Civil Procedure*") at para 57/3/17.

59 We disagree with Sakae's contention. It is clear to us, from a plain reading of O 57 r 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), that only a single notice of appeal needs to be filed for an appeal against a single *judgment* even if the judgment deals with multiple *actions*. This can be seen from, specifically, O 57 r 3(2), which provides that a notice of appeal is to be filed "either in respect of the whole or in respect of any specified part of the *judgment or order of the Court below*" [emphasis added]. Thus, notices of appeal are filed in respect of *judgments or orders*, and *not actions*.

60 In our view, there are sound reasons for such a construction of O 57 r 3(2). First, this helps to conserve judicial resources and reduce costs for the parties to an appeal. Where separate notices of appeal are filed, the appeals would presumptively be dealt with separately, with separate submissions and appeal records having to be filed in respect of each appeal. Additional work would then have to be undertaken by the Registry to determine whether to consolidate the appeals. Second, filing a single notice of appeal obviates the need for an appellant to furnish separate security for the costs of each appeal. If the position were otherwise, it might be financially onerous for the appellant, and needlessly so where what the appellant seeks to do ultimately is to challenge the merits of a single judgment.

Version No 1: 27 Oct 2020 (22:40 hrs)

61 Sakae relies on our earlier decisions in *Tang Liang Hong* and *Linda Lai* in support of its position that Andy Ong should have filed separate notices of appeal for the two Suits, but we do not find either of these decisions persuasive for two reasons.

62 First, in *Linda Lai* (at [24]) and *Tang Liang Hong* (at [37]), the court cited with approval a passage from, respectively, an earlier edition of *Singapore Civil Procedure* and an earlier edition of Jeffrey Pinsler SC, *Singapore Court Practice 2017* vol II (LexisNexis, 2017) ("*Singapore Court Practice*"). Both of these passages are broadly similar to the following extract from *Singapore Civil Procedure* (at para 57/3/17):

> *… Where … an appellant wishes to appeal against orders made in different actions (even if tried together) a separate notice of appeal will be required in respect of each action. …*
>
> Likewise if orders are made in one action, but not at the same trial or hearing, separate notices of appeal will still be required. …
>
> [emphasis added]

63 It is unclear from the above passage whether the "orders made in different actions" are contained in a single order or judgment. Leaving this to one side, no authority is cited in the passage in support of the propositions made therein. As against this, in *Dixon v Allgood* [1999] Lexis Citation 2340 ("*Dixon*"), the English Court of Appeal (*per* May LJ, with whom Lord Woolf MR and Robert Walker LJ agreed) held that the Deputy Registrar in the court below erred in requiring the appellant to file two separate applications for leave to appeal in respect of two interlocutory costs orders made on separate occasions in the same action. In that context, which is slightly different from the situation in the present case, May LJ doubted the correctness of a passage in *The Supreme Court Practice 1999* (Sir Richard Scott & Sir Jack

Version No 1: 27 Oct 2020 (22:40 hrs)

I H Jacob gen eds) (Sweet & Maxwell, 1999) which is similar to the passage reproduced at [62] above, and commented thus:

> … *There is, in my view, no relevant rule which dictates the answer and certainly no rule which compels the conclusion stated in the last sentence of the editorial comment to which I have referred. I can see no reason of substance or practice or practicality* why two applications for leave to appeal from separate decisions given on different days in the same case have to be made on separate pieces of paper. *There is every reason of economy why they should be made in a single application.* … [emphasis added]

64 In our judgment, the reservations expressed in *Dixon* as to the "substance or practice or practicality" of "the last sentence of the editorial comment" (concerning the filing of separate notices of appeal for orders made in respect of one action but at different hearings) apply with even greater force to the filing of separate notices of appeal for orders made in respect of two *consolidated* actions at the *same* hearing and in a *single* judgment.

65 Second, and in any case, both *Tang Liang Hong* and *Linda Lai* are factually distinguishable from the present case. In *Tang Liang Hong*, although the High Court judge made 12 *separate* interlocutory judgment orders against the appellant in the 12 actions brought against him, the appellant filed only a single notice of appeal against all 12 judgment orders (at [31]–[32]). In those circumstances, we held that "there was clearly an error or defect in the notices of appeal filed" (at [37]). Similarly, in *Linda Lai*, the appellant attempted to consolidate, in a single notice of appeal, two appeals against two *separate* orders of the High Court made in relation to two separate actions (at [23]). We held that that was impermissible. Both of these cases are distinguishable from the present case in that they both involved an appellant attempting to file a single notice of appeal to cover *multiple* appeals against *multiple* judgment orders. In contrast, what Andy Ong did in the present case was to file two *single* appeals,

Version No 1: 27 Oct 2020 (22:40 hrs)

each relating to a *single* judgment – one (CA 87) against the findings made by the Judge in the Main Judgment on Sakae's claims in the two Suits, and another (CA 103) against the findings made by the Judge in the Third Party Judgment on the third party claims in both Suits. Our decisions in *Tang Liang Hong* and *Linda Lai* are therefore not applicable to the factual scenario that is before us in this case.

The Main Appeals

66 We turn now to the Main Appeals. As indicated earlier at [53] above, we allow Ho's appeal in CA 86, while we allow CA 87 in part only in respect of Transaction 6. Before proceeding to explain our reasons for these decisions, we think it appropriate, given the significance of this issue and even though (as noted at [35] and [50] above) the Judge's ruling on it is not challenged on appeal, to first address the anterior question of whether the AO Defendants could rely on the evidence led by Ho despite having elected and undertaken not to adduce evidence pursuant to their "no case to answer" submission.

The implications of the AO Defendants' "no case to answer" submission

67 In our judgment, the Judge was right in holding that the AO Defendants could rely on the evidence adduced by Ho despite their "no case to answer" submission on the grounds that in proceedings where some (but not all) of the defendants make a "no case to answer" submission and, in support of this, elect not to adduce evidence, these defendants may nonetheless rely on the evidence adduced by the other defendants who do not make the submission and who thus proceed to lead evidence.

68 At the trial, Sakae argued that the AO Defendants should not be permitted to rely on the evidence led by Ho because, in undertaking not to call

Version No 1: 27 Oct 2020 (22:40 hrs)

evidence at the close of Sakae's case, the AO Defendants were in fact submitting that Sakae's case was *in and of itself* unsustainable (see the Main Judgment at [26]–[27]). The Judge disagreed and gave three reasons for her decision on this point (see the Main Judgment at [28]–[30]). First, Sakae's position was not supported by the relevant case authorities, which indicated that the evidence adduced by the defendants who did not make a "no case to answer" submission might well prove to be relevant to the liability of those defendants who made such a submission, and therefore could be considered by the court. Second, the rationale underlying the rule prohibiting a defendant who made a "no case to answer" submission from calling evidence – namely, the inappropriateness of making any ruling on the evidence until it had been completely presented, and to avoid the expense and inconvenience which would result from having to recall defence witnesses if the court's decision to uphold the submission were reversed on appeal – did not extend the scope of the undertaking from one not to *adduce* evidence to one not to *rely on* evidence already or otherwise to be adduced in court. Third, accepting Sakae's argument would lead to an artificial and inconsistent approach in a case where the *plaintiff* sought to rely on parts of the evidence adduced by a defendant who did not make a "no case to answer" submission and who therefore did lead evidence. It would not be logical or fair to allow the plaintiff to in effect selectively determine which parts of that defendant's evidence the court could consider in determining the issues before it. Both common sense and fairness dictated that evidence from a witness which could be used *against* a party could also be used *by* that party.

69 We agree with these reasons, and supplement them with the following observations.

70 To begin with, it is settled law in Singapore that the court will not entertain a "no case to answer" submission by a defendant at the close of the

Version No 1: 27 Oct 2020 (22:40 hrs)

plaintiff's case *unless the defendant undertakes not to call evidence*: see *Goh Ya Tian v Tan Song Gou and others* [1981–1982] SLR(R) 193 ("*Goh Ya Tian*") at [16]–[18], affirming *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239 at 241 *per* Thomson CJ (as he then was). In *Goh Ya Tian*, Lai Kew Chai J rejected the contrary position taken in *Pandey v Hotel Marco Polo Pte Ltd* [1979–1980] SLR(R) 115 at [10]–[11], where it was held that the judge had the discretion *not* to order the defendant to undertake not to call evidence; Lai J's decision was subsequently affirmed by the Court of Appeal in *Tan Song Gou v Goh Ya Tian* [1981–1982] SLR(R) 584 at [12]. The rationale underlying the requirement that a defendant who makes a "no case to answer" submission must undertake not to call evidence is that it is inappropriate for a judge to make *any* ruling on the evidence until it has been completely presented. Further, the imposition of such an undertaking avoids the prospect of the evidence being supplemented depending on the outcome of the court's evaluation of the plaintiff's case, as well as the expense and inconvenience that would arise from possibly having to recall witnesses in such circumstances: see the Main Judgment at [29]; see also *Singapore Court Practice* at para 35/4/10 and Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 20.006.

71 Where two or more defendants are sued and only one or some (but not all) of them make a "no case to answer" submission at the close of the plaintiff's case, those defendants who make this submission should be permitted, despite having undertaken not to *adduce* evidence, to *rely on* the evidence led by the remaining defendants who do not make the submission.

72 Allowing defendants who make a "no case to answer" submission to rely on the evidence of other defendants who do not make that submission is simply a logical corollary of what has been regarded as the appropriate stage during a trial when the judge should rule on such a submission. The case law is clear that

Version No 1: 27 Oct 2020 (22:40 hrs)

a judge should generally *not* rule on a "no case to answer" submission immediately upon the close of the plaintiff's case, but should instead proceed to hear the evidence of the other defendants who do not make this submission (including the evidence of their witnesses) as well as the parties' full submissions before determining whether the plaintiff has made out a case against any of the defendants, unless it is *absolutely* clear at the close of the plaintiff's case that the defendants making the submission are not liable. This is also the position taken by the courts in England, Australia and Malaysia, as we will discuss below.

73 This approach is a sensible one because the evidence which is adduced by the defendants who do not make a "no case to answer" submission might well have a bearing on the determination of whether the submission should be upheld. Hence, by ruling on the submission only at the close of the trial rather than at the close of the plaintiff's case, the court will not be making a decision on the submission until after it has had the opportunity to consider *all* the evidence that is going to be adduced at the trial.

74 This approach is borne out by the precedents. In the English Court of Appeal case of *Hummerstone and Another v Leary and Another* [1921] 2 KB 664 ("*Hummerstone*"), the plaintiffs sued two defendants to recover damages for personal injuries caused in a motor accident. At the close of the plaintiffs' case, the first defendant submitted that there was no case to answer. The trial judge accepted the submission and entered judgment in favour of the first defendant. The case then proceeded against the second defendant, at the end of which the trial judge also dismissed the claim against the second defendant. On appeal by the plaintiffs, Bray J (with whom Lush J agreed) allowed the appeal and ordered the matter to be sent for a retrial, holding (at 666–668):

Version No 1: 27 Oct 2020 (22:40 hrs)

> … In our opinion the learned judge took an entirely wrong course in allowing [the first defendant] to be dismissed from the action. Instead of trying the case as one entire case, which it was, and hearing all the evidence before arriving at a conclusion, he divided it into what we may call compartments and tried each separately, the result of which was that it was never really tried at all. He treated it as a claim against [the first defendant] alone and a claim against [the second defendant] alone, overlooking the fact that the plaintiffs, as they were entitled to do under the Rules, were alleging that either [the first defendant] or [the second defendant] or both were responsible for the accident. When once a state of facts was proved, as it was, from which the reasonable inference to be drawn was that prima facie one if not both drivers had been negligent, the plaintiffs were entitled to call on the defendants for an answer, and *the proper time at which to decide whether on the evidence one defendant or the other defendant or both the defendants were liable was* ***at the close of the whole case****. …*
>
> It must not be supposed from our judgment that if a plaintiff fails to make a prima facie case at all he is entitled to call on two defendants under such circumstances as these to give evidence and ask for judgment if no such evidence is given. He must of course prove facts from which in the absence of an explanation liability could properly be inferred. *It might perhaps happen that a plaintiff suing two defendants in the alternative proved affirmatively that as regards one of them it is impossible to impute blame to him, and in that case, if such a case should occur, the judge would no doubt be entitled to dismiss him from the action. …*
>
> [emphasis added in italics and bold italics]

75 The same position was subsequently taken in a number of Australian cases. In the decision of the High Court of Australia in *Nesterczuk v Mortimore* (1965) 115 CLR 140, Kitto J (as he then was) implicitly affirmed *Hummerstone* in the following terms (at 141):

> … [W]here the evidence adduced for the plaintiff raises a prima facie inference that the plaintiff's injuries resulted from negligence on the part of one or other or both of the defendants, it is an error to dismiss one defendant from the action at the close of the plaintiff's case on the ground that as the evidence stands it is more probably the other defendant who was negligent. *The proper course is to await the conclusion of the whole of the evidence and then consider whether the collision*

Version No 1: 27 Oct 2020 (22:40 hrs)

> *was due to negligence on the part of one only or to negligence on the part of each.* [emphasis added]

76 Similarly, in the decision of the Federal Court of Australia in *Trade Practices Commission v Allied Mills Industries Pty Ltd and others (No 3)* (1981) 37 ALR 225, Sheppard J held (at 231):

> An outstanding question which remains unresolved is what is to happen if I find a case to answer against some, but not all, respondents. *The usual practice is not to dismiss a case against any respondent at that stage, but only to do that if there is still no case to answer against a respondent at the close of any evidence which may be led by the respondents against whom there is a case*: *Menzies v Australian Iron & Steel Ltd* (1952) 52 SR (NSW) 62. [emphasis added]

77 This was also the position taken by the Federal Court of Australia in *James and Others v Australian and New Zealand Banking Group Ltd and Others* (1986) 64 ALR 347, and by the Malaysian High Court in *Ng Neoh Ha & Ors v Maniam & Ors* [1994] 1 MLJ 434.

78 Of course, this is not an inflexible position. The question of when the court should rule on a "no case to answer" submission is ultimately a matter of proper case management having regard to the interests of justice, including convenience as well as economy in time and money: see *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers (Western Australia Branch) and Others* (1992) 111 ALR 377 at 382 *per* French J (as he then was) and *Lafarge Concrete (M) Sdn Bhd (formerly known as Supermix Concrete (M) Sdn Bhd v Hasrat Usaha Sdn Bhd & Anor* [2011] 6 MLJ 701 at [7]–[8]. However, this does not detract from the general rule, which is as laid down in *Hummerstone* and affirmed in the other authorities that we have cited above.

Version No 1: 27 Oct 2020 (22:40 hrs)

Sakae's oppression claims in Suit 1098

79 We move now to the oppression claims in Suit 1098, which constitute Sakae's primary cause of action against the appellants. The legal principles governing oppression actions are for the most part well settled in Singapore law. However, one area of potential uncertainty lies in the overlap between *personal* wrongs and *corporate* wrongs. This issue arises for our consideration in the Main Appeals because the appellants argue that Sakae is not entitled to relief under s 216 as its oppression claims are based not on wrongs which it has suffered, but rather, on wrongs done to the Company. Before addressing this point, we preface our analysis of Sakae's oppression claims with the general observation that both in the parties' written submissions as well as during the oral hearing before this court, the factual findings made by the Judge on these claims were not seriously disputed, and whatever limited arguments which were advanced in that respect did not in any event materially undermine any of the Judge's findings on these claims.

(1) The established principles on oppression actions

80 Section 216 of the Companies Act provides protection for minority shareholders where:

> (a) the company's affairs are being conducted or the directors' powers are being exercised: (i) in a manner that is oppressive to one or more shareholders; or (ii) in disregard of the interests of one or more shareholders; or
>
> (b) an act is done or threatened or a member's resolution is passed or proposed which: (i) unfairly discriminates against one or more shareholders; or (ii) is otherwise prejudicial to one or more shareholders.

Version No 1: 27 Oct 2020 (22:40 hrs)

81 This section essentially encapsulates four limbs: (a) oppression; (b) disregard of a shareholder's interests; (c) unfair discrimination; and (d) prejudice. As we held in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*"), the common element undergirding these four limbs is commercial unfairness (at [70]–[71] and [81]). A shareholder who brings a s 216 action is not required to identify the specific limb relied on, but needs instead to demonstrate that the conduct complained of amounts to commercially unfair conduct. Such unfairness will generally be found where there has been "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect" (see *Over & Over* at [77], citing *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229). In ascertaining whether there has been commercial unfairness, the court must assess the unfairness of the alleged wrongdoer's conduct objectively in the context of the parties' relationship and in view of the fact that that relationship is a *commercial* relationship: see *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 ("*Re Saul*") at 17–20 and Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at paras 4.040–4.042.

82 Further, in deciding whether to grant relief under s 216, the court must consider not only the legal rights of the parties, but also their legitimate expectations (see *Over & Over* at [78]). Thus, commercial unfairness may be found even where the majority shareholders have been acting *lawfully*. The same point was made recently by Vinodh Coomaraswamy J in *Leong Chee Kin (on behalf of himself and as a minority shareholder of Ideal Design Studio Pte Ltd) v Ideal Design Studio Pte Ltd and others* [2017] SGHC 192 ("*Ideal Design*") at [48]:

> A distinction must also be drawn between unfairness and unlawfulness. A person may act within his legal rights and yet

Version No 1: 27 Oct 2020 (22:40 hrs)

> act in a manner which is commercially unfair. As the Court of Appeal observed in *Over & Over* at [78], the law on s 216 looks not only at a person's legal rights but also at the legitimate expectations of the company's members. The converse is also true. Unlawful conduct that is of a technical nature, *eg*, a trivial breach of a director's duties, is not necessarily commercially unfair (see *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] 5 SLR 307 at [100]). In the final analysis, whether an act is commercially unfair depends on the context in which the act took place. That includes, but goes beyond, the issue of whether the act is lawful or regular.

83 In that light, we turn to consider the specific issues raised by Sakae's oppression claims, beginning with the question of whether Sakae should be denied relief under s 216 on the ground that its claims are based not on personal wrongs done to itself, but on corporate wrongs done to the Company.

(2) Whether Sakae's oppression claims are properly based on personal wrongs

84 In *Ng Kek Wee*, we briefly considered, albeit in *obiter*, the applicability of s 216 to corporate wrongs as opposed to personal wrongs. There, the plaintiff shareholder held approximately 54% of the shares in the company concerned, while the alleged wrongdoer, who was the managing director of the company, held 15%. The wrongdoer was found to have mismanaged the company's affairs and improperly enriched himself (at [38]–[45]). We nonetheless held that the plaintiff was not entitled to relief under s 216 because it was within its power as the majority shareholder to take control of the company's management (at [55]–[59]). While this was sufficient to dispose of the matter, we also observed that: (a) the plaintiff's complaint appeared to be based on "*corporate wrongs* that could have been pursued … by way of a derivative action under s 216A" [emphasis added]; and (b) the plaintiff was essentially seeking restitution to the company of the amounts that had been misappropriated from it by the wrongdoer (at [71]).

Version No 1: 27 Oct 2020 (22:40 hrs)

85 We further emphasised that s 216 should not be used to "vindicate essentially corporate wrongs" (at [64]) for two broad reasons. First, an overly permissive interpretation of s 216 allowing it to be invoked to vindicate wrongs to a company would be contrary to the legislative scheme, which provided for the commencement of a statutory derivative action on behalf of the company (subject to its own built-in safeguards) under s 216A to remedy such wrongs. Second, permitting an essentially corporate wrong to be pursued by way of an oppression action under s 216 would be an abuse of process as it improperly circumvented the proper plaintiff rule, and might result in the aggrieved shareholder who brought a s 216 action recovering damages at the expense of other similarly affected shareholders, who could otherwise have benefitted too if the action had properly been brought on behalf of the company under s 216A (at [63]–[65]).

86 However, we also recognised in *Ng Kek Wee* that the distinction between personal complaints of oppression and complaints of wrongs against a company was not always clear, and this was compounded by the fact that under s 216, "the concept of commercial unfairness also appears to embrace wrongs done to the company" (at [62]). We then made some observations on the analytical framework that could assist in the delineation of the boundary between personal wrongs and corporate wrongs. First, we referred to the decision of Millett J (as he then was) in the English High Court case of *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 ("*Re Charnley Davies*"), and suggested that a s 216 action was likely to have been properly brought in respect of a personal wrong where the wrongdoer's conduct was relied on "as *evidence* of the manner in which the wrongdoer had conducted the ***company's affairs*** in disregard of the complainant's interest[s] as a minority shareholder and where the complaint cannot be adequately addressed by the remedy provided by law for that wrong"

Version No 1: 27 Oct 2020 (22:40 hrs)

[original emphasis in italics; emphasis added in bold italics] (see *Ng Kek Wee* at [67]–[69]). Second, we referred to the Canadian case of *Pappas v Acan Windows Inc* (1991) 2 BLR (2d) 180 ("*Pappas*"), and suggested that in order for an aggrieved shareholder to succeed in an oppression action, it had to show "something more than the unlawfulness of the defendant's conduct", and further, its injury could not merely reflect the injury suffered by the company (at [70]).

87 In the present case, the CA 87 appellants argue that the wrongs which form the basis of Sakae's oppression claims in Suit 1098 are "essentially corporate wrongs". This is because Sakae sued Andy Ong, Ong Han Boon and Ho for breaching their fiduciary duties to the Company, resulting in the Company being "deprived" of its assets. Sakae's oppression claims, it is submitted, are derivative in nature, and any loss or injury suffered by Sakae is merely reflective of the injury allegedly suffered by the Company. In this regard, the CA 87 appellants argue that since the facts in this case are similar to those in *Ng Kek Wee*, Sakae's oppression claims should be dismissed on the basis that in essence, the wrongs which Sakae complains of are corporate wrongs that cannot be pursued by way of an oppression action. They also contend that Sakae's "real purpose" is to obtain redress for wrongs done to the Company, as is evident from the fact that Suit 1098 essentially revives claims that Sakae had previously made in OS 124, which it initiated under s 216A but later discontinued (see [26] above).

(A) SECTIONS 216 AND 216A COMPARED

88 We think it helpful to begin our analysis by comparing the causes of action under ss 216 and 216A of the Companies Act. Section 216 provides a remedy for a wrong suffered by a member of a company in its personal capacity.

Version No 1: 27 Oct 2020 (22:40 hrs)

An action thereunder is brought by the member in its own name to protect its interests as a member of the company. In contrast, s 216A allows a member of a company, with the court's leave, to bring a derivative action in the name of the company where a wrong is alleged to have been done to the company (that is, a corporate wrong) and the controlling directors refuse to bring an action to remedy that wrong.

89 There are significant differences between s 216 and s 216A. The first lies in the *process* that applies to the action brought under each of these provisions. While leave of the court is required for an action under s 216A to be commenced (see s 216A(2) of the Companies Act), this is unnecessary for an action under s 216. The second lies in the *substance* of the cause of action under each of these sections. The statutory derivative action under s 216A is intended to enable minority shareholders to bring an action in the company's name to right the wrong done to *the company* where those in control of the company are causing harm to the company or are breaching their duties to the company and thus cannot be counted on to cause the company to take steps to protect or advance its interests. The oppression action under s 216, on the other hand, is intended to enable *minority shareholders* to bring an action in their own names to protect themselves from being unfairly prejudiced by majority shareholders who use their dominant power to subject them to commercially unfair treatment.

90 That said, there are, critically, notable similarities between s 216 and s 216A as well. First, as we emphasised in *Ng Kek Wee* (at [63]), acts which are alleged to be oppressive to an individual minority shareholder may often concurrently constitute a wrong to the company (see also Paul L Davies & Sarah Worthington, *Principles of Modern Company Law* (Sweet & Maxwell, 10th Ed, 2016) at para 20-14). To take a typical example, a majority shareholder who is diverting company funds for its own benefit is likely to be committing a wrong

Version No 1: 27 Oct 2020 (22:40 hrs)

against both the company and the minority shareholders if that act affects the interests of the minority shareholders in an unfairly prejudicial manner. Another important way in which ss 216 and 216A may be regarded as being similar is that the remedies available under each of these provisions overlap to some degree. This is a corollary of the breadth of s 216, which allows the plaintiff in an oppression action to obtain remedies that may include but also extend beyond the remedies that are available in a statutory derivative action under s 216A (see s 216(2) of the Companies Act).

91 Notwithstanding these important similarities, it is clear that the two causes of action are ultimately intended to have *distinct* spheres of application. This stems from the need to prevent the improper circumvention of the proper plaintiff rule and the concomitant principle barring the recovery of reflective loss (see *Ng Kek Wee* at [65]). The proper plaintiff rule in *Foss v Harbottle* (1843) 2 Hare 461 provides that in an action to seek redress for a wrong alleged to have been done to a *company*, the proper plaintiff is *prima facie* the company itself (see *Ng Kek Wee* at [61]); in other words, only *the company* can sue for the loss that it has suffered.

92 The reflective loss principle is a corollary to the proper plaintiff rule: see *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 ("*Townsing Henry George*") at [78]. Where the plaintiff shareholder's loss is merely a reflection of the loss suffered by the company which would be made good if the company were able to and did enforce its rights, the proper party to recover that loss is the company and not the shareholder: see *Ng Kek Wee* at [61], citing *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 35 ("*Johnson*") *per* Lord Bingham of Cornhill. The rationale underlying this principle was explained by Lord Millett in *Johnson* (at 62) as follows:

Version No 1: 27 Oct 2020 (22:40 hrs)

> … If the shareholder is allowed to recover in respect of such loss [that is to say, loss which is merely reflective of the loss suffered by the company], then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. …

93 For these reasons, we affirm and reiterate the view which we expressed in *Ng Kek Wee* that s 216 of the Companies Act should not be used to vindicate wrongs which are in substance wrongs committed against a company and which are thus corporate rather than personal in nature. It therefore becomes necessary to confront the difficult task of ascertaining whether an oppression claim is based on a personal wrong or a corporate wrong when it contains features of both types of wrongs.

94 To address this, we develop the analysis that we applied in *Ng Kek Wee*, beginning with a brief survey of the approach taken in other Commonwealth jurisdictions which feature statutory provisions on relief from oppression that are phrased in substantially similar terms as s 216 of our Companies Act.

(B) A SURVEY OF THE APPROACH IN OTHER COMMONWEALTH JURISDICTIONS

95 Section 216 of our Companies Act is based on s 210 of the UK's Companies Act 1948 (c 38) ("the 1948 UK Companies Act"): see cl 181 of the Companies Bill (Bill 58 of 1966), which was subsequently enacted in our Companies Act 1967 (Act 42 of 1967); see also *Ng Kek Wee* at [48]. The oppression remedy in Australia, which is set out in ss 232 and 233 of the Corporations Act 2001 (Cth) ("the 2001 Australian Corporations Act"), is similarly modelled after s 210 of the 1948 UK Companies Act, and the same

Version No 1: 27 Oct 2020 (22:40 hrs)

applies to the equivalent provisions in Hong Kong (s 168A of the Companies Ordinance (Cap 622, 2014) (HK)) and Canada (s 241 of the Canada Business Corporations Act (RSC 1985, c C-44)).

96 While there are differences in the specific statutory language found in these different jurisdictions' provisions, the provisions have "a common purpose … aimed at affording minority shareholders protection against the abuse of majority power" (see *Minority Shareholders' Rights and Remedies* at para 4.004). Further, "the underlying reasons and motivation for the inclusion of the [oppression] remedy are and remain the same": see Pearlie Koh, "A Reconsideration of the Shareholder's Remedy for Oppression in Singapore" (2013) 42(1) Common Law World Review 61 at p 63. It is thus worthwhile undertaking a comparative analysis of foreign jurisprudence which can "shed helpful light on the scope of section 216" (see *Minority Shareholders' Rights and Remedies* at para 4.004).

(I) THE UK AND HONG KONG

97 We consider the jurisprudence in the UK and Hong Kong together since their jurisprudence on this issue has developed along similar lines.

98 We begin with *Re Charnley Davies*, where Millett J emphasised the importance of determining the *true nature* of the plaintiff shareholder's complaint in ascertaining whether the complaint was more appropriately pursued by way of an oppression action or by way of a statutory derivative action (at 784):

> … The very same facts may well found either a derivative action or a s 459 [unfair prejudice] petition [the then UK equivalent of an oppression action under s 216 of our Companies Act]. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two

Version No 1: 27 Oct 2020 (22:40 hrs)

> cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a s 459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they *would not have been content with an order that the respondent make restitution to the company*. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they *wanted to be bought out*. They wanted *relief from mismanagement, not a remedy for misconduct*. [emphasis added]

99 In this passage, the key inquiry is whether the *true nature* of the plaintiff shareholder's complaint pertains to "the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution [in favour of the company]", or whether the plaintiff is in fact seeking "relief from mismanagement, not a remedy for misconduct".

100 Millett J's approach in *Re Charnley Davies* has been applied in Hong Kong. In *In the matter of Re Chime Corporation Limited* (2004) 7 HKCFAR 546 ("*Re Chime*"), Lord Scott of Foscote NPJ, sitting in the Hong Kong Court of Final Appeal, reasoned that it was an abuse of process for a shareholder to use an unfair prejudice petition to circumvent the proper plaintiff rule where the true nature of the complaint was misconduct (to the prejudice of the company) rather than mismanagement (to the prejudice of the shareholder). Where the true nature of the complaint was misconduct and the appropriate remedy was in fact for the benefit of the company, the proper recourse for obtaining the relief sought was by way of a statutory derivative action: see *Re Chime* at [62]–[63]. Just as Millett J did in *Re Charnley Davies*, the court in *Re Chime* focused on identifying what the plaintiff shareholder's precise complaint was and measuring that by reference to the nature of the remedy sought. *Re Chime* has since been applied and affirmed in subsequent Hong Kong cases (see *Re Shun*

Version No 1: 27 Oct 2020 (22:40 hrs)

Tak Holdings Ltd [2009] 5 HKLRD 743 at [30]–[35] and *Waddington Ltd v Chan Chun Hoo Thomas and Others* (2008) 11 HKCFAR 370 at [77]).

101 We note that the distinction between "misconduct" and "mismanagement" has been criticised in Rita Cheung & Jenkin Suen, *Shareholder Rights and Remedies in Hong Kong* (LexisNexis, 2011) as being "artificial and unrealistic as the alleged wrongdoings might not be as clear cut as might be thought" (at para 6-198). It has also been suggested that the approach taken in (among other cases) *Re Charnley Davies* has not been effective in preventing corporate wrongs from being pursued under the guise of an oppression action. As one commentator has observed (see Andrew Keay, "Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006" (2016) 16(1) Journal of Corporate Law Studies 39 at p 64):

> Notwithstanding the approach taken by Millett J and the fact that it is supported in some quarters, it does seem that UK courts have undermined the rules that apply to wrongs perpetrated against companies by permitting the merging of corporate and personal claims. It is to be regretted that the legislature has failed to draw the boundaries between the two kinds of actions, thereby causing some uncertainty. …

102 The overlap between the remedies that may be granted in an oppression action and in a statutory derivative action has been touched on by the Hong Kong courts. In *Re Chime*, the court had to consider whether it had the jurisdiction, in an unfair prejudice petition brought by a shareholder, to order restitution in favour of, or payment of damages or compensation to the company – in short, to grant corporate relief. The court unanimously agreed that it did have such jurisdiction (at [27] and [49]). However, Bokhary PJ cautioned that the circumstances in which corporate relief could properly be granted in an unfair prejudice petition "would in any case of complexity be rare and

Version No 1: 27 Oct 2020 (22:40 hrs)

exceptional" (at [27]), while Lord Scott thought that corporate relief should generally *not* be ordered in unfair prejudice proceedings "unless it is clear at the pleadings stage that a determination of the amount, if any, of the director's liability at law to the company can be conveniently dealt with [at] the hearing of the petition" (at [62]).

103 The limitation suggested by Lord Scott was not, however, subsequently picked up in the decision of the Judicial Committee of the Privy Council (on appeal from Jersey) in *Gamlestaden Fastigheter AB v Baltic Partners Ltd and others* [2008] 1 BCLC 468 ("*Gamlestaden*"), which unreservedly affirmed the holding in *Re Chime* that the court had the jurisdiction to grant corporate relief in a shareholder's unfair prejudice petition: see Victor Joffe QC *et al*, *Minority Shareholders: Law, Practice, Procedure* (Oxford University Press, 5th Ed, 2015) at para 6.252.

(II) AUSTRALIA

104 The need to prevent the oppression remedy from being deployed to vindicate *corporate* wrongs has likewise featured in Australian case law.

105 In *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359, the New South Wales Court of Appeal acknowledged that some parameters had to be established for oppression actions brought under s 232 of the 2001 Australian Corporations Act because the provision had a potentially wide scope of operation and should not be allowed to subvert established constraints on the availability of the statutory derivative action (at [199]). However, the court provided no further assistance as to how such parameters might be drawn up, and arguably blurred the line between personal wrongs and corporate wrongs by observing as follows (at [214]):

Version No 1: 27 Oct 2020 (22:40 hrs)

> Among the duties of a director of a corporation is the obligation to exercise powers in good faith in the best interests of the corporation and for a proper purpose: s 181. There is a duty not to exercise a power so as to cause detriment to the corporation: ss 182 and 183. It is likely that conduct in contravention of these provisions could also constitute conduct contrary to the interests of the members as a whole, within s 232(d). *It is* ***not tenable*** *that there be a bright line separating cases involving misfeasance by directors from cases involving oppression.* Nor is it in dispute that there was an obligation of co-operation between the two joint directors, such co-operation being necessary to ensure that anticipated benefits enured to the company and its shareholders from the efficient operation of its business. In such a case, a failure to co-operate may be conduct of a company's affairs contrary to the interests of the members as a whole, or conduct oppressive to a member in whatever capacity, and may thus fall within s 232. It is true that a failure to co-operate may result in deadlock: but it is more than that. If it is conduct the legal responsibility for which can be sheeted home to one party rather than the other, it can (though it need not) constitute oppression in one of the senses reflected in s 232(d) and (e). [emphasis added in italics and bold italics]

106 In the subsequent decision of the Queensland Supreme Court in *LPD Holdings (Aust) Pty Ltd v Phillips* [2013] QSC 225 ("*LPD Holdings*"), Philip McMurdo J similarly acknowledged that many cases of wrongdoing by those in control of a company would involve conduct of a "dual character", namely, wrongs actionable either by way of a statutory derivative action or by way of an oppression action (at [40]–[41]). With respect to the relationship between ss 232–233 and ss 236–237 of the 2001 Australian Corporations Act, which provide for an oppression action and a statutory derivative action respectively, he observed as follows:

> 42 Because there will be many cases where the relevant conduct is both oppressive or unfairly prejudicial and actionable by the company, the submissions for the defendants [namely, that the court's broad powers under s 233 must be qualified by excluding a power to grant relief for acts or omissions which could fall under s 236] would significantly confine the beneficial operation of s 233. On their submissions, where there is conduct of that kind, the operation of s 233 is ousted …

Version No 1: 27 Oct 2020 (22:40 hrs)

> 43 I am unable to accept that the scope of the powers conferred by s 233 has become so limited by the introduction of s 236 and s 237, as the defendants suggest. But I do accept that those other provisions, and the means which they provide for the prosecution of proceedings in the company's name, could be relevant to the exercise of the court's discretion under s 233 in some cases. *In particular, the court should be mindful of the potential for the misuse of proceedings which are purportedly brought under s 233* ***but for relief which, in the circumstances, could not be warranted in order to prevent or remedy the consequences of conduct of a kind described in s 232***. And of course the availability of s 236 proceedings will be relevant in the discretionary consideration of whether there should be an order made under s 233(1)(f) [for the company to institute, prosecute, defend or discontinue specified proceedings].
>
> [emphasis added in italics and bold italics]

107 It would appear that the Australian courts, in determining whether there is any possible abuse of process, will consider whether the oppressive conduct complained of requires a remedy under the oppression provisions of the 2001 Australian Corporations Act in order to bring that conduct to an end. This is broadly in line with Millett J's approach in *Re Charnley Davies* of matching the relief sought to the appropriate form of action (see [86] and [98] above).

(III) CANADA

108 In the Newfoundland Supreme Court case of *Pappas*, L D Barry J relied on the notion of "incidental injury" to ascertain whether there was a personal wrong that was distinct from a corporate wrong. He held that if the plaintiff shareholder's injury was not distinct from the company's injury but merely incidental thereto, the cause of action would be regarded as being derivative in nature (at [104]). He further stated (at [110]) that in cases which featured both personal wrongs and corporate wrongs, the court should exercise its discretion to decide whether the plaintiff shareholder's action should be allowed to proceed without the court's leave (such leave being required for a statutory

Version No 1: 27 Oct 2020 (22:40 hrs)

derivative action). In relation to this discretion, Barry J made the following observations (at [110]–[111]):

> 110 … [In cases involving both personal wrongs and corporate wrongs], it is for the Court to determine whether … "the Statement of Claim is so saturated by derivative claims that it cannot be allowed to stand" because leave to commence a derivative action has not been obtained, or … whether the derivative claims and the personal claims are "so intermingled" and "inextricably woven" that the action should not be allowed to proceed. … If the cause of action is one of an essentially derivative character, then, in my opinion, in order to give any meaning to the derivative claim sections of the Corporations Act [(SN 1986, c 12)], it is necessary to require that a Claimant first obtain leave to commence the action. That is particularly appropriate, I believe, where, as here, there is no intervening limitation period and no other reason given as to why leave was not first sought. …
>
> 111 It does not necessarily follow that, because derivative claims are included with claims for oppression remedies in an action commenced without leave, that the action should be dismissed with respect to all claims. It may be that the personal claims can be so clearly separated from the derivative claims as to permit their continuance while discontinuing the derivative claims. If, however, it is not possible to clearly separate the personal and derivative claims, then I believe that both those claims should be discontinued, where no leave has been obtained, unless the derivative claims are merely incidental to and clearly of secondary importance to the personal claims. Where a Court will find the proper balance cannot, in my opinion, be predicted. I believe that it will be necessary to decide each case on its own facts. …

109 In *Malata Group (HK) Ltd v Jung* (2008) 89 OR (3d) 36 ("*Malata*"), the Ontario Court of Appeal similarly acknowledged that "a bright-line distinction" could not be drawn between claims which could be advanced under the statutory derivative action provisions and those which could be brought under the oppression provisions (at [26]), and that the claims falling under the two categories were "not mutually exclusive" (at [30]). Notably, the court in *Malata* observed, in relation to disputes involving "closely held companies with relatively few shareholders" (namely, quasi-partnerships), that there was less

Version No 1: 27 Oct 2020 (22:40 hrs)

reason to insist on the plaintiff shareholder seeking the court's leave given that the small number of shareholders involved would tend to minimise the risk of frivolous lawsuits being brought against the company (at [39]), presumably because there would be a smaller pool of potential plaintiffs in such a context.

110 More recently, the Ontario Court of Appeal faced a similar issue in *Rea v Wildeboer* (2015) 126 OR (3d) 178 ("*Wildeboer*"), where the plaintiff shareholder ("Mr Rea") was a former director and minority shareholder of a successful public corporation ("Martinrea"). Mr Rea claimed that a group of directors and officers had misappropriated large sums of Martinrea's funds for their personal benefit. He sought relief under the oppression provisions and asked for restitution of the stolen funds in favour of Martinrea. On the issue of whether Mr Rea's oppression claim was the appropriate cause of action, Blair JA (with whom Weiler and Sharpe JJA agreed) held that it was not because Mr Rea had not suffered any personal wrong that was distinct from the wrongs done to Martinrea. The court made several observations on what amounted to a personal wrong. In its view, "the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole" (at [33]), and the alleged wrongs must "*directly* [affect] the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants" [emphasis added] (at [29]). Blair JA explained the court's reasoning as follows (at [35]):

> That the harm must impact the interests of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole – is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create *two* remedies, with two different rationales and two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy. [emphasis in original]

Version No 1: 27 Oct 2020 (22:40 hrs)

111 The decision in *Wildeboer* was subsequently cited with approval by the British Columbia Court of Appeal in *Jaguar Financial Corporation v Alternative Earth Resources Inc and others* (2016) 86 BCLR (5th) 317 (at [186]), where it was held that the wrongs complained of by the plaintiff shareholder in an oppression action "cannot withstand scrutiny" unless the plaintiff proved that "it suffered a distinct harm [from] that suffered by all shareholders" (at [187]).

112 In *Wildeboer*, the court also echoed the views expressed in *Malata* (see [109] above), noting that most of the overlap cases which featured both personal wrongs and corporate wrongs would "involve small closely held corporations, not public companies" (see *Wildeboer* at [29]). Unlike the harm done in *Wildeboer* to Martinrea, which was a large public corporation, in *Malata*, the misappropriation of corporate funds *directly* affected a small, closely-held corporation and the minority shareholder, who was also a major creditor of the corporation (see *Wildeboer* at [31]). The court in *Wildeboer* was of the view that because the harm to the shareholder-creditor in *Malata* was personalised and could not be confined to harm that was an *indirect* result of the harm to the corporation, the oppression action was rightly found to be appropriate (see *Wildeboer* at [40]).

113 At first blush, the decision in *Wildeboer* that *indirect* wrongs to a shareholder would not generally afford grounds for an oppression action might appear to be at odds with the following recommendation of the Jenkins Committee (see para 206 of *Report of the Company Law Committee* (Cmnd 1749, 1962) ("the Jenkins Report"), which was cited in *Ng Kek Wee* at [62]):

> In addition to these direct wrongs to the minority, there is the type of case in which a wrong is done to the company itself and

Version No 1: 27 Oct 2020 (22:40 hrs)

> the control vested in the majority is wrongfully used to prevent action being taken against the wrongdoer. In such a case the minority is *indirectly wronged*. [emphasis added]

114 This extract from the Jenkins Report indicates that the oppression action is intended to provide shareholders with relief for *indirect wrongs* (in addition to direct wrongs), contrary to the reasoning in *Wildeboer*. However, it should be noted that at the time the Jenkins Report was issued, the statutory derivative action did not exist in the UK. Singapore only introduced this action in 1993, while the UK introduced its equivalent in 2006. The statutory derivative action, which is designed to cater to indirect wrongs that harm the shareholders of a company equally, would therefore generally be the more appropriate means of seeking redress for indirect wrongs to a shareholder.

(C) OUR ANALYTICAL FRAMEWORK

115 Taking into account the considerations articulated by the courts in the various authorities surveyed above, we now set out the analytical framework which, in our judgment, should guide the court in a situation where an oppression action features both personal wrongs and corporate wrongs. It is helpful to begin with some preliminary observations. First, in common with what has been pointed out in a number of the above precedents, we note that the distinction between a personal wrong and a corporate wrong will not always be clear. We can expect many overlap cases where it could plausibly be argued that what appears to be a corporate wrong is also in some way a personal wrong. Second, at least in more recent times, the legislature has provided a separate and distinct remedy for corporate wrongs. Older cases that have dealt with such wrongs under the oppression framework should therefore be viewed with circumspection. Third, insofar as the oppression provisions can be invoked without the court's leave and, if successfully invoked, can result in the grant of a much broader range of remedies than those available in a statutory derivative

Version No 1: 27 Oct 2020 (22:40 hrs)

action, one might fairly conclude that the real concern in overlap cases is with plaintiffs improperly seeking to pursue an oppression action when a possible remedy under a statutory derivative action might not only be available but also be more appropriate. The latter, moreover, comes with its own screening device of requiring the court's leave, such that one need be less concerned, if at all, with its improper invocation. In the circumstances, it seems to us that the key question to be addressed in overlap cases may be framed in these terms: is a plaintiff who brings an oppression action under s 216, instead of seeking leave to commence a statutory derivative action under s 216A, abusing the process?

116 In answering that question, we consider it appropriate to remind ourselves that while the legislature has not seen fit to clearly demarcate the boundary between the two types of actions, what can be deduced, in view of the similarities and differences between them as outlined earlier (see [89]–[90] above), is that in the endeavour to appropriately delineate that boundary, it will be relevant to have regard in particular to the kind of *remedy* sought, these being wider in one type of action than the other, as well as the kind of *injury* that is complained of and for which the remedy is sought. Having regard to these considerations, it is unsurprising that in many of the cases reviewed above, the courts sought to identify the dividing line between oppression actions and statutory derivative actions by examining the remedy sought and the injury complained of. In our judgment, the appropriate analytical framework to ascertain whether a claim that is being pursued under s 216 is an abuse of process is as follows:

(a) **Injury**

(i) What is the real injury that the plaintiff seeks to vindicate?

Version No 1: 27 Oct 2020 (22:40 hrs)

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) **Remedy**

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

(ii) Is it a remedy that can only be obtained under s 216?

117 As we will explain shortly, these two pairs of questions encapsulate the key aspects of the various approaches taken in the precedents which we examined above. The focus on the essential remedy sought and its relation to the real injury which the plaintiff shareholder complains of picks up the approach that was first espoused in *Re Charnley Davies*. In our judgment, notwithstanding the criticisms that have been levelled at the focus on the essential remedy sought, this remains a very important part of the inquiry. After all, it is in the remedies that we find one of the key differences between the two types of action since, unlike the position under s 216, remedies such as a winding-up order or a share buyout order are not available in an action under s 216A. If the essential remedy sought is one that can only be obtained in an action under s 216, then that would tend to be a strong indicator that the action brought under that provision is *not* an abuse of process (see also *Minority Shareholders' Rights and Remedies* at paras 4.121 and 4.225–4.227).

118 We note that where the court finds that oppression has been established, it has "a wide discretion" to fashion such relief as it considers just: see *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell Asia, Revised 3rd Ed, 2009) at para 5.96. This extends to making orders for the errant

Version No 1: 27 Oct 2020 (22:40 hrs)

shareholders or directors of the company concerned to make restitution to the company of moneys that they have wrongfully diverted from the company: see *Kumagai Gumi Co Ltd v Zenecon Pte Ltd and others and other appeals* [1995] 2 SLR(R) 304 ("*Kumagai Gumi*") at [71]–[75], *Lowe v Fahey and others* [1996] 1 BCLC 262 at 268 and *Low Peng Boon v Low Janie and others and other appeals* [1999] 1 SLR(R) 337 ("*Low Peng Boon*") at [60]. The court may thus grant relief to the company in a s 216 action even though the same relief would happen to be also available in a statutory derivative action: see *Gamlestaden* at [28]–[29].

119 That said, we think it appropriate to highlight the words of caution of Bokhary PJ and Lord Scott in *Re Chime* (see [102] above) against too readily granting what is in essence *corporate* relief in an oppression action. This is why it is necessary to focus on the ***essential*** *remedy* that the plaintiff is seeking. In our judgment, an oppression action under s 216 should generally not be permitted where the essential (or, as the case may be, the sole) remedy sought is a remedy for *the company* (such as a restitutionary order in favour of the company). Where that is the case, the presumptively appropriate remedy would be the statutory derivative action under s 216A. In such a case, it will also be evident that the plaintiff's primary purpose in bringing the action is not to obtain a remedy that brings to an end the situation by which it has been prejudiced or harmed as a shareholder. In contrast, a plaintiff who seeks an essential remedy directed at bringing to an end the oppressive conduct which it has been subjected to as a shareholder will likely be permitted to pursue its claim by way of an oppression action under s 216 even if, as part of that essential remedy, it also seeks remedies in favour of the company such as restitutionary orders. This will readily be seen to be the case where the remedies sought by the plaintiff, such

Version No 1: 27 Oct 2020 (22:40 hrs)

as a share buyout or a winding-up order, will be impacted by suitable restitutionary orders in favour of the company.

120 At the same time, we do not think the question of whether an action under s 216 amounts to an abuse of process can be resolved by focusing solely on the essential remedy sought by the plaintiff. In this regard, the pair of questions directed at the real injury that the plaintiff seeks to vindicate (see [116(a)(i)]–[116(a)(ii)] above) draws inspiration from the Canadian cases which we considered earlier. To properly invoke s 216, the plaintiff would have to identify the real injury which it has suffered and establish that that injury does amount to oppressive conduct against it as a shareholder. In this regard, it will be relevant to examine how the real injury which the plaintiff suffers as a *shareholder* is distinct from and not merely incidental to the injury which the *company* suffers. This will also have to be examined in the context of the essential remedy which the plaintiff is seeking and whether that remedy is in fact directed at the real injury which the plaintiff suffers as a shareholder. It follows from this that the mere fact that a given instance of unlawful conduct which is relied on by the plaintiff could also have formed the basis of a statutory derivative action pursued in the company's name will not in itself be a bar to an oppression action under s 216: see *Ideal Design* at [86]; see also generally *In re A Company (No 005287 of 1985)* [1986] 1 WLR 281, *John Farquhar Anderson v Ruraigh Hogg* [2002] SC 190 and *LPD Holdings*. The crucial question in such a case is whether the plaintiff shareholder can demonstrate an injury to it that is distinct from the wrong done to the company.

121 In our view, as a practical matter, the application of the two pairs of questions pertaining to injury and remedy respectively will generally exclude recourse to oppression actions in cases involving publicly or widely-held companies because either the essential remedy sought or the real injury

Version No 1: 27 Oct 2020 (22:40 hrs)

complained of will quite likely not bring the case within s 216. However, it is not necessary for us to lay down a rule to this effect in order to dispose of the Main Appeals and we do not do so.

122 Finally, with regard to any concern that the rationale underlying the proper plaintiff rule and the reflective loss principle might be undermined by the analytical framework which we have set out at [116] above, in our judgment, where an action under s 216 gives rise to a risk of double recovery or prejudice to the creditors or shareholders of the company concerned, this should be dealt with by crafting the orders made in suitable terms to avoid such a risk. This was alluded to in *Ideal Design*, where Coomaraswamy J suggested that the court should consider whether the policy concerns underlying the principle barring the recovery of reflective loss would be contravened by permitting a shareholder to pursue an action for personal loss (see *Ideal Design* at [89] and *Hengwell Development Pte Ltd v Thing Chiang Ching and others* [2002] 2 SLR(R) 454 at [22]; see also, generally, Pearlie Koh, "The Shareholder's Personal Claim: Allowing Recovery for Reflective Losses" (2011) 23 SAcLJ 863). This approach finds support in *Townsing Henry George*, where we dealt with a claim relating to a director's breach of duty that resulted in loss to the company and a diminution in the value of the plaintiff's shares. There, we suggested (at [85]–[86]) that the plaintiff would not have contravened the reflective loss principle if it had adduced evidence or procured an undertaking from other interested parties to satisfy the court that there was no danger of double recovery.

(D) APPLICATION OF THE ANALYTICAL FRAMEWORK TO THE PRESENT FACTS

123 We turn now to apply the analytical framework laid down above to the facts of the present case. First, we note the contention by the CA 87 appellants that because Sakae had earlier commenced OS 124 under s 216A but then

Version No 1: 27 Oct 2020 (22:40 hrs)

discontinued the action, it should be regarded as having accepted that it had essentially suffered only corporate wrongs (see [87] above). We are satisfied that this cannot possibly be regarded as being dispositive of Sakae's oppression claims in Suit 1098. Whether Sakae is indeed entitled on the present facts to seek relief by pursuing an oppression action under s 216 is a question that should be answered according to the law and not based on Sakae's prior conduct in these proceedings, and we therefore address this question on the basis of the analytical framework outlined above.

124 Applying that analytical framework to the present facts, it is plain to us that Sakae's oppression claims in Suit 1098 pertain to personal wrongs committed against it and hence are claims that were properly pursued by way of an action under s 216 as opposed to a statutory derivative action under s 216A.

125 Considering, first, the question of *injury*, we are satisfied that the real injury which Sakae seeks to vindicate is the injury to its investment in the joint venture and the breach of its legitimate expectations as to how the Company's affairs generally and its financial investment in the Company in particular would be managed. In the Main Judgment, the Judge carefully considered each of the impugned transactions to assess how Sakae was personally affected by them. In respect of all the impugned transactions (except Transaction 5), the Judge found that: (a) the appellants had carried out the transactions in breach of Sakae's rights that had been carefully negotiated for in the JVA and/or other documents executed at the inception of the parties' joint venture; and (b) sham documents had been created and used to conceal the transactions in circumstances where Sakae would otherwise not have agreed to them. We agree with the Judge's assessment of the evidence, save as to Ho's involvement in the matter, which we elaborate on further below.

Version No 1: 27 Oct 2020 (22:40 hrs)

126 In our view, the facts of the present case, taken as a whole, present a picture of *systemic* abuse by Andy Ong, the key figure behind all the impugned transactions, and Ong Han Boon in relation to the management of the Company's affairs. They misappropriated large sums from the Company without Sakae's knowledge. Sakae had entered into the joint venture as an investor and had partially funded the joint venture, and it would clearly have been its legitimate expectation that its funds would not be mismanaged, much less siphoned away in the way that was done by Andy Ong and Ong Han Boon. As is evident from the numerous sham documents that were fabricated, Andy Ong and Ong Han Boon also engaged in fraudulent schemes to mislead Sakae and Foo and conceal the true nature of the transactions from them.

127 While the aforesaid conduct also constituted a wrong against the Company in the sense that assets belonging to the Company were misappropriated at Andy Ong's initiative, it *separately* amounted to a *distinct* personal wrong against Sakae, a minority shareholder who had let Andy Ong and his team manage the Company's affairs because of the long-standing friendship between Andy Ong and Foo, the chairman of Sakae's board. Andy Ong knew that Foo (and by extension, Sakae) trusted him and deliberately took advantage of that trust, using the Company as a vehicle through which he cheated Sakae. The result of this was that there were systemic abuses which benefitted one group of shareholders (namely, GREIC and, subsequently, ERC Holdings as well, both of which were controlled by Andy Ong at the material time) at the expense of the other (namely, Sakae). The clearest instance of this was when Andy Ong took $8m from the Company through Transaction 7, diverted the money to ERC Holdings for its purchase of more than 8 million of the Company's shares (which purchase formed part of Transaction 6) and then (likewise in relation to Transaction 6) convinced Sakae to subscribe for an

Version No 1: 27 Oct 2020 (22:40 hrs)

additional 2,641,975 shares in the Company. While it might have been debatable in respect of at least some of the impugned transactions whether any single one of them would have sufficed as a basis to grant Sakae relief under s 216, it is indisputable that these transactions taken together, coupled with the systemic nature of Andy Ong's abuse, occasioned serious commercial unfairness to Sakae.

128 Turning, next, to the question of *remedy*, the essential remedy sought by Sakae is to exit the JVA. In its statement of claim in Suit 1098, Sakae prayed for either a winding up of the Company or a buyout of its shares in the Company. In our view, either remedy offers the only way in which Sakae can exit the joint venture with as little loss as possible and thereby meaningfully vindicate the real injury that it has suffered, namely, the misuse of its investment in the Company and the breach of its expectations as to how the Company would be managed. Further, these remedies are only available in an action under s 216. Although Sakae did additionally pray for relief in the form of restitutionary orders against Andy Ong, Ong Han Boon and Ho, these orders do not constitute the essential remedy sought. Rather, these orders are necessary insofar as they help to ensure a fair value exit for Sakae, in that any restitution received would go directly to the Company, such that upon its winding up, all its shareholders (including Sakae) would receive the appropriate and due realisation of their investment in the Company. This outcome would also obviate the risk of multiple claims being brought against the appellants as well as the risk of prejudice to the shareholders and creditors of the Company. Seen in this light, and given especially Sakae's desire to wind up the Company, any benefit that accrues to the Company from Sakae's oppression action is purely incidental to the essential remedy which Sakae seeks, which is to bring to an end the matters that it complains of on the fairest terms possible.

Version No 1: 27 Oct 2020 (22:40 hrs)

129 We are therefore satisfied that it was not an abuse of process for Sakae to pursue its oppression claims by way of an action under s 216, and we turn next to consider the respective appellants' liability for these claims.

(3) The respective appellants' liability for oppression

130 In our judgment, the Judge rightly found that Sakae's oppression claims were made out in respect of the actions of Andy Ong and Ong Han Boon as directors of the Company, but, with respect, she erred in finding that Ho too was liable for oppression.

(A) ANDY ONG AND ONG HAN BOON

131 Where Andy Ong and Ong Han Boon are concerned, given their deliberate involvement in the transactions recounted above with full knowledge of the true effect of the transactions, it is clear to us that they were rightly found by the Judge to be liable for oppression. It bears noting that no arguments are made by them in CA 87 to challenge the Judge's findings on their involvement in each of the impugned transactions. We therefore need not say more about their liability.

(B) HO

132 However, we do not think Sakae's oppression claims against Ho are made out. In our judgment, where Ho is concerned, the evidence only supports a finding that he acted in breach of the duty of care, skill and diligence which he owed the Company. Sakae did not, however, plead this particular breach of duty in its statement of claim in Suit 1098; instead, it only pleaded that Ho acted in breach of his fiduciary duties to the Company. Sakae's oppression claims against Ho must therefore necessarily fail because its pleaded case was not made out. Further, even if we were to overlook Sakae's failure to plead particulars of

Version No 1: 27 Oct 2020 (22:40 hrs)

the actual breach of duty that Ho could be found to have committed (namely, breach of the duty of care, skill and diligence), we do not in any event think that this breach was sufficient to amount to commercial unfairness to Sakae on the facts of this case. We therefore allow Ho's appeal in CA 86.

133 Before we explain our reasons for so deciding, we first point out that it is Ho's conduct in relation to only Transactions 3, 4 and 7 which is relevant to our analysis. This is because the Judge made payment orders against Ho only in respect of these three transactions (see [41] above). Although she held that Ho was also in breach of his fiduciary duties to the Company in respect of Transactions 1(b), 2 and 5, she ultimately did not make any adverse orders against him in relation to those transactions because: (a) for Transaction 1(b), Sakae sought a declaration that the TPAP was void, which the Judge declined to grant; (b) for Transaction 2, the Judge found that Ho's actions were not oppressive to Sakae as they had no real impact on the transaction itself but were simply undertaken in order to disguise Andy Ong's involvement in the transaction; and (c) for Transaction 5, oppression was not made out (see, respectively, [42], [37(c)] and [37(f)] above).

(I) WHETHER HO BREACHED HIS FIDUCIARY DUTIES TO THE COMPANY

134 Section 157(1) of the Companies Act provides that "[a] director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office". The duty under s 157(1) to "act honestly" enshrines in statute a director's common law duty to act *bona fide* in the best interests of the company: see *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [35] and *Townsing Henry George* at [59]. In contrast, the duty under s 157(1) to "use reasonable diligence in the discharge of the duties of [a director's] office" encapsulates a director's separate common law duty to

Version No 1: 27 Oct 2020 (22:40 hrs)

exercise due care, skill and diligence: see *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 ("*Lim Weng Kee*") at [22] and *Falmac Ltd v Cheng Ji Lai Charlie* [2013] SGHC 113 at [65]. These two duties are "conceptually distinct" and are "different aspects of a director's bundle of duties even though they may overlap on certain facts": see *Lim Weng Kee* at [32].

135 Although a company director is a quintessential example of a fiduciary (see *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134), not all the duties which he owes his company are fiduciary duties. Fiduciary duties in the classic sense encompass the two distinct rules proscribing a fiduciary from making a profit out of his fiduciary position (namely, the no-profit rule) and putting himself in a position where his own interests and his duty to his principal are in conflict (namely, the no-conflict rule): see *Bray v Ford* [1896] AC 44 and *Chan v Zacharia* (1984) 154 CLR 178. Although conceptually distinct, these two rules share a common foundation in a director's duty of loyalty to his company. The duty of care, skill and diligence is not a fiduciary duty because it is not imposed to exact loyalty from a director, and accordingly does not encompass either of the two aforementioned rules that are the hallmarks of a fiduciary obligation: see Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 9.097. As Millett LJ (as he then was) aptly put it in *Bristol and West Building Society v Mothew* [1998] Ch 1 (at 18):

> … Breach of fiduciary obligation … connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

136 The expectations of a director in respect of his duty of care, skill and diligence were well summarised by Kannan Ramesh JC (as he then was) in *Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and another v Lim Say Wan and another* [2017] 3 SLR 839 as follows:

Version No 1: 27 Oct 2020 (22:40 hrs)

> 43 … The law further draws no distinction between the types of duties owed by different categories of directors – nominee directors … owe the same duties to a company as any other director (see *eg*, *W&P Piling Pte Ltd v Chew Yin What* [2007] 4 SLR(R) 218 at [80]).
>
> 44 The standard of care and diligence owed by a director, however, is not fixed and is a continuum depending on various factors such as the individual's role in the company, the type of decision being made, and the size and the business of the company. The standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience, and will instead be raised if he held himself out to possess or in fact possesses some special knowledge or experience (see *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 at [28]; and *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 at [42]). Given the disparate nature of companies and the varying degrees of complexity of their operations, the law does not expect homogeneity in the extent of knowledge and skill of every director.

137 Ultimately, all directors, whether engaged in an executive or non-executive capacity, are subject to a minimum objective standard of care which entails the obligation to take reasonable steps to place oneself in a position to guide and monitor the management of the company: see *Daniels v Anderson* (1995) 16 ACSR 607 at 664. As stated by Pollock J in *John J Francis and others v United Jersey Bank and others* 432 A 2d 814 (1981) at 821:

> … Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect. …

138 In the present case, while Ho's conduct in relation to Transactions 3, 4 and 7 was an evident breach of his duty of care, skill and diligence, this does not mean that Ho therefore also breached his fiduciary duties to the Company. To explain this point, we turn to the Judge's specific findings in respect of Ho for each of these three transactions.

Version No 1: 27 Oct 2020 (22:40 hrs)

139 In relation to Transaction 3, the Judge made the following findings in the Main Judgment (at [128]):

> As for Mr Ho, it is clear from the evidence that *he signed the Lease Agreement on [Andy] 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 [Andy] 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 [Andy] 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. [emphasis added]

140 We find ourselves unable to accept the conclusion stated in the last sentence of this extract because the findings of fact made in relation to Ho are simply insufficient to support the conclusion that he was in breach of his *fiduciary* duties to the Company. The fact that Ho was *negligent* in failing to make the necessary inquiries to satisfy himself that signing the Lease Agreement was in the Company's interests and failing to inquire about the terms of that agreement does not, in and of itself, make him *dishonest*.

141 As for Transaction 4, the Judge found as follows in respect of Ho in the Main Judgment (at [145]):

> I find clear breaches of fiduciary duties on the part of [Andy] Ong and Mr Ho in relation to the Consultancy Agreement. It is apparent from Mr Ho's testimony that *he had acted under [Andy] Ong's directions the entire time. He was content to rely on [Andy] 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 [Andy] Ong to ensure that the transactions were in order based on the "Established Norm" …, this is an argument I reject. In addition, given that [Andy] 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

Version No 1: 27 Oct 2020 (22:40 hrs)

> the Company's board even though [Andy] Ong had an obligation to do so. It seems to me that *Mr Ho, by merely doing [Andy] Ong's bidding the entire time without independent inquiry*, had in fact preferred [Andy] Ong's interests over those of the Company. Therefore, considering the evidence as a whole, I find that [Andy] 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 [Andy] Ong's instructions without conducting proper inquiries, had clearly breached the fiduciary duties which they owed to the Company. [emphasis added]

142 Again, we find ourselves unable to agree with the conclusion that Ho was in breach of his fiduciary duties because he "had acted under [Andy] Ong's directions the entire time" and "was content to rely on [Andy] Ong's explanation of the Consultancy Agreement without verifying whether committing the Company to the obligations thereunder was truly in its interest[s]". Such conduct would again indicate Ho's lack of diligence, but it does not show dishonesty on his part. Also, while the Judge was correct to reject Ho's defence that he should be excused because he was at all times acting in accordance with the Established Norm, she was, with respect, wrong to then find on this basis that Ho had breached his fiduciary duties to the Company. Rather, all that the rejection of the Established Norm defence meant was that Ho was not entitled to claim that he should be excused of *all* liability; and in our judgment, he could have been found liable for breaching his duty of care, skill and diligence to the Company if this had been properly pleaded. But, as we have noted, Sakae did not plead the breach of this particular duty, and in any event, such a breach does not amount to a breach by Ho of his fiduciary duties.

143 Finally, in relation to Transaction 7, the Judge found that Ho breached his fiduciary duties to the Company in signing the PMA because he must have known, when signing that agreement, that it was being backdated to 4 May 2012 for dubious reasons (see the Main Judgment at [261]). Notably, the Judge

Version No 1: 27 Oct 2020 (22:40 hrs)

disbelieved Ho's evidence that Andy Ong had told him that Foo had agreed to the PMA and the payment of $8m to Andy Ong. This finding was critical because Ho would have had every reason to believe Andy Ong *if* the latter had indeed told him that Foo had given the PMA his blessings since, as noted by the Judge in the Main Judgment, Ho was so "accustomed to acting on [Andy] Ong's instructions in the management of the Company" that he adhered to Andy Ong's directions "to the point of unquestioning deference" (at [42]).

144 On balance, we are unable to agree with the Judge that Ho acted in breach of his fiduciary duties to the Company in signing the PMA. Although we do not disagree with the Judge's inference that Ho must have known, when signing the PMA, that it was being backdated, we do not think that this necessarily leads to the inference that he was actuated by dishonest or fraudulent motives in signing that agreement. In this regard, the decision in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 is pertinent. There, Chan Seng Onn J rejected the submission that the backdating of documents was always objectionable, and observed that such backdating might sometimes be done in the interests of commercial expediency (at [118]). As a matter of principle, this must be correct; it is trite that allegations of dishonesty or fraud should only be accepted if they are supported by sufficiently cogent evidence. Hence, insofar as the Judge concluded that Ho was acting dishonestly simply because he signed the PMA despite knowing it to be backdated, that finding cannot stand. Aside from this, in our judgment, the Judge also had little basis to reject Ho's evidence as to what Andy Ong had told him regarding the PMA. The Judge rejected Ho's account without the benefit of Andy Ong's evidence on the events surrounding the signing of the PMA since the latter did not testify, given his "no case to answer" submission. The contention that Ho was acting dishonestly in signing

Version No 1: 27 Oct 2020 (22:40 hrs)

the PMA with the knowledge that it was backdated was also never put to Ho in cross-examination by both Sakae and Foo at the trial. We accordingly conclude that Ho was once again negligent rather than dishonest in signing the PMA despite knowing that it was backdated.

145 To summarise, the evidence reveals that Ho relied heavily on Andy Ong in acting as he did in relation to Transactions 3, 4 and 7, and this points to a failure on his part to take reasonable steps to monitor the management of the Company. Even though Ho was only a non-executive director of the Company; he should not have unthinkingly acted in accordance with Andy Ong's directions, and he was therefore in breach of his duty of care, skill and diligence. But, for the reasons explained above, the evidence does not show that he also acted in breach of his fiduciary duties to the Company.

146 We pointed out earlier (at [132] above) that Sakae did not plead particulars of the actual breach of duty that Ho could be found to have committed (namely, breach of the duty of care, skill and diligence), and instead merely pleaded the breach of Ho's fiduciary duties to the Company. Be that as it may, for completeness, we turn now to the question of whether Ho's breach of his duty of care, skill and diligence (if this had been properly pleaded) could have supported Sakae's oppression claims against him.

(II) WHETHER HO'S BREACH OF HIS DUTY OF CARE, SKILL AND DILIGENCE COULD HAVE AMOUNTED TO OPPRESSION

147 It can be seen from the above analysis of Ho's conduct in relation to Transactions 3, 4 and 7 that Ho's breach of his duty of care, skill and diligence consisted, in essence, of his negligence in monitoring the management of the Company's affairs. The general rule as to when negligent management of a company may amount to oppressive conduct has been considered in a series of

Version No 1: 27 Oct 2020 (22:40 hrs)

English cases. In *Re Elgindata Ltd* [1991] BCLC 959 ("*Re Elgindata*"), Warner J held that "in an appropriate case it is open to the court to find that *serious mismanagement* of a company's business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders", but "the court will *normally be very reluctant* to accept that managerial decisions can amount to unfairly prejudicial conduct" [emphasis added] (at 993). Warner J explained that his conclusion rested on two principal considerations: first, it was in general not for the court to resolve disagreements arising out of whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or whether a particular proposal relating to the conduct of the company's business was commercially sound; second, at least presumptively, there should be no finding of unfairness to a shareholder if the quality of a company's management turned out to be poor because a shareholder acquired shares in a company knowing that their value would depend in some measure on the competence of the company's management and so accepted the risk that the company's management might turn out not to be of the highest quality (at 994). We consider Warner J's view to be sound in principle, and see no reason not to apply it here.

148 In *Re Elgindata*, the plaintiff, who was a minority shareholder and non-executive director of the company in question, brought a petition under s 459 of the Companies Act 1985 (c 6) (UK) ("the 1985 UK Companies Act"), making the following broad allegations: (a) the plaintiff had been excluded from management decisions even though he had legitimate expectations that he would be consulted about and participate in the company's policy-making decisions; (b) the respondent, who was the majority shareholder-cum-managing director of the company, had conducted the company's affairs in a manner which was unfairly prejudicial to the plaintiff's interests by, among other things,

Version No 1: 27 Oct 2020 (22:40 hrs)

delaying the payment of a dividend; (c) the respondent had used the company's assets for the benefit of himself as well as his family and friends; and (d) the respondent had neglected and been incompetent in the management of the company's business. Warner J held that there had been unfairly prejudicial conduct insofar as the respondent had used the company's assets to benefit himself as well as his family and friends (at 1003–1004). However, he did not find the plaintiff's other allegations, including those relating to the plaintiff's exclusion from the company's policy-making decisions and the late dividend payment, sufficient to support a finding of unfair prejudice (at 1004). Most pertinently for present purposes, Warner J held that the respondent's alleged mismanagement of the company, considered singularly, *did not* amount to *unfairness* towards the plaintiff (at 1000).

149 The decision in *Re Elgindata* may be contrasted with that in *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 ("*Re Macro*"). In *Re Macro*, the plaintiffs brought an unfair prejudice petition under s 459 of the 1985 UK Companies Act, complaining of the ineffective or inadequate supervision of the business of two companies by the respondent, who was the majority shareholder and sole director of both companies. In this regard, the plaintiffs alleged that there had been: (a) dishonest "diversion" of commissions; (b) a failure to obtain competitive tenders for repairs to the companies' properties; (c) a failure to conduct regular inspections of the companies' properties such that defective work was not noticed, resulting in the builders responsible being overpaid; (d) a failure to let the companies' properties on the most advantageous terms; (e) late registration of rent; and (f) overpayment of management fees. Arden J (as she then was) held that the allegations of mismanagement *were* sufficiently serious to amount to unfairly prejudicial conduct. In her view, the allegations did not merely concern poor quality management, but instead concerned specific acts

Version No 1: 27 Oct 2020 (22:40 hrs)

of mismanagement which had continued over many years and which the respondent had failed to prevent or rectify. Those acts and failures were found to be sufficiently serious to justify the court's intervention (at 406). In Arden J's view, "in cases where what is shown is mismanagement, rather than a difference of opinion on the desirability of particular commercial decisions, and the *mismanagement is sufficiently serious* to justify the intervention by the court" [emphasis added], then a remedy would be available under s 459 of the 1985 UK Companies Act (at 405).

150 A different outcome was reached in *In re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745. There, the plaintiff brought a petition under s 210 of the 1948 UK Companies Act for relief from oppression, alleging that the respondent, who was the managing director of the company as well as the chairman of its board, had been unwise, inefficient and careless in performing the duties of his office. Buckley J dismissed the petition because he found that the respondent's lack of wisdom, inefficiency and/or carelessness did not amount to oppression on the facts of the case. He noted that the plaintiff's allegations contained "no suggestion that [the respondent] has acted unscrupulously, unfairly, or with any lack of probity towards the [plaintiff] or any other member of the company, or that he has overborne or disregarded the wishes of the board of directors, or that his conduct could be characterised as harsh or burdensome or wrongful towards any member of the company" (at 752).

151 It is evident from these cases that it will not be easy for a shareholder who bases its oppression action on allegations of mismangement to meet the requisite threshold for establishing oppression. Notably, even in *Re Macro*, where the unfair prejudice found by the court rested, at least in part, on the grounds of serious mismanagement, there was also a self-serving aspect to the

Version No 1: 27 Oct 2020 (22:40 hrs)

mismanagement in question: see Sarah Worthington, *Sealy & Worthington's Text, Cases & Materials in Company Law* (Oxford University Press, 11th Ed, 2016) at p 730. On the facts of that case, the respondent's failure to properly supervise the companies' affairs had (among other things) caused the companies to pay excessive charges to an estate agency which in fact belonged to the respondent.

152 Although the case law does not in terms require that a breach of a director's duty of care, skill and diligence in the form of mismangement or managerial incompetence must be to the personal benefit of the errant director (as was the case in *Re Macro*) before it can be found to amount to oppression, it has been argued in *Minority Shareholders' Rights and Remedies* (at paras 4.181–4.182) that this requirement should apply. It is unnecessary for us to arrive at a firm conclusion on this point for present purposes because even if there were no such requirement, the fact remains that the mismanagement in question must be *sufficiently serious* to amount to commercial unfairness before relief under s 216 may be granted. In the present case, Ho's incompetence and breach of his duty of care, skill and diligence is just that, and there is nothing that takes it over the threshold so as to amount to commercial unfairness to Sakae. If we were to hold that some element of personal benefit must be established before a director's breach of his duty of care, skill and diligence can amount to oppression, it should be noted that Ho did not in fact gain any benefit from Transactions 3, 4 or 7, and there is no allegation that he did. Accordingly, insofar as Sakae's oppression claims against Ho were based exclusively on conduct which amounted to a breach of his duty of care, skill and diligence but not (contrary to Sakae's pleaded case) a breach of his fiduciary duties to the Company, we dismiss these claims.

Version No 1: 27 Oct 2020 (22:40 hrs)

(4) Whether any of the remaining general defences apply

153 Before the Judge, the CA 87 appellants mounted several overarching defences to Sakae's oppression claims in Suit 1098 apart from their main defence that Sakae's complaints in that suit were based on personal wrongs rather than corporate wrongs. They have repeated several of these defences on appeal, and we consider them in turn below.

(A) REMEDIES UNDER THE JVA PRECLUDING AN OPPRESSION CLAIM

154 One of the primary contentions raised by the CA 87 appellants is that the contractual remedies provided under the JVA preclude Sakae from bringing an oppression action under s 216. They rely in particular on two specific clauses in the JVA:

(a) clause 18, which provides that where a shareholder of the Company commits a material breach of any of its obligations under the JVA, any other shareholder is entitled to purchase all the shares belonging to the defaulting shareholder at a price equal to 90% of the shares' fair value (cl 19 sets out a specific and detailed procedure for an approved accountant to determine the fair value of the shares); and

(b) clause 26, which provides that "[i]n the event of any dispute between the Parties arising out of or relating to [the JVA]", the parties are to hold a "Dispute Meeting" in an effort to resolve the dispute, and any dispute which cannot be resolved shall, at the request of either party, be referred to arbitration.

155 The Judge did not accept the aforesaid argument by the CA 87 appellants for a number of reasons which are set out in the Main Judgment at [273]–[276].

Version No 1: 27 Oct 2020 (22:40 hrs)

156 The CA 87 appellants argue that the Judge erred in so deciding because, since the JVA had been carefully negotiated and provided Sakae with "clear avenues for redress" in the event of any breach of its terms, any such breach should be remedied by reference to the terms of the JVA and not by way of an oppression action under s 216. The CA 87 appellants further argue, citing *Ng Kek Wee*, that a shareholder cannot obtain relief under s 216 if it has the power to take control of the company and bring an end to the alleged oppression. Since Sakae has the power (so the CA 87 appellants contend) under cl 18 of the JVA to take control of the Company, stop any oppression from continuing and obtain redress for itself as well as for the past wrongs against the Company, there is no basis for Sakae to obtain relief from oppression under s 216.

157 In response, Sakae argues that it is relying on the breaches of the JVA only as evidence of commercial unfairness, in that its interests as a minority shareholder of the Company have been prejudiced. With regard to cl 18 of the JVA, Sakae agrees with the reasons given by the Judge for its inapplicability in the present case, in particular, that cl 18 provides a remedy against a defaulting shareholder of the Company whereas the relevant appellants here are not shareholders. Further, cl 18 would not provide an adequate remedy in that it would not require the return of the funds misappropriated from the Company. With regard to cl 26, Sakae submits that this clause does not preclude it from pursuing an action under s 216, and in any event, an earlier application by six of the defendants in Suit 1098 to stay the suit in favour of arbitration has already been heard and dismissed.

158 We agree with the Judge's conclusion that the contractual remedies provided under the JVA for any breach of its terms do not preclude Sakae from bringing an oppression action under s 216. We explain our reasons by considering the following three questions:

Version No 1: 27 Oct 2020 (22:40 hrs)

(a) First, what, as a matter of law, is the relevance of alternative remedies (whether contractual or otherwise) to an oppression action under s 216?

(b) Second, can Sakae reasonably be expected in the present circumstances to invoke cl 18 of the JVA to take control of the Company?

(c) Third, does the existence of the arbitration agreement in cl 26 of the JVA preclude Sakae from bringing a s 216 action?

(I) THE RELEVANCE OF ALTERNATIVE REMEDIES TO AN OPPRESSION ACTION

159 In relation to the first question outlined above, the determinative issue is, in our judgment, whether any alternative remedy that might be available to the aggrieved shareholder can be shown to be both *adequate and appropriate* to bring to an end the matters complained of. It is only if this question is answered in the affirmative that an oppression action under s 216 may be precluded. As a general rule, a contract between the shareholders of a company is presumptively applicable to govern any dispute that falls within its ambit; and in principle, recourse to an oppression action may be precluded on the grounds that the matters complained of are governed by the terms of the contract. As stated in Robin Hollington QC, *Hollington on Shareholders' Rights* (Sweet & Maxwell, 8th Ed, 2016):

> 7-189 … [I]f the parties have made express provision for what should happen in specified circumstances, such as a breakdown of the relationship of trust and confidence, then those terms are prima facie enforceable between the parties.
>
> 7-190 For example, it is not uncommon for a company's articles of association, or a shareholders' agreement, to contain provisions whereby one shareholder can buy out another in certain circumstances on certain terms.

Version No 1: 27 Oct 2020 (22:40 hrs)

> Articles may provide that, in the event of a shareholder being desirous of selling his shares to a non-member, the others shall have the option to buy him out at, for example, a "fair value" to be fixed by the company's auditors. If, on the true construction of the contract, the provision of the articles or shareholders' agreement applied to the circumstances giving rise to the petition, so that the petitioner was attempting to escape from the contract, he would not be permitted to do so unless he could establish special equitable considerations to displace the application of the contract.

160 Cases and academic commentaries likewise note that the court is *unlikely* to find that there has been oppression where there is an alternative remedy for the aggrieved shareholder. Reference may be made in this context to *Corporate Law* (at fn 242, p 515):

> It is *less likely* that s 216 of the Companies Act … was intended to cover any complaint that arises out of a breach of a contract negotiated at arm's length, given that such a contract is likely to provide expressly for remedies. [emphasis added]

161 A similar view was also taken by the British Columbia Court of Appeal in *Ontario Ltd v CSA Building Sciences Western Lt*d (2016) 88 BCLR (5th) 278:

> 53 It is clear [that] the oppression action was intended to permit courts to remedy oppressive or unfairly prejudicial conduct not generally susceptible to correction by other forms of redress. *Where the claimant already has a clear remedy – in contract, tort, or debt, for example – the court is* ***unlikely*** *to grant a remedy under s. 227* [of the Business Corporations Act (SBC 2002, c-57)]. Thus [Kevin P McGuinness, *Canadian Business Corporations Law* (LexisNexis Canada, 2nd Ed, 2007] observes in connection with contractual claims:
>
> > Where the sole complaint is that of a breach of contract, then a contract action should be pursued. Insofar as the contract deals with a specific matter, it seems only natural to conclude that it sets out exhaustively the underlying intentions, understandings and expectations of the parties. While many – perhaps all – breaches of contract can be characterized as oppressive to the injured party, and while many – perhaps all – forms of tortious injury may be said to be unfairly prejudicial, the legislature clearly cannot have intended

Version No 1: 27 Oct 2020 (22:40 hrs)

> for the oppression provisions to serve as a panacea for all manner of legal wrongs, or to make the remedies created under the statute for genuine cases of oppression or unfair prejudice a substitute for the normal legal and equitable remedies that are available to aggrieved parties. …
>
> [original emphasis omitted; emphasis added in italics and bold italics]

162 However, these observations stop short of identifying *when* an action for relief from oppression may nevertheless be pursued despite the existence of alternative remedies. In our judgment, the answer to this can be discerned by considering the relevance and suitability of the alternative remedies in question. This is because s 216 is intended to provide a means of redress for a shareholder who "lacks the power to stop the allegedly oppressive acts" (see *Ng Kek Wee* at [48]). This is consistent with the view that the oppression remedy is primarily residual in nature, serving an "essentially 'gapfilling' role" limited to "instances in which the petitioner himself is unable to remedy the conduct of which complaint is made" (see Robert Goddard, "Re: Legal Costs Negotiators Ltd: An Oppressed Majority?" (1999) 20(7) The Company Lawyer 241 at p 241).

163 In *Ng Kek Wee*, we observed (at [48]):

> … [W]here a member is able to remedy any prejudice or discrimination he has suffered through the ordinary powers he possesses by virtue of his position, the conduct of the defendant *cannot* be said to be *unfair* to him … [emphasis added]

In a similar vein, Hoffmann J (as he then was) opined in *Re a Company (No 006834 of 1988) ex parte Kremer* [1989] 5 BCC 218 (at 220–221) that the existence of an available shareholder exit mechanism could negate any unfairness arising from shareholder disputes (see also *Minority Shareholders' Rights and Remedies* at para 4.103 and our decision in *Ting Shwu Ping (administrator of the estate of Chng Koon Seng, deceased) v Scanone Pte Ltd*

Version No 1: 27 Oct 2020 (22:40 hrs)

and another appeal [2017] 1 SLR 95 at [75]). It is therefore evident that the presence of and reliance upon any available alternative remedy is inextricably tied to the ultimate inquiry into the commercial fairness or otherwise of the defendant's conduct.

164 The focus on commercial fairness entails, however, that it is necessary for a court to go further because the availability of an alternative remedy may not displace the essential element of commercial unfairness that underlies the grant of relief under s 216 (see [81] above). This can be illustrated by the following example. Suppose a share buyout provision values the company's shares as at the date of the proposed buyout, but the company's coffers have largely been emptied by that date through the oppressive acts of the wrongdoer, with the result that the company's shares have in turn greatly diminished in value: it seems to us untenable, in such circumstances, that the wrongdoer can be allowed to buy out the wronged party's shares at a discounted price, and in so doing, preclude the latter from pursuing a remedy under s 216.

165 Section 216 serves the purpose of "bringing to an end or remedying the matters complained of" (see s 216(2) of the Companies Act; see also *Ng Kek Wee* at [49]). It stands to reason from this that the court should consider not only the existence of an alternative remedy, but also its *adequacy and appropriateness* in "bringing to an end the prejudicial state of affairs" (see *Ng Kek Wee* at [49]) or in otherwise addressing the matters complained of. Where a shareholder has met the threshold test of commercial unfairness which must be satisfied before a finding of oppression can be made, it should be entitled to invoke the remedies provided under s 216 as opposed to being forced to resort to other remedies which will not bring to an *end* the state of affairs complained of.

Version No 1: 27 Oct 2020 (22:40 hrs)

166 Support for the proposition that the alternative remedies available to a shareholder who complains of oppression must be *adequate* and *appropriate* can be found in *Minority Shareholders' Rights and Remedies* at para 1.090:

> Where the shareholders' agreement provides for an exit mechanism or a specified route in terms of dispute resolution, the question then arises as to whether such provisions displace a shareholder's right to pursue statutory remedies. The inquiry in this regard would occur within the equitable realm, in the form of *ascertaining whether the shareholders' agreement provides an* ***appropriate*** *alternative remedy*, and would take into account the equities between the parties, including the unfair conduct complained of, the applicant's own counduct, and the remedy sought to address the unfairness of the situation. Suffice to say that any agreement intended to displace a statutory remedy *has to clearly and fully address the unfairness complained of*, and in particular, *provide* ***adequate*** *remedies to address the unfairness as are available under statute to a minority shareholder*. If not, it would be unfair to restrict the innocent shareholder to contractual remedies where the legislature has provided for others. [emphasis added in italics and bold italics]

167 In a similar vein, Sean FitzGerald and Graham Muth make the following observations in *Shareholders' Agreements* (Sweet & Maxwell, 6th Ed, 2012) on the relevance of remedies provided in a shareholders' agreement (at para 1-56):

> The existence of a shareholders' agreement and/or specially drawn articles of association may … have an impact on the statutory remedies. Specifically:
>
> 1. where the parties have spelt out in detail all the matters which are to govern their relationship, it is unlikely that the court will find that a shareholder has any legitimate expectation beyond his rights under those agreements (*A Company No. 005685 of 1988) (No. 2), Re* [1989] B.C.L.C 427;
>
> 2. *if a petitioner already has an* ***appropriate*** *remedy under an existing agreement, it is unlikely that his petition will be allowed to proceed*; and
>
> 3. *if there is already a mechanism for valuing a petitioner's shares on a transfer to another shareholder, he may have to accept that procedure* ***provided, however, it is fair in the circumstances***.

Version No 1: 27 Oct 2020 (22:40 hrs)

[emphasis added in italics and bold italics]

168 The English Court of Appeal's decision in *Virdi v Abbey Leisure Ltd* [1990] BCC 60 ("*Virdi*") illustrates when an alternative remedy to an oppression action may be found to be inadequate and/or inappropriate. In *Virdi*, the company in question had been formed on the understanding that it would undertake a single venture. That venture was completed, but a new one was contemplated, which the petitioner did not wish to pursue. The respondents made an open offer to buy the petitioner's shares and to have them valued in accordance with a pre-emption provision in the company's articles of association, but the petitioner refused to accept this offer and commenced winding-up proceedings and an oppression action respectively. The issue was whether the petitioner was acting unreasonably in seeking to have the company wound up instead of pursuing another remedy. The English Court of Appeal held that the petitioner's refusal to take advantage of the valuation procedure under the aforesaid pre-emption provision did not constitute unreasonable conduct. This was because the company had been formed for a single venture which had come to an end, and its assets were almost entirely in cash. On a winding up, those assets would be distributed to the shareholders *pro rata*. On the other hand, if the pre-emption mechanism in the articles of association were applied, the petitioner was likely to receive a discounted valuation of his shares. The court held that it was not unreasonable for the petitioner to refuse to run that risk (at 68).

169 In their written submissions to this court, the CA 87 appellants cited three cases – *Landvis Canada Inc v Ocean Choice International Limited Partnership* [2016] NJ No 8 ("*Landvis*"), *Remo Valente Real Estate (1990) Ltd v Portofino Riverside Tower Inc* [2010] OJ No 1062 ("*Remo Valente*") and *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and*

Version No 1: 27 Oct 2020 (22:40 hrs)

another appeal [2013] 2 MLJ 297 ("*Jet-Tech*") – which, they contend, stand for the proposition that where the parties have carefully defined the terms of their venture in an agreement, their remedies for what, in essence, are breaches of that agreement should be found within its terms. However, as the CA 87 appellants themselves recognise in that part of their written submissions addressing *Landvis* and *Remo Valente*, both of these cases in fact do not stand for the precise proposition that the CA 87 appellants advance. Rather, they stand for the different proposition that an oppression action cannot be based on a breach of reasonable expectations when such expectations are not found in the contracts that the shareholders have entered into among themselves (see *Landvis* at [141] and *Remo Valente* at [24]). That is not the issue presented by the factual scenario before us. Instead, the question which arises on the facts before us is whether a shareholder who complains of oppression may be prevented from seeking recourse under s 216 on the basis that the shareholders' agreement concerned envisages some other remedy in lieu of an action under s 216. *Jet-Tech* is more germane in this regard.

170 In *Jet-Tech*, the appellants brought a claim under s 181 of Malaysia's Companies Act 1965 (No 125 of 1965) (which is essentially in similar terms as s 216 of our Companies Act), alleging that the respondents' conduct in refusing to allow the removal of certain directors of the company amounted to a breach of the shareholders' agreement concerned. The Federal Court of Malaysia held in a single paragraph (at [37]), without much explanation, that breaches of a shareholders' agreement could not be a basis for bringing a petition under s 181:

> It was alleged by the appellants that Yushiro's conduct in refusing to allow Chen to remove Gan and Firdaos as directors of the company amounted to a breach of the shareholders[']agreement. In this regard we are in agreement with the submission of learned counsel for the respondents that

Version No 1: 27 Oct 2020 (22:40 hrs)

> breaches of a shareholders[']agreement cannot be a basis for bringing a petition under s 181. A complaint under s 181 … must be confined to matters relating to the affairs of the company. *Shareholders' agreement and breach of the same clearly are not matters relating to the affairs of the company. They are private matters enforceable by the parties to the shareholders[']agreement* … [emphasis added]

171 We respectfully disagree with the court's conclusion in *Jet-Tech*. First, we do not accept the underlying premise in *Jet-Tech* that shareholders' agreements "are not matters relating to the affairs of [a] company". One can easily conceive of possible situations where a shareholders' agreement in fact specifically concerns the affairs of the company in question. The JVA in the present case is an example of just such an agreement as it spells out, among other things, the *business* of the Company (cl 6), the composition of the Company's board of directors (cl 7) and the proceedings of directors' meetings (cl 8). In our judgment, it is only where "the complaint relates *purely* to inter-shareholder disputes, so *that neither the company nor its affairs are implicated*" [emphasis added] that an action under s 216 will be unavailable (see *Corporate Law* at para 11.041).

172 Second, it is trite that any understanding between the shareholders of a company, whether contained in a formal agreement or merely in the form of an informal understanding, can and generally will form the backdrop against which the court determines whether there has been commercial unfairness: see *Corporate Law* at para 11.052 and *Minority Shareholders' Rights and Remedies* at para 4.043. Where such an understanding between shareholders arises from written agreements, these agreements would generally be in the form of a company's constitutional documents, *shareholders' agreements* or other collateral agreements: see *Corporate Law* at para 11.053, citing *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379. In the present case, the JVA is not only a shareholders' agreement; it is also to be treated (pursuant to cl 32.3

Version No 1: 27 Oct 2020 (22:40 hrs)

thereof) "as if [it were] embodied in the Constitutional Documents of [the Company]" (see [175] below). It is well established that the breach of a company's constitutional documents can give rise to oppression in appropriate cases (see *Ideal Design* at [65], citing *Re Saul* at 18).

173 We therefore conclude that a shareholder who complains of oppression may be precluded from seeking relief under s 216 only where *appropriate and adequate* alternative remedies that would bring to an end the matters complained of are available to it. This brings us to the question of whether, in the present case, cl 18 and/or cl 26 of the JVA constitute such remedies where Sakae is concerned.

(II) WHETHER SAKAE CAN REASONABLY BE EXPECTED TO INVOKE CL 18 OF THE JVA TO TAKE CONTROL OF THE COMPANY

174 The appropriate remedies that a shareholder who complains of oppression may avail itself of generally fall into two broad categories: (a) exercising its voting rights to influence the company's management; or (b) selling its shares in the company (see, generally, David C Donald, "Shareholder Voice and its Opponents" (2005) 5(2) Journal of Corporate Law Studies 305). In the present case, the JVA does not give Sakae either option. Instead, cl 18 offers Sakae the option of buying over the shares of a shareholder of the Company who has committed a material breach of any of its obligations under the JVA.

175 In the court below, the Judge held that in order for an aggrieved shareholder of the Company to invoke cl 18 of the JVA, the party in default had to be a shareholder of the Company as well. Since Andy Ong, Ong Han Boon and Ho were all not shareholders of the Company, Sakae could not deploy cl 18 against them (see the Main Judgment at [274]). The CA 87 appellants argue that

Version No 1: 27 Oct 2020 (22:40 hrs)

the Judge erred in so concluding because Sakae could have invoked cl 32.3 of the JVA to hold GREIC (as opposed to Andy Ong, Ong Han Boon and Ho) responsible for the breaches committed by the directors which GREIC had appointed in its capacity as a shareholder of the Company. Clause 32.3 of the JVA reads as follow:

> Each Shareholder undertakes with the others to exercise all voting rights and powers of control available to it in relation to [the Company] so as to give full effect to the provisions of this Agreement including, where appropriate, the carrying into effect of such provisions as if they were embodied in the Constitutional Documents of [the Company].

176 On this basis, the CA 87 appellants contend that if the directors appointed by GREIC had caused the Company to act in breach of the JVA and GREIC refused to exercise its voting power to remedy those breaches, this would constitute a material breach by GREIC of the undertaking in cl 32.3 of the JVA. Sakae could then invoke cl 18 of the JVA to buy over GREIC's shares in the Company and take control of the Company.

177 We find this argument lacking in merit. First, GREIC itself is effectively controlled by Andy Ong and there is no reason to think that it would have acted to address Sakae's concerns. Certainly, no evidence to this effect was led in the court below.

178 Second, the Judge found that any buyout of GREIC's shares in the Company by Sakae pursuant to cl 18 would have been inadequate because it would not have required the appellants to return, prior to the share buyout, the money that they had misappropriated from the Company. The Judge also considered that it would have been unrealistic to expect Sakae to resort to a remedy whereby it would have to pay more money to acquire shares in the Company when its primary complaint was that the funds which it had invested

Version No 1: 27 Oct 2020 (22:40 hrs)

in the Company had been misappropriated and the Company had been run in the interests and for the benefit of, in essence, Andy Ong (see the Main Judgment at [274]). The CA 87 appellants contend that the Judge erred in reaching that conclusion because it would have been "plainly more beneficial" for Sakae to purchase GREIC's shares in the Company before the misappropriated moneys were restored to the Company since Sakae would have paid a lower price for those shares (presumably because the Company's shares would be valued on the basis that the Company's assets had been diminished by the amount misappropriated). They also argue that it was wrong of the Judge to find that GREIC's shares in the Company would have been unattractive to Sakae because Sakae would have been getting a significant pool of assets at a discount of 10% (see cl 18 of the JVA as outlined at [154(a)] above), with the right to sue for the misappropriated funds.

179 We disagree with these arguments by the CA 87 appellants, not least because they are not borne out by the evidence. Moreover, to expect an aggrieved shareholder to expend money to purchase shares in a company in which it has been oppressed so as to take control of that company and thus put an end to the oppression complained of seems to us to be hopelessly unrealistic and lacking in commercial sense. It may be noted that this supposed "remedy" is the very *opposite* of one of the typical remedies sought and granted in oppression actions, which is an order for a buyout of the aggrieved shareholder's shares by the wrongdoer (see [174] above). The rationale of such a share buyout order is to ensure that the aggrieved shareholder is able to realise its investment in the company at a fair value without being locked in (since there may not be a ready market for the company's shares): see *Corporate Law* at para 11.088. The CA 87 appellants' argument, by contrast, proceeds on the basis of reversing this potential remedy so that the aggrieved party in the present case, Sakae, is

Version No 1: 27 Oct 2020 (22:40 hrs)

expected to expend money to purchase more shares in an already-troubled company. In the present context, this hardly seems to offer Sakae a remedy, much less an adequate and appropriate one.

(III) THE ARBITRATION PROVISION IN CL 26 OF THE JVA

180 We turn next to the CA 87 appellants' invocation of the arbitration mechanism under cl 26 of the JVA.

181 In *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373, we held that a dispute concerning minority oppression or unfair prejudice was arbitrable and could be stayed in favour of an arbitration agreement (at [88]):

> … [T]he essence of a claim for relief on the ground of oppressive or unfairly prejudicial conduct lies in upholding the commercial agreement between the shareholders of a company. … Section 216 is concerned with protecting the commercial expectations of the parties to such an association. *It seems to us that if those persons choose to have their differences resolved by an arbitral tribunal, they should be entitled to do so.* … [emphasis added]

182 The question in the present case is whether, as argued by the CA 87 appellants, Sakae should be confined to the arbitration mechanism under cl 26 of the JVA to obtain relief for the oppressive conduct which it complains of. We disagree with this contention for two reasons.

183 First, as pointed out by the Judge (see [276] of the Main Judgment; see also [157] above), an application to stay Suit 1098 in favour of arbitration was previously made; this application was dismissed and no appeal was brought against the dismissal. This means that there is a binding decision as to whether Sakae is bound under the JVA to refer its claims in Suit 1098 to arbitration. To that extent, the issue is *res judicata*.

Version No 1: 27 Oct 2020 (22:40 hrs)

184 Second, it is not even clear that Sakae's complaints of oppression in the present case fall within the scope of the arbitration agreement in cl 26 of the JVA. Clause 26 applies only to "dispute[s] between *the Parties* arising out of or relating to [the JVA]" [emphasis added], the "Parties" in this context being defined in the preamble to the JVA as Sakae, GREIC and the Company (see also [6] above). This is relevant because Sakae's oppression claims in Suit 1098 were based on the pattern of oppressive conduct orchestrated by (primarily) Andy Ong and (to a lesser degree) Ong Han Boon. As both Andy Ong and Ong Han Boon are not parties to the JVA, it seems to us that Sakae's dispute with them would fall outside the ambit of cl 26. In this regard, although GREIC is a party to the JVA, it would have been pointless for Sakae to invoke cl 26 against GREIC because it was not Sakae's case in Suit 1098 that GREIC committed oppressive acts against Sakae or breached any of the provisions in the JVA. A further reason why it is unclear whether Sakae's complaints of oppression are covered by cl 26 lies in the nature of the matters complained of. Sakae's complaints concerned the making of unauthorised loans, the misappropriation of the Company's assets, the attempt to wrongfully dilute Sakae's agreed shareholding in the Company as well as the creation of fictitious or sham agreements to conceal the impugned transactions. All of these actions were oppressive to Sakae even *without regard to the JVA*. It is therefore not clear to us that Sakae's complaints were even matters that would have fallen within the ambit of the arbitration agreement in cl 26 to begin with.

185 For these reasons, we agree with the Judge that the contractual remedies provided under the JVA are neither adequate nor appropriate to bring to an end the matters which Sakae complained of, and therefore do not preclude Sakae from pursuing an oppression action under s 216.

Version No 1: 27 Oct 2020 (22:40 hrs)

(B) SAKAE'S ABILITY TO RESIST OPPRESSION

186 Another general defence which the CA 87 appellants rely on is that Sakae failed to exercise its own ability to resist the alleged oppression and secure its own interests. We disagree that Sakae had the ability to resist the oppressive conduct complained of, primarily for the reasons given by the Judge in rejecting this defence: see the Main Judgment at [268]–[270].

(C) SAKAE'S KNOWLEDGE OF THE IMPUGNED TRANSACTIONS

187 The CA 87 appellants also argue that it was not open to Sakae to bring an oppression action because Sakae knew, ought to have known, or was in a position to know of the oppressive conduct which it complained of but failed to take steps to prevent it. We reject this contention for several reasons.

188 First, as Sakae rightly points out, the provenance of this proposition is weak. The cases that the CA 87 appellants cite in support of their argument stand instead for the different proposition that a plaintiff may be precluded from alleging oppression where it has acquiesced in the conduct complained of (see *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 at [97] and *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors* [1994] 1 MLJ 520). The essence of acquiescence is that a plaintiff who knows about the conduct which it complains of and yet does nothing to object to or prevent such conduct may be taken to have made a representation to the defendant that it does not object to that conduct, which representation may found an estoppel, a waiver or an abandonment of rights: see *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [112] and [114] and *Genelabs Diagnostics Pte Ltd v Institut Pasteur and another* [2000] 3 SLR(R) 530 at [76]. In the present case, insofar as the CA 87 appellants can be said to be mounting an argument based on acquiescence, leaving aside the fact that this was not

Version No 1: 27 Oct 2020 (22:40 hrs)

properly pleaded, the Judge found as a fact that Sakae did not know about the wrongful transactions at all material times (see [39(e)] above). In our judgment, the Judge's findings on this point are well supported. Accordingly, Sakae cannot be said to have acquiesced in any of the impugned transactions.

189 Second, on the issue of whether Sakae ought to have known of or was in a position to find out about the wrongful transactions, it is pertinent to note the decision of the English Court of Appeal in *Re Tobian Properties Ltd* [2013] 2 BCLC 567 ("*Re Tobian*"). There, it was held that a complaint of minority oppression on the basis of excessive directors' remuneration would be upheld *even if* the filed accounts of the company disclosed the remuneration and the minority shareholders had not been diligent in checking those accounts and raising their complaints earlier. The court reasoned that the contention that minority shareholders would be disentitled from seeking relief from oppression *simply because* they had not reviewed the company's accounts would impose a requirement for diligence that lacked basis, whether in statute, principle or authority (at [32]).

190 The Judge agreed with the holding in *Re Tobian* and made a number of observations on its relevance in the present case (see [285]–[286] of the Main Judgment). We see no reason to depart from her decision in this respect.

(D) ABSENCE OF "OVERBEARING CONDUCT" DURING THE DISCUSSIONS HELD AFTER THE IMPUGNED TRANSACTIONS

191 In their written submissions to this court, the CA 87 appellants mounted a fresh contention to rebut Sakae's oppression claims against them, namely, that Sakae was not "forced to submit to the [impugned transactions] by the '*overbearing conduct*' of the majority" [emphasis in original]. According to the CA 87 appellants, this is relevant because in order for a complaint of oppression

Version No 1: 27 Oct 2020 (22:40 hrs)

to be made out, there must be "clear evidence of overbearing conduct", in the sense that the plaintiff shareholder must have been "forcefully coerced" by the majority shareholders into accepting the state of affairs or transactions complained of despite any objections which it raised. Relying on this proposition, which is premised on a fact situation where the plaintiff shareholder had the opportunity to and did object to the transactions or state of affairs concerned but was nonetheless forced to accept the situation, the CA 87 appellants submit that the impugned transactions were not oppressive to Sakae. This is because after Sakae voiced its concerns (through Foo, the chairman of its board) about some of the impugned transactions, meetings of the Company's board were held on 3 and 11 April 2013 in an attempt to address those concerns. Sakae thus had the opportunity to "resolve its grievances [about the impugned transactions] through the normal corporate processes". However, at those two board meetings, Foo (so the appellants assert) "engaged in evasive, petty and pedantic manoeuvres that scuttled any attempt to have a reasonable discussion". The CA 87 appellants thus contend that "far from Sakae's concerns being overriden, Sakae itself … stymied all attempts to discuss the [impugned transactions]".

192 In our judgment, there is no merit in the above submissions by the CA 87 appellants. In the first place, as the evidence in the present case showed and the Judge found, the impugned transactions were deliberately concealed from Sakae such that it did not have any opportunity to object to those transactions at all before they were effected. We find that the two April 2013 board meetings which the CA 87 appellants referred to did not constitute an opportunity for Sakae to object because by then, the impugned transactions had already been carried out, and nothing that Sakae said or did during those board meetings

Version No 1: 27 Oct 2020 (22:40 hrs)

could have undone the prejudice and harm that had already been occasioned to it by the transactions (see the Main Judgment at [281]).

193 More importantly, the CA 87 appellants' contention as to the need for "overbearing conduct" in the form of "forceful coercion" to be present rests on an incorrect proposition of law. It is settled law that what must be present to make out a complaint of oppression is commercial unfairness (see [81] above), and *not* "forceful coercion". There have been numerous cases where oppression was successfully established in the absence of "forceful coercion", and these include cases where, as in the present case, the wrongful transactions in question were concealed from the plaintiff shareholder such that it was not even in a position to object to them and therefore, based on the CA 87 appellants' argument, could not possibly have been "forcefully coerced" into accepting the transactions (see, for example, *Kumagai Gumi* at [34]–[35] and *Chow Kwok Ching v Chow Kwok Chi and others and other suits* [2008] 4 SLR(R) 577 at [214]). And even in cases where the plaintiff shareholder had the opportunity to and did object to the alleged acts of oppression (which are also the cases primarily relied on by the CA 87 appellants), our courts did not regard the overruling of the plaintiff shareholder's objections as the crucial element needed to prove oppression. This can be seen from *Low Peng Boon*, where this court, while accepting that the "repeatedly dismissive treatment of the legitimate queries made on behalf of [the minority shareholder]" amounted to "an oppression of [the minority shareholder] and a disregard of her interest in [the company]" (at [44]), did not in any way suggest that that was necessary to its holding on oppression. Indeed, in addition to the "repeatedly dismissive treatment" of the minority shareholder's concerns, this court also relied on (among other things) the majority shareholder's misuse of the company's funds

Version No 1: 27 Oct 2020 (22:40 hrs)

for his personal travels and his wrongful retention of the company's profits to find that there had been oppression of the minority shareholder (at [44]).

Sakae's breach of fiduciary duty claim against Andy Ong in Suit 122

194 We turn now to Andy Ong's appeal against the Judge's decision on Sakae's breach of fiduciary duty claim against him in Suit 122. As we noted earlier, this suit concerned only Transaction 6.

195 In respect of Transaction 6, we agree with the Judge that Andy Ong breached his fiduciary duties to Sakae as he placed himself in a position of conflict of interest and failed to act in Sakae's interests. However, we consider that the Judge erred in ordering Andy Ong, rather than the Company, to pay Sakae the sum of $2,641,975 (and interest thereon) as a remedy for the breach of fiduciary duty claim in Suit 122 and as a remedy for the oppression claim relating to Transaction 6 in Suit 1098. In our judgment, in the light of the Judge's findings on Transaction 6 in the context of Suit 1098, which we agree with, the appropriate remedy in respect of this transaction would have been to invalidate Sakae's subscription for the additional 2,641,975 shares in the Company and order the Company to repay Sakae the sum of $2,641,975.

196 To briefly recapitulate, in Transaction 6, ERC Holdings was granted an option (the ERC Option) in September 2010 to subscribe for 8.8 million of the Company's ordinary shares at a price of $8.8m. ERC Holdings purported to exercise this option on 24 May 2012 by paying the Company $8.8m, but Andy Ong only informed Foo two weeks later on 6 June 2012 that ERC Holdings intended to exercise the option. Although Foo disapproved of the share issue, Andy Ong insisted that the ERC Option would be exercised. Sakae thus authorised and approved the allotment of 8,058,025 shares to ERC Holdings,

Version No 1: 27 Oct 2020 (22:40 hrs)

and concurrently subscribed for a further 2,641,975 shares in the Company at the price of $2,641,975. According to Sakae, it subscribed for these additional shares only because it wanted to maintain its 24.69% shareholding in the Company.

197 In our judgment, the Judge should have set aside Sakae's subscription for the additional 2,641,975 shares in the Company. She had sufficient basis to do so given that the court has a "very wide" jurisdiction under s 216(2) of the Companies Act to make any order that it thinks fit as long as such order is made "with a view to bringing to an end or remedying the matters complained of": see *Kumagai Gumi* at [71]. This wide-ranging discretion as to the relief that may be granted clearly extends to the invalidation of Sakae's subscription for the additional 2,641,975 shares since s 216(2)(*a*) expressly provides that the court may "cancel or vary any transaction". In the present case, the setting aside of Sakae's subscription for these additional shares would have been the appropriate order to bring to an end or remedy the unfairness complained of in relation to the Share Option Agreement.

198 Sakae subscribed for the additional 2,641,975 shares in the Company only because it was labouring under a fundamental misapprehension as to the true status of the Share Option Agreement. If Sakae had known that that agreement was in fact a sham, it would not have felt compelled to subscribe for these shares in order to maintain its percentage shareholding in the Company. Andy Ong and Ong Han Boon knew that Sakae was unaware that the Share Option Agreement was a sham and took advantage of this. Accordingly, it seems to us that the present facts could be usefully analogised to a situation of fraudulent misrepresentation, in that Sakae, in subscribing for the additional 2,641,975 shares, relied on Andy Ong's and Ong Han Boon's representations as to the true nature of the Share Option Agreement, which representations were

Version No 1: 27 Oct 2020 (22:40 hrs)

fraudulent because Andy Ong and Ong Han Boon knew them to be false. Sakae should thus now be entitled to rescind its subscription for these shares. The Judge should therefore have set aside Sakae's subscription for the additional 2,641,975 shares pursuant to the broad powers accorded to the court under s 216(2) of the Companies Act.

199 Once Sakae's subscription for the additional 2,641,975 shares is set aside, the Judge's order for Andy Ong to pay Sakae the sum of $2,641,975 and interest thereon should correspondingly also be set aside.

200 There is a further reason for setting aside Sakae's subscription for the additional 2,641,975 shares. If this share subscription were not set aside and Andy Ong remained liable to repay Sakae the sum of $2,641,975, Sakae would effectively be over-compensated in that it would remain in possession of an additional 2,641,975 shares for which it has itself paid nothing. There is no indication that the value of these shares has declined so significantly that they have become altogether valueless. As a matter of principle, it would be incorrect for Sakae to receive from Andy Ong the equivalent of the full value of the additional 2,641,975 shares (at the time of the share subscription) as equitable compensation, and yet at the same time still be allowed to retain these shares.

201 It follows from what we have said that the shares granted to ERC Holdings by the Company must also be set aside. Given the Judge's finding that the Share Option Agreement was not a valid agreement, the consequent order would be to invalidate any shares granted thereunder. In our judgment, such an invalidation is also warranted in order to ensure that Sakae's eventual shareholding in the Company is not diluted below its original level and to prevent Andy Ong from receiving (via his interests in GREIC and ERC Holdings) a disproportionate share of the Company's assets when the Company

Version No 1: 27 Oct 2020 (22:40 hrs)

is eventually wound up. As for the sum paid by ERC Holdings for the shares which it received, we order this to be held by the Company in escrow, and grant Sakae and ERC Holdings the liberty to apply to us within 30 days of the date of this judgment for an appropriate order as to how this sum is to be disbursed.

Our decision on the Main Appeals

202 For the reasons set out above, we allow Ho's appeal in CA 86. As for CA 87, we allow the appeal in part only in respect of Transaction 6. Specifically, in relation to this transaction, we: (a) set aside the Judge's order for Andy Ong to pay Sakae the sum of $2,641,975 and interest thereon from the date of the writ in Suit 122, and instead invalidate Sakae's subscription for the additional 2,641,975 shares in the Company and order the Company to repay Sakae the sum of $2,641,975; (b) invalidate the grant of shares in the Company to ERC Holdings pursuant to the Share Option Agreement; and (c) order the sum paid by ERC Holdings for the shares which it received to be held by the Company in escrow, with liberty to Sakae and ERC Holdings to apply to this court within the timeframe stated at [201] above for an appropriate order as to the disbursement of this sum.

The Third Party Appeals

203 Finally, we turn to the Third Party Appeals brought by Andy Ong and Ong Han Boon in CA 103, and by Ho in CA 104. As stated at [53] above, we dismiss the appeal in CA 103 in respect of the third party claims under Suit 1098, albeit on grounds that are different from those relied on by the Judge in the Third Party Judgment, and make no order in respect of the third party claim under Suit 122. As for CA 104, we make no order, save that we set aside the Judge's order of indemnity costs against Ho. We explain our reasons for these decisions below.

Version No 1: 27 Oct 2020 (22:40 hrs)

CA 104: Ho's third party claim

204 Beginning, first, with CA 104, in the light of our decision in CA 86 that Ho is *not* liable to Sakae for its oppression claims in Suit 1098, the merits of CA 104 are now moot.

CA 103: Andy Ong's and Ong Han Boon's third party claims

205 Moving on to CA 103, in order for Andy Ong and Ong Han Boon to succeed in their claims against Foo for third party contribution, they will first need to show that they are *entitled* to recover such contribution pursuant to s 15(1) of the Civil Law Act. Next, they will need to show that Foo should *not* be *exempted* under s 16(2) from liability to make contribution. Finally, if both these hurdles are crossed, the *extent* of the contribution awarded to Andy Ong and Ong Han Boon will have to be determined according to the principles outlined in s 16(1). This is and was common ground between the parties (see the Third Party Judgment at [9]–[10]).

206 The relevant subsections of ss 15 and 16 of the Civil Law Act read as follows:

> **Entitlement to contribution**
>
> **15.**—(1) Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> …
>
> **Assessment of contribution**
>
> **16.**—(1) Subject to subsection (3), in any proceedings for contribution under section 15, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

Version No 1: 27 Oct 2020 (22:40 hrs)

> (2) Subject to subsection (3), the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
>
> …

(1) Whether Andy Ong and Ong Han Boon are entitled to recover third party contribution from Foo

207 In our judgment, there is no basis for Andy Ong and Ong Han Boon to recover any contribution from Foo in respect of the two Suits.

208 Where Sakae's breach of fiduciary duty claim against Andy Ong in Suit 122 is concerned, given our decision to set aside the Judge's order for Andy Ong to pay Sakae the sum of $2,641,975 and interest thereon (see [199] and [202] above), Andy Ong has no personal liability to Sakae in respect of this suit. As such, there is no basis for him to claim any contribution from Foo in this regard, and we accordingly make no order on his third party claim in this suit.

209 As for Sakae's oppression claims against Andy Ong and Ong Han Boon in Suit 1098, we agree with the Judge that Andy Ong and Ong Han Boon have not satisfied the requirements under s 15(1) of the Civil Law Act for recovering third party contribution from Foo. We differ, however, from the Judge in our reasons for so ruling. In particular, we find, with respect, that the Judge erred in framing the three-step test set out at [49] of *Tan Juay Pah* in an unduly narrow fashion. Notwithstanding this, we nonetheless affirm her decision to dismiss Andy Ong's and Ong Han Boon's third party claims in this suit because they have not proved their pleaded case that Foo acted in breach of his fiduciary duties to the Company, and also because Foo should in any event be exempted under s 16(2) of the Civil Law Act from any liability to make contribution.

Version No 1: 27 Oct 2020 (22:40 hrs)

210 In the Third Party Judgment, the Judge held (at [11]) that the test which she had to apply to decide whether the requirements under s 15(1) of the Civil Law Act were satisfied was the three-step test set out in *Tan Juay Pah* at [49], which in turn was adopted from the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond and others (Taylor Woodrow Construction (Holdings) Ltd, Part 20 defendant)* [2002] 1 WLR 1397 ("*Royal Brompton*"). The Judge stated this three-step test in the following terms (at [11]):

> … Adapted to the circumstances of this case, the three-step test can be stated as follows:
>
> (a) What damage was suffered *by Sakae* as a result of the actions of [Andy Ong and Ong Han Boon]?
>
> (b) Are [Andy Ong and Ong Han Boon] liable *to Sakae* in respect of that damage?
>
> (c) Is [Foo] also liable *to Sakae* in respect of that very "same damage" or some of it?
>
> [emphasis added]

211 It can be seen from the above passage that the Judge focused exclusively on the damage suffered by *Sakae* without considering the damage to the Company at all. It would appear that she did so because she thought that the analysis should be based solely on the damage suffered by *Sakae* since it was Sakae (and not the Company) that had commenced Suit 1098 against (among other defendants) Andy Ong and Ong Han Boon. In our judgment, this construction of s 15(1) is not supported by a plain reading of the provision.

212 Section 15(1) of the Civil Law Act states that "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of *the same damage* (whether jointly with him or otherwise)" [emphasis added]. In our judgment, a plain and literal

Version No 1: 27 Oct 2020 (22:40 hrs)

reading of s 15(1) contemplates the three-step test set out by Lord Bingham of Cornhill in *Royal Brompton* (at [6]), which is as follows:

> When any claim for contribution falls to be decided the following questions in my opinion arise: (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it? …

213 There are two key observations that may be made in respect of s 15(1). First, in order for any claim for contribution to be brought, the damage caused by the defendant in the main action ("(B)") to the party who suffered the damage ("(A)") must be the *same* as the damage caused to (A) by the third party from whom contribution is sought ("(C)"). Second, and most importantly for present purposes, there is no requirement under s 15(1) that (A) must be the plaintiff or the claimant in the main action. Although the *Royal Brompton* formulation is generally applied in cases where (A) is the plaintiff or the claimant in the main action, there is nothing in the language of s 15(1) which mandates that this must be so.

214 The second observation which we have just made is critical to our reasoning in this case. Under the *Royal Brompton* formulation, (B), the defendant in the main action, is the claimant in the third party proceedings ("third party claimant"), while (C) is the defendant in the third party proceedings ("third party defendant"). We acknowledge that in the vast majority of cases, (A) will be the plaintiff or the claimant in the main action; but, as we have just pointed out, that is not a necessary element for the purposes of s 15(1). Section 15(1) focuses instead on the separate question of the *damage* that (A) has suffered. On the facts before us, although Sakae has suffered damage in that its interests as a minority shareholder of the Company have been detrimentally affected by the seven impugned transactions, the Company too has suffered damage in that its assets have been misappropriated for the benefit of companies

Version No 1: 27 Oct 2020 (22:40 hrs)

in the ERC Group (and ultimately, Andy Ong). Hence, the Company can also be regarded as (A) for the purposes of s 15(1) even though the two Suits were brought by Sakae rather than by the Company. The Judge appears to have thought that (A) necessarily had to be and could only be Sakae, but we see no reason why this must be the case. Indeed, in the context of an oppression action under s 216, if (A) must and can only be the plaintiff shareholder who brings the action, then defendants who are sued for oppression might not be able to avail themselves of the right to recover contribution under s 15(1). We see no principled reason why the right to claim contribution should not be extended to defendants in oppression actions.

215 Foo contends that in the present case, (A) cannot be regarded as the Company because what Andy Ong and Ong Han Boon prayed for in their third party statement of claim in Suit 1098 was contribution "in respect of such sums … which [they] may be liable to pay [*Sakae*]" [emphasis added]. Relying on this, Foo submits that Andy Ong and Ong Han Boon cannot recover any contribution from him in respect of the sums which they are liable to pay *the Company*. We are not persuaded by this argument. The third party pleadings of Andy Ong and Ong Han Boon made repeated references to Foo being in breach of his fiduciary duties to *the Company*; the only possible relevance of these averments by Andy Ong and Ong Han Boon is to claim contribution from Foo for any liability which they might be found to owe *the Company*. We also note that there was a prayer in Andy Ong's and Ong Han Boon's third party pleadings for contribution "towards any liability *in respect of* [Sakae's] claim" [emphasis added]. This would necessarily include the sums that Andy Ong and Ong Han Boon are found liable to pay the Company since such liability would be "in respect of" Sakae's oppression claims in Suit 1098, in that it would have arisen

Version No 1: 27 Oct 2020 (22:40 hrs)

as a result of those claims. Foo's objection based on Andy Ong's and Ong Han Boon's third party pleadings thus cannot stand.

216 In our judgment, on the present facts, the three-step test articulated at [49] of *Tan Juay Pah* should be framed as follows:

(a) What damage was suffered *by the Company* as a result of the actions of Andy Ong and Ong Han Boon?

(b) Are Andy Ong and Ong Han Boon liable *to the Company* in respect of that damage?

(c) Is Foo also liable *to the Company* in respect of that very same damage or some of it?

217 As far as limb (a) is concerned, the Judge found that the Company suffered damage as a result of Transactions 1(a) and 2, which were fraudulently carried out by Andy Ong and Ong Han Boon in breach of their fiduciary duties to the Company (see [37(a)] and [37(c)] above). As for limb (b), the Judge held that Andy Ong and Ong Han Boon were jointly and severally liable to the Company for the damage caused by their breach of fiduciary duties in relation to these two transactions, while Andy Ong was liable (jointly and severally with Ho) to the Company for the damage caused by his breach of fiduciary duties in relation to Transactions 3, 4 and 7 (see [41] above; in this regard, we reiterate our earlier ruling that while the Judge was right to find Andy Ong liable to the Company in respect of (among other transactions) Transactions 3, 4 and 7, she erred in holding that Ho too was liable).

218 With regard to limb (c), Foo may *in principle* be found to be liable to the Company for the very same damage that Andy Ong and Ong Han Boon are

Version No 1: 27 Oct 2020 (22:40 hrs)

liable to the Company for, or at least some part of that damage. This is because Foo can be said to have breached his duty of care, skill and diligence to the Company in two main ways. First, he was completely disinterested in the Company's financial and operational affairs, as was evident from his admission at the trial that he *never* once asked to look at any of the Company's documents or financial records despite being one of the only two directors of the Company, and that he relied entirely on Sakae's Chief Financial Officer to consolidate and monitor the Company's management accounts. Second, Foo completely abdicated his duties as a director of the Company, as evidenced by his conduct in leaving the management of the Company's daily operations entirely to Andy Ong and his team, to the extent that (as he admitted at the trial) he even blindly signed documents sent by Andy Ong without paying much attention. Arguably, Foo's neglect of his duties as a director of the Company led to Andy Ong being able to orchestrate and, together with Ong Han Boon, being able to effect the impugned transactions.

219 Our conclusion on limb (c) is unaffected by the fact that on our analysis, Foo would be liable to the Company on a different legal basis (namely, for breach of his duty of care, skill and diligence) from Andy Ong and Ong Han Boon, who (as the Judge held and we affirmed) are liable to the Company for breach of their fiduciary duties. There are two main reasons why we are of this view.

220 First, the plain language of s 15(1) of the Civil Law Act itself and its accompanying interpretation provision, s 19(1), both support such a reading of s 15(1). In order for a claim for third party contribution to be brought, all that s 15(1) requires is that the *damage* which (C) (the third party defendant) is liable to (A) (the party who suffered the damage) for is "*the same damage*" [emphasis added] as that which (B) (the third party claimant) is liable to (A) for; there is

Version No 1: 27 Oct 2020 (22:40 hrs)

no requirement that (C) must also be liable to (A) on the same legal basis as (B). Furthermore, s 19(1) states that a person is "liable" in respect of any damage for the purposes of s 15 "if the person who suffered [the damage] … is *entitled to recover compensation from him* in respect of that damage (*whatever the legal basis of this liability*), whether tort, breach of contract, breach of trust or otherwise" [emphasis added]. It can be seen from this that under our statutory third party contribution framework, the criteria for liability to be "in respect of the same damage" for the purposes of s 15(1) is simply identity in the liability to compensate (A) *without* any requirement that there must also be identity in the *legal basis* of the liability to compensate (A).

221 Our second reason for taking the position stated at [219] above stems from the decision of the English High Court in *K and Another v P and Others* [1993] Ch 140 ("*K v P*"). There, the plaintiffs sued six defendants for damages for *conspiracy to defraud*. The third defendant issued a third party notice against the plaintiffs' accountant claiming contribution or indemnification on the basis that the accountant had been *negligent* in failing to warn the plaintiffs. The accountant applied to strike out the third party claim against him, but failed. On appeal, Ferris J affirmed the lower court's decision not to strike out the third party claim, and accepted the argument made by counsel for the third defendant that "[i]t does not matter that the plaintiffs' cause of action against the third defendant arises from conspiracy or fraud whereas their cause of action against the third party arises from breach of a contractual or tortious duty of care" (at 148). Ferris J's reasoning in *K v P* has since been applied by our High Court in *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda and another suit* [2014] 2 SLR 673 ("*Airtrust*") at [36]–[37] and *Nganthavee Teriya (alias Gan Hui Poo) v Ang Yee Lim Lawrence and others* [2003] 2 SLR(R) 361 ("*Nganthavee*") at [15]–[17].

Version No 1: 27 Oct 2020 (22:40 hrs)

222 However, notwithstanding what we have just said at [218]–[221] above, we find that Andy Ong's and Ong Han Boon's third party claims against Foo for contribution in respect of Sakae's oppression claims against them in Suit 1098 are ultimately unsustainable. This is because the third party statement of claim which Andy Ong and Ong Han Boon filed in this suit was pleaded on the basis that Foo acted in breach of "his *fiduciary* duties owed to [the Company]" [emphasis added]. Even though Andy Ong and Ong Han Boon appear, at one point, to have regarded the "duty to exercise reasonable diligence and use reasonable care in performing the duties of [Foo's] office" as a facet of Foo's fiduciary duties to the Company, this error in their conception of the duties which a director's fiduciary duties encompass does not detract from the fact that their third party pleadings were framed in a manner that was premised solely on a breach of *fiduciary* duties by Foo. Given that the evidence only establishes that Foo acted in breach of his duty of skill, care and diligence to the Company (see [218] above) but did not breach of any of his fiduciary duties to the Company, we find that Andy Ong and Ong Han Boon have not managed to establish that Foo is "liable", based on their pleaded case, in respect of the damage suffered by the Company (which was damage caused by, specifically, the breach of fiduciary duties). Andy Ong's and Ong Han Boon's third party claims against Foo for contribution under s 15(1) of the Civil Law Act must thus fail on this basis.

223 For completeness, however, we turn to consider whether, assuming that Andy Ong and Ong Han Boon had properly pleaded that Foo had acted in breach of his duty of care, skill and diligence, Foo should in any event be exempted under s 16(2) of the Civil Law Act from liability to make contribution to them.

Version No 1: 27 Oct 2020 (22:40 hrs)

(2) Whether Foo should in any event be exempted from liability to make third party contribution to Andy Ong and Ong Han Boon

224 Section 16(2) of the Civil Law Act is set out again below for convenient reference:

> **Assessment of contribution**
>
> **16.**— …
>
> (2) Subject to subsection (3), the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
>
> …

225 In the Third Party Judgment, the Judge held that even if the requirements under s 15(1) of the Civil Law Act were satisfied in the present case, Foo should be exempted under s 16(2) from liability to make contribution because the wrongs in respect of which Andy Ong and Ong Han Boon (as well as Ho) were seeking contribution were not negligent wrongs and Foo should not be required to contribute to damage arising out of wrongful acts which are deliberate (at [35]–[36] and [38]). With respect, we disagree. We prefer instead the proposition advanced by Andy Ong and Ong Han Boon that a wrongdoer who engages in deliberate wrongdoing should not automatically or necessarily be precluded from seeking contribution in respect of his liability to the victim of the wrongdoing.

226 In our judgment, insofar as the Judge laid down a rule that contribution will never be available in respect of wrongs that are deliberate, this is, with respect, incorrect. This is because, by virtue of the definition of "liable" in s 19(1) of the Civil Law Act, contribution under s 15 may be recovered in respect of all forms of liability to compensate a victim of a civil wrong "(whatever the legal basis of this liability), whether tort, breach of contract,

Version No 1: 27 Oct 2020 (22:40 hrs)

breach of trust or otherwise": see *Airtrust* at [39]; see also [220] above. Given that torts, breaches of contract and breaches of trust (among other civil wrongs) may all be committed deliberately, the fact that Parliament did not expressly preclude persons liable on any of these legal bases from recovering contribution shows that there should not be a blanket exclusion of claims for contribution in respect of deliberate wrongs. This conclusion finds support in the decision of the English Court of Appeal in *Downs and Another v Chappell and Another* [1997] 1 WLR 426, where the court affirmed the trial judge's observation that he would have apportioned liability between the two defendants equally even though one defendant had acted fraudulently and "was very seriously at fault", while the other defendant had only acted negligently (at 445). We should also point out that Foo himself agrees that a party who causes damage as a result of deliberate acts should *not* be precluded from seeking contribution in respect of its liability to the injured party. Hence, it is clear to us that even a dishonest and fraudulent wrongdoer is not necessarily barred from recovering contribution.

227 Having said that, we agree that even if Andy Ong and Ong Han Boon had properly pleaded in their third party statement of claim that Foo had breached his duty of care, skill and diligence to the Company, Foo should in any event be exempted under s 16(2) of the Civil Law Act from any liability to make contribution to them in respect of the sums that they are to pay the Company.

228 In our judgment, while the court has a broad discretion to determine when to exercise its power under s 16(2) to exempt a third party defendant (who is a secondary wrongdoer) from making contribution to a third party claimant (who is a primary wrongdoer), it should generally exercise this discretion in at least two particular situations. The first is when allowing a third party claimant to recover contribution from a third party defendant would have the effect of

Version No 1: 27 Oct 2020 (22:40 hrs)

permitting the third party claimant to retain part of its wrongly acquired benefit to the extent of any sum that it is able to recover from the third party defendant, with the result that the third party claimant would be unjustly enriched: see *Nganthavee* at [18] and *Airtrust* at [61]; see also *K v P* at 149H, affirmed in *Dubai Aluminium Co Ltd v Salaam and Others* [2003] 2 AC 366 at [54] *per* Lord Nicholls of Birkenhead. The second is when allowing a third party claimant to seek contribution from a third party defendant would in effect be allowing the third party claimant to rely on its own illegality to recover damages from the third party defendant: see *Airtrust* at [61].

229 In respect of the second situation concerning illegality on the part of a third party claimant, it has been observed that "a claim for contribution under ss 15 and 16 of the [Civil Law Act] is *not affected* by any illegality (tortious or criminal) tainting the transactions or events" [emphasis in original]: see *Airtrust* at [39], citing *Nganthavee* at [17]. However, this broad statement of the position at law may need to be qualified somewhat.

230 In *Nganthavee*, Judith Prakash J (as she then was) held that a party to a conspiracy who was sued by the victim of that conspiracy was not precluded from exercising its right to recover contribution from a fellow conspirator, and that the *ex turpi causa* defence could not be relied on by the latter as a defence to the former's claim for contribution (at [17]). In arriving at her decision, Prakash J was guided by the decision in *K v P*, where Ferris J held that the *ex turpi causa* defence was not available as an answer to a claim for contribution under s 1(1) of the Civil Liability (Contribution) Act 1978 (c 47) (UK) ("the 1978 UK Civil Liability Act"), which is *in pari materia* with s 15(1) of our Civil Law Act. Ferris J explained that this was because the specific purpose of the 1978 UK Civil Liability Act was to enable claims for contribution to be made as between parties who would otherwise have no such claim under the general

Version No 1: 27 Oct 2020 (22:40 hrs)

law, and hence, to permit the *ex turpi causa* defence to defeat claims for contribution would substantially narrow the deliberately wide scope of s 1(1) of that Act (at 148H–149B).

231 In our judgment, the aforementioned authorities stand for the proposition that illegality cannot function as a *complete* defence to a claim for contribution under s 15(1) of the Civil Law Act. This, however, is not inconsistent with the view that illegality is a relevant factor which the court may consider in determining how it will exercise its discretion under s 16 to grant exemption from liability to make contribution (under s 16(2)) or otherwise limit the amount of contribution recoverable (under s 16(1)). Illegality may not be relied on as a complete defence to a claim for contribution under s 15(1) because, as recognised in *K v P*, the parliamentary intention underlying the statutory third party contribution regime is to enable claims for contribution to be made as between parties who would otherwise have no such claim under the general law, regardless of the legal basis of the third party claimant's liability to the injured party. This, however, does not prevent the court, in exercising its discretion under s 16 to determine the amount of contribution that a third party claimant should receive, from taking into account the presence of any illegality on the latter's part. Indeed, in *K v P* itself, Ferris J expressly recognised that ss 2(1) and 2(2) of the 1978 UK Civil Liability Act (which are *in pari materia* with ss 16(1) and 16(2) of our Civil Law Act) "give the court ample power to fix the amount of the contribution at a level, *including a zero level*, which takes account of all the factors which, in relation to common law claims, are relevant to the ex turpi causa defence" [emphasis added] (at 149B), and went on to observe that it was in fact possible for the *ex turpi causa* defence to exclude a claim for contribution altogether under the 1978 UK Civil Liability Act within the ambit of exemption from contribution under s 2(2) thereof (at 149D).

Version No 1: 27 Oct 2020 (22:40 hrs)

232 Applying these principles to the third party claims brought by Andy Ong and Ong Han Boon in Suit 1098, we are satisfied that even if Andy Ong and Ong Han Boon had properly pleaded that Foo had acted in breach of his duty of care, skill and diligence, Foo should in any event be exempted from making any contribution to them. Where Andy Ong is concerned, permitting him to recover any contribution would be tantamount to allowing him to retain part of his wrongly acquired benefit. It is clear that Andy Ong benefitted directly from the impugned transactions because the recipients of the wrongful payments concerned were either himself or companies in the ERC Group, in which he holds a substantial interest (see [9] above). Andy Ong would thus be unjustly enriched if he were allowed to claim any contribution from Foo.

233 Where Ong Han Boon is concerned, although the evidence does not support a finding that he would effectively be unjustly enriched if he were permitted to recover contribution from Foo, Foo should nonetheless still be exempted from making any contribution in this regard because Ong Han Boon would otherwise in effect be permitted to rely on his own illegality to avoid bearing the full brunt of his liability for his wrongdoing. The evidence shows that Ong Han Boon colluded with Andy Ong in respect of the two transactions for which he was found liable, namely, Transactions 1(a) and 2 (see [37(a)] and [37(c)] above). In respect of Transaction 1(a), Ong Han Boon facilitated the misapplication of the Company's assets for GCM's benefit by helping to prepare the Addendum, which was a sham, and channel to GCM management fees in excess of what had been agreed in the MA. In respect of Transaction 2, Ong Han Boon acted dishonestly in arranging for the First Loan to ERC Unicampus by helping to fabricate a paper trail to conceal from Sakae and Foo the fact that the loan had been executed without valid authorisation by the Company. It seems to us wholly untenable that Ong Han Boon, who participated

Version No 1: 27 Oct 2020 (22:40 hrs)

in a scheme with Andy Ong to defraud Sakae by causing the Company to carry out transactions which were oppressive to Sakae as a minority shareholder, should now be allowed to recover contribution in respect of his liability to the Company from Foo, the chairman of Sakae's board.

234 Therefore, even assuming that the requirements under s 15(1) of the Civil Law Act are satisfied, we find that Foo should in any event be exempted under s 16(2) from making any third party contribution to Andy Ong and Ong Han Boon in respect of Sakae's oppression claims in Suit 1098.

Our decision on the Third Party Appeals

235 Accordingly, we dismiss the appeal brought by Andy Ong and Ong Han Boon in CA 103 in respect of their third party claims in Suit 1098, and make no order in respect of Andy Ong's third party claim in Suit 122. As for Ho's appeal in CA 104 against the Judge's dismissal of his third party claim, we make no order, save as to set aside the Judge's order of indemnity costs against him.

Conclusion

236 For these reasons, we make the following orders:

(a) SUM 126 is allowed.

(b) No order is made in respect of OS 13.

(c) CA 86 is allowed.

(d) CA 87 is allowed in part only in respect of Transaction 6. The Judge's order for Andy Ong to pay Sakae the sum of $2,641,975 and interest thereon is set aside. Instead, Sakae's subscription for the additional 2,641,975 shares in the Company is invalidated and the

Version No 1: 27 Oct 2020 (22:40 hrs)

Company is to repay Sakae the sum of $2,641,975. ERC Holdings' subscription for shares in the Company is invalidated. The sum paid by ERC Holdings for the shares which it received is to be held by the Company in escrow, and Sakae and ERC Holdings have the liberty to apply to this court within 30 days of the date of this judgment for an appropriate order as to how this sum is to be disbursed.

(e) CA 103 is dismissed in respect of the third party claims under Suit 1098, and no order is made in respect of the third party claim under Suit 122.

(f) No order is made in CA 104, save as to the setting aside of the Judge's order of indemnity costs against Ho.

237 Unless the parties come to an agreement on costs, they are to furnish submissions (not exceeding ten pages each) to this court on the costs of these appeals and applications within 30 days of the date of this judgment.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Lee Eng Beng SC, Rethnam Chandra Mohan, Yuen Djia Chiang Jonathan, Jeremy Gan, Chia Ming Yee Doreen and Gaw Wai Ming Daniel (Rajah & Tann Singapore LLP) for the applicant in Court of Appeal Originating Summons No 13 of 2017 and the appellants in Civil Appeals Nos 87 and 103 of 2017;
Davinder Singh s/o Amar Singh SC, Jaikanth Shankar, Pardeep Singh Khosa, Navin Shanmugaraj Thevar, Lydia Ni and Jaspreet Singh (Drew & Napier LLC) for the first respondent in Court of

Version No 1: 27 Oct 2020 (22:40 hrs)

Appeal Originating Summons No 13 of 2017 and the respondent in Civil Appeals Nos 86 and 87 of 2017;
Siraj Omar, Lee Wei Alexander and Audie Wong Cheng Siew (Premier Law LLC) for the second respondent in Court of Appeal Originating Summons No 13 of 2017 and the respondent in Civil Appeals Nos 103 and 104 of 2017;
Chacko Samuel, Lim Shack Keong, Anne Marie John and Too Fang Yi (Legis Point LLC) for the appellant in Civil Appeals Nos 86 and 104 of 2017.

Version No 1: 27 Oct 2020 (22:40 hrs)