IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 67

High Court — Suit No 639 of 2018

Between

Lim Anthony

… *Plaintiff*

And

(1) Gao Wenxi
(2) Aussino International Pte Ltd

… *Defendants*

JUDGMENT

[Companies] — [Oppression]
[Contract] — [Misrepresentation]

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Lim Anthony
v
Gao Wenxi and another

[2020] SGHC 67

High Court — Suit No 639 of 2018
Mavis Chionh Sze Chyi JC
6, 10, 11, 12 December 2019, 28 March 2020

6 April 2020 Judgment reserved.

Mavis Chionh Sze Chyi JC:

Background

1 The second defendant ("Company") was incorporated by the plaintiff ("Anthony"), who obtained a license for the Company to use the Aussino trademark (the "Mark") from the licensor, Aussino (USA) Inc ("Aussino USA"). Anthony was the executive director and CEO of Aussino USA, but he had no shareholding in Aussino USA. Anthony owned 100,000 shares in the Company, for which he paid $100,000. Afterwards, on the introduction of her husband ("Ben"), the first defendant ("Gao") joined Anthony as his business partner in running the Company.

2 The Company wanted to rent a unit at Harbourfront, but the landlord required the Company to have a minimum paid-up capital of $200,000. At Ben's proposal, Anthony transferred 50,000 shares to Gao, so that each of them held

50,000 shares in the Company as at 24 October 2017. On the same day, Gao was appointed a director of the Company. On 26 October 2017, a further 50,000 shares were issued to Anthony and Gao each, so that each of them held 100,000 shares in the Company. The purchase price of the 100,000 newly-issued shares was set-off against a loan of $100,000 that Anthony had previously made to the Company.

3 After some time, the working relationship between Anthony and Gao deteriorated. Parties negotiated for Anthony's exit from the Company. Anthony proposed a Memorandum of Understanding ("MOU"), under which the Company would be granted a three-year license to use the Mark from Aussino USA. Gao, however, wanted the license to be "indefinite". Negotiations broke down. Anthony resigned as director on 11 May 2018, while remaining a 50% shareholder of the Company.

4 After Anthony's resignation as director, he used another company he owned, Aussino Fashion Pte Ltd ("Aussino Asia"), to set up operations selling products branded with the Mark. Gao, in turn, proceeded to issue 2,400,000 shares to herself at the nominal price of $1 on 21 May 2018. This resulted in a dilution of Anthony's shares in the Company from 50% to about 4%.

Issues

5 Anthony brought the following claims against Gao and the Company:

(a) Against Gao, two claims for $50,000 each, for money that Anthony paid to obtain the shares in the Company for Gao; and another claim under s 216 Companies Act (Cap 60, 2006 Rev Ed) ("CA"); and

(b) Against the Company, a claim for $450,000, being repayment of the loans that he had made to the Company.

6 Gao bought two counterclaims against Anthony:

(a) A claim for $450,000, being the recovery of her loans to the Company, based on misrepresentations which she said Anthony had made to induce her to invest in the Company; and

(b) A claim for $700,000, for breach of an agreement that the Company would be able to use the Mark exclusively in Singapore, Malaysia and Indonesia.

7 The Company also brought counterclaims against Anthony for breaches of director's duties.

8 I will address the claims and counterclaims in turn.

Anthony's claims

$50,000 from Gao for the 50,000 shares transferred to her

9 It was not disputed that parties had entered into an agreement on 20 October 2017 ("the October Agreement"), which set out the structure of their shareholding in the Company. Under the October Agreement, Gao was to pay Anthony $50,000 for the latter to transfer her 50,000 shares in the Company; and they would each pay an equal amount to the Company for the issuance of new shares. It is also undisputed that Gao has not paid Anthony the $50,000.

10 Gao claimed she was induced to enter into the October Agreement because of the following misrepresentations from Anthony:[1]

(a) first, that the Mark was owned by Anthony or by a company he controlled;

(b) second, that the Company could use the Mark for its business; and

(c) third, that the Company had at least $100,000 in its bank account with UOB Bank ("UOB Account").

Gao claimed that she was entitled to rescind the October Agreement as a result of the misrepresentations, and that she was not bound to pay Anthony the $50,000.

11 Having considered the evidence adduced and the submissions made, I find Gao's defence to be without merit. An actionable misrepresentation is a false statement of fact made by one party to the other party, on which the other party relied in entering into the contract: *Halsbury's Laws of Singapore* vol 7 (Buttersworth Asia, 2020) at para 80.173. In my view, there were no actionable misrepresentations made by Anthony.

The representation that Anthony or a company under his control owned the Mark

12 According to Gao, Anthony represented that either he or a company he controlled owned the Mark.[2] I am not satisfied that Anthony made any

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1 Gao's AEIC at [35].

2 Gao's AEIC at [22].

representation that *he himself* was the owner of the Mark. I note that Gao's husband Ben (who was the main person from the Defendants' side dealing with Anthony in relation to the October Agreement) wrote in his email dated 26 October 2017 that it was "[Anthony's] company [who was] the [Mark's] owner".[3] This was a mere six days after the October Agreement was entered into.

13 As for the alleged representation that Aussino USA – a company controlled by Anthony – owned the Mark, Gao's case on this issue did not make sense. It was not disputed that Aussino USA *is* the owner of the Mark – so any representation by Anthony to this effect would not be false. As to whether Anthony *misrepresented that he controlled Aussino USA*, in the first place there was no documentary or other objective evidence of Anthony making such a representation. However, even if Anthony had represented that he controlled Aussino USA, the Defendants themselves clearly accept such a representation would be true. In fact, the Defendants themselves pleaded in their Defence and Counterclaim that Anthony "effectively has control over Aussino USA".[4] On the Defendants' own case, therefore, assuming Anthony had represented that he controlled Aussino USA, there could be no question of such a representation being false.

The representation that the Company can use the Mark for its business

14 Understandably, if the Company's business involves the sale of goods branded with the Mark, the Company must have been entitled to use the Mark.

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3 Agreed Bundle of Documents vol 1 at p 361.

4 Defence and Counterclaim (Amendment No 2) at [74].

This meant that Anthony likely did represent to Gao that the Company was entitled to use the Mark.

15 However, I am not persuaded that these representations were false. On the evidence before me, the Company was in fact entitled to use the Mark, having been granted a license from Aussino USA. It did not matter that the license was later revoked. This is also consistent with Anthony's case that the Company was entitled to use the Mark as long as he remained involved in managing the Company.[5]

The representation about the money in the UOB Account

16 I am similarly not persuaded that Anthony made any representation about the money in the UOB Account. According to Gao's AEIC, Anthony told Ben over the phone sometime "in or around late October 2017"[6] that the Company had "at least $100,000"[7] in the UOB Account. Her evidence on the stand, however, was inconsistent with her affidavit evidence. First, the sum represented by Anthony to have been in the UOB Account went from "at least $100,000"[8] to $130,000.[9] Second, Gao made the sudden claim on the stand that she was sitting next to Ben when Anthony made the phone call.[10] Third, the date of the phone call was now "[b]etween 20 to 24th [October]",[11] and not "late

5 Transcript (6 December 2019) at 61, 129.

6 Gao's AEIC at [20]; see also FNBP (20 December 2018) at [10].

7 Gao's AEIC at [20].

8 Gao's AEIC at [20], [22(c)].

9 Transcript (10 December 2019) at 136, 139.

10 Transcript (10 December 2019) at 136.

11 Transcript (10 December 2019) at 136.

October". On the other hand, Ben stated on the stand that the phone calls were made in "late September or early October".[12] Given the material inconsistencies in the evidence about the circumstances in which Anthony's representation was allegedly made, I am not persuaded that there was any representation from Anthony about the money in the UOB Account.

17 Gao also sought to furnish last-minute evidence on the stand. She alleged that Anthony made two further representations: First, Anthony was said to have represented to her on 24 October 2017 that the Company had $130,000 in the UOB Account to her; and second, Anthony was said to have represented to Ben on the phone around 25 or 26 October 2017 that there was only about $10,000 in the UOB Account. These representations were not mentioned in her pleadings or AEIC, and I am not persuaded that they were made. Indeed, regrettably, I formed the distinct impression that Gao was inventing this new evidence on the stand in an attempt to bolster her case. In any event, these alleged representations occurred *after* the October Agreement had been entered into, and were thus irrelevant.

18 Even if Anthony did misrepresent to Gao the money in the UOB Account, I am not persuaded that she relied on this misrepresentation in entering into the October Agreement. First, Ben's email dated 20 October 2017, which contained the proposal for the terms of the October Agreement, made no mention of the money in the UOB Account. Second, Gao claimed that she entered into the October Agreement to "equalise [her] contributions"[13] in the UOB Account. If this was really the case, then the purchase price for the shares

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12 Transcript (10 December 2019) at 38.

13 Gao's AEIC at [37].

would have been $65,000 (being half of the $130,000 that, according to Gao on the stand, Anthony represented was in the UOB Account). It was not. This suggests that Gao's obligations under the October Agreement were unrelated to the amount of money in the UOB Account, and therefore, that the question of the money in that account was not on Gao's mind when she entered into the October Agreement.

19 Even if there is an actionable misrepresentation, rescission will still be unavailable if the representee chooses to affirm the contract: *Strait Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [42]. During cross-examination, Gao admitted that after finding out about the balance of the UOB Account, she did not say to Anthony that she was no longer obligated to pay him $50,000;[14] instead, she chose to continue the joint venture with him.[15] In my view, this evidence pointed towards her unequivocal intention to affirm and to continue with the October Agreement. Accordingly, I do not find that Gao is entitled to rescission.

$50,000 from Gao for a further 50,000 shares Anthony has bought for Gao

20 As mentioned at [2] above, to increase the Company's paid-up capital, 50,000 shares were issued to Anthony and Gao each, and the purchase price for the newly-issued shares was set off against a loan of $100,000 that Anthony had previously made to the Company. These arrangements were documented[16].

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14 Transcript (10 December 2019) at 161.

15 Transcript (10 December 2019) at 162–163.

16 Anthony's AEIC at [46]–[53].

Anthony then claimed against Gao for the purchase price of her portion of the newly-issued shares, at $50,000.

21 In response, Gao claimed that she was unaware of the above arrangements. She insisted that the purchase price for her 50,000 new shares would be set off against the money she had put in the Company. Having examined the evidence, I reject Gao's explanations as they were refuted by the objective documentary evidence available.

22 First, Gao was clearly aware of the arrangements. In cross-examination, she admitted that Ben had informed her of the arrangements around 26 October 2017.[17] She also admitted that she was copied in an email from the Company's corporate secretary to Anthony on 26 October 2017, which contained details of the arrangements.[18]

23 Second, although Gao claimed that she had paid $85,000 on behalf of the Company for the deposit on the lease, which could be used to set off the purchase price of the shares, in cross-examination she agreed that this $85,000 was an "expense" for which she could seek reimbursement from the Company.[19]

24 On the evidence before me, Gao's additional 50,000 shares were clearly paid for by money paid by Anthony. The 50,000 additional shares were not, and could not have been, a gift from Anthony. Even Gao has not claimed that they were a gift. In the circumstances, I find that Gao is liable to pay Anthony the purchase price for the shares, at $50,000.

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17 Transcript (11 December 2019) at 25.

18 Transcript (11 December 2019) at 26.

19 Transcript (11 December 2019) at 32–33.

Anthony's oppression claim against Gao under s 216 CA

25 Anthony's oppression claim under s 216 CA is premised on two grounds:

(a) First, Gao's issuance of 2,400,000 shares in the Company to herself without Anthony's consent on 21 May 2018; and

(b) Second, Gao's refusal to negotiate a license agreement with Aussino USA.

26 According to Anthony, he entered into another agreement with Gao on 26 October 2017, which governed how the Company was to be managed by them ("Shareholders Agreement"). Anthony claimed that he had two legitimate expectations pursuant to the Shareholders Agreement, which were breached: that his shareholding in the Company would not be diluted without his consent, and that he would be entitled to the final say in important matters. In response, Gao claimed that her dilution of Anthony's shareholdings was a legitimate response to Anthony's attempts at sabotaging the Company's business.

27 A claim in minority oppression can be established if there has been a departure from a complainant's legitimate expectations to the extent that it has become unfair: *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 ("*Lim Kok Wah*") at [103]. The complainant's legitimate expectations can be gleaned from formal legal agreements such as the company's constitution and any supplemental shareholders' agreements (see Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 4.031); or, where equitable considerations apply, even from informal and undocumented understandings (*Lim Kok Wah* at [103]).

28 I find in favour of Anthony on his claim of oppression arising from Gao's dilution of his shares through the unilateral issuance of 2,400,000 shares to herself. The Shareholders Agreement made it crystal clear in cl 5 that

> …[The] issuance of new shares and the request to increase paid-up capital must be **mutually agreed** [by Anthony] and [Gao].
>
> [emphasis in original]

Therefore, Anthony had a legitimate expectation that his shares in the Company would not be varied without his consent. Gao's unilateral issuance of shares to herself – which diluted Anthony's shareholding from 50% to a mere 3.96% – was thus a departure from Anthony's legitimate expectations.

29 I am of the view that this departure from Anthony's legitimate expectations was unfair. The dilution of Anthony's shares meant that Gao now had near-complete ownership of the Company without actually having had to spend any money to buy out Anthony's shares. As a corollary, Anthony's investment in the Company lost nearly all its value overnight, as he went from being an equal shareholder to having a shareholding of less than 4% – in spite of the provisions in cl 5 of the Shareholders Agreement. This amounted to commercial unfairness which engaged s 216 CA. In this connection, it is well-established that a single act can amount to minority oppression so long as it passes the test of being 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 Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 at [74]–[77]) – which on the evidence before me, is what Gao's act of diluting Anthony's shareholding amounted to.

30 I do not accept Gao's claim that the dilution of Anthony's shares was necessary to protect the Company from Anthony's attempts at sabotage. The

claim by Gao of Anthony's "attempts" at sabotage did not carry any real merit, as I will explain (see [42] below). Tellingly, Gao herself has conceded in the amended Defence and Counterclaim that she is agreeable to the allotment of the 2,400,000 shares being set aside[20].

31 However, I am of the view that there is no case of oppression arising from Gao's refusal to negotiate a license agreement with Aussino USA. Anthony failed to explain how Gao's refusal in this respect amounted to a departure from his legitimate expectation that he was entitled to the final say on the management of the Company. At least in the period prior to Gao's dilution of his shareholding on 21 May 2018, it was open to Anthony to override a decision by Gao not to negotiate a licence agreement. There is no evidence that he tried to do so. In fact, on his own evidence, he was the one who voluntarily resigned his directorship on 11 May 2018 and – in his own words – "washed [his] hands of the management" of the Company.[21]

$450,000 from the Company for repayment of loans

32 I turn next to Anthony's claim for repayment of loans made to the Company. It is not factually disputed that Anthony made loans to the Company totalling $450,000, which he now seeks to claim back. In response, Gao contended that Anthony had agreed to seek repayment of the loans only when the Company became profitable.

33 A creditor is entitled to demand payment of a loan at any time by giving reasonable notice in the absence of any special arrangement: *Gobind Lalwani v*

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20 Defence and Counterclaim (Amendment No 2) at [84].

21 Anthony's AEIC at [35].

Basco Enterprise Pte Ltd [1998] 3 SLR(R) 1019 at [16]. Thus, the onus lies on Gao to show that Anthony had agreed to ask for repayment of the loan only when the Company turned a profit.

34 There is nothing in the evidence that supports Gao's contention. Neither the October Agreement nor the Shareholders Agreement (the terms of which were first drafted by Gao's husband Ben) referred to a promise by Anthony to seek repayment of his loan only when the Company makes a profit. During the trial, Gao herself admitted that there was no discussion between her and Anthony about when the money should be repaid.[22] In particular, she stated that

> "[If she and Anthony] did talk about [Anthony's agreement to defer repayment of his loan to the Company], [they] would have to sign a loan agreement, but [they] didn't sign anything."[23]

35 I find therefore that the Company is liable to repay Anthony the $450,000.

Gao's counterclaims

$450,000 from Anthony for misrepresentations

36 I will next address Gao's counterclaims. Gao claimed that she had given $450,000 in shareholder loans to the Company on the basis of the following misrepresentations from Anthony:[24]

(a) first, that the Mark was owned by Anthony or a company he controlled;

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22 Transcript (11 December 2019) at 40.

23 Transcript (11 December 2019) at 33.

24 Defence and Counterclaim (Amendment No 2) at [88].

(b) second, that the Company could use the Mark for its business; and

(c) third, that the Company had at least $100,000 in its bank account.

Gao claimed that she had lost the $450,000 in consequence of Anthony's misrepresentations.

37 I dismiss this counterclaim, since I have found that Anthony made no actionable misrepresentations (see [12]–[18] above).

$750,000 from Anthony for breach of the Shareholders Agreement

38 Gao also claimed that Anthony breached cl 2 of the Shareholders Agreement, which provided that the Company had the exclusive right to use the Mark in Southeast Asia, by the following acts after he resigned as director of the Company:[25]

(a) Issuing letters of demand alleging that the Company did not have any right to use the Mark; and

(b) Imposing onerous conditions in the MOU for the license of the Mark.

39 I begin with an examination of cl 2. The clause provided that "The [Company] had the exclusive rights to use the [Mark] in [Southeast Asia]." Since Anthony was the one who obtained approval from Aussino USA for the Company to use the Mark, cl 2 would be interpreted as imposing on Anthony

[25] Defence and Counterclaim (Amendment No 2) at [94].

an obligation to provide the Company with an "exclusive [right]" to use the Mark.

40 I turn to examine the nature of this "exclusive [right]". It could not have been an indefinite right, which would only be granted later once the Company was successfully listed - as provided under cl 1 of the Shareholders Agreement.[26] Nor was it a right arising from a contractual license, since there was no evidence of a license agreement subsisting between the Company and Aussino USA at the time the Shareholders Agreement was entered into. On the evidence available, the irresistible inference was that the Company's right to use the Mark came from a bare licence, which was revocable at will. This inference is consistent with Anthony's position that he could "procure permission to use the [Mark] in Singapore for the immediate future."[27]

41 As a result, cl 2 only imposed on Anthony an obligation to provide the Company with a right to use the Mark which was revocable at will. It follows that Anthony was not in breach of cl 2 because he *did* provide the Company with such a right.

The Company's counterclaims

42 The Company has also made a number of counterclaims against Anthony. Nearly all of them were without merit. I will address them next.

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26 Agreed Bundle of Documents at p 361; Transcript (11 December 2019) at 44.

27 Anthony's AEIC at [35].

Anthony's request for medical insurance

43 The Company claimed that Anthony had breached his director's duties by requesting that the Company extend its medical insurance policy (if any) to his Wife.[28] With respect, I do not see how the making of this request amounted to a breach of Anthony's duty as a director. Anthony's request was refused by Gao in any event, which meant that the Company did not suffer any loss or damage – nor did Anthony make any gain – from his request.

Anthony's request for the Company to pay rent for Aussino Asia's premises

44 The Company claimed that Anthony breached his director's duties by requesting that the Company pay for the rental of Aussino Asia's premises. Once again, with respect, I do not see how the mere act of making a request can amount to a breach of director's duties. Moreover, Anthony's alleged request was refused by Gao,[29] which meant that the Company did not suffer any loss or damage, nor did Anthony make any gains.

The payment of salary to one Edward Wee

45 The Company alleged that Anthony caused it to pay the salary of one Edward Wee ("Wee"), even though Wee carried out work for Aussino Asia. However, Wee's salary was paid for work that Wee did *for the Company*, and not for Aussino Asia – as evidenced in the employment contract between the Company and Wee.[30] There was no evidence that Wee failed to do *any work* at

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28 Defence and Counterclaim (Amendment No 2) at [100(a)].

29 Gao's AEIC at [97].

30 Anthony's Core Bundle at PCB 148.

all for the Company. Therefore, Anthony did not cause the Company to remunerate Wee for work that the latter had done for *another* company.

46 Gao also claimed that Anthony unilaterally hired Wee without her consent. However, she was the one who signed the employment contract between Wee and the Company.[31] She claimed at trial that she had no choice in signing the employment contract because Anthony has insisted on hiring Wee.[32] I do not accept her explanation because she clearly had no problem rejecting requests from Anthony (as seen from her rejection of his requests for medical insurance for his wife and for rental of Aussino Asia's premises).

Anthony's request for a list of the Company's suppliers

47 The Company claimed that Anthony requested a list of the Company's suppliers so that he could order products from these suppliers for other companies selling goods branded with the Mark in USA and China.[33]

48 I am not persuaded that this request from Anthony was a breach of duty. First, the Company's business was focused in the Southeast Asia region, as seen from cl 2 of the Shareholders Agreement.[34] This meant that the orders made by companies selling goods branded with the Mark in USA and China would not impinge on the Company's business. Second, Anthony had explained in an email to Gao dated 6 December 2017 that with the extra orders, the price for the

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31 Transcript (11 December 2019) at p 132.

32 Transcript (11 December 2019) at p 133.

33 Gao's AEIC, [100]–[103].

34 Agreed Bundle of Documents vol 1 at 364.

goods bought for the Company could be negotiated downwards.[35] This suggested that Anthony's request was actually to the Company's benefit. In any event, as I have said, I am not satisfied that his request constituted a breach of his director's duties.

The blocking of the Company's email accounts

49 The Company also accused Anthony of misusing his directorial powers by requesting the blocking of the Company's email accounts. This accusation is without merit. The Company's email accounts were blocked on or around 22 May 2018,[36] ten days after Anthony resigned.[37] At this time, Anthony was no longer a director of the Company, meaning that he no longer owed any duties to the Company (except the fiduciary duty not to misappropriate the Company's assets – see [58] below). It followed that Anthony was not in any breach of duty for requesting that the Company's email accounts be blocked.

50 Further, Anthony remained a director of Aussino USA after his resignation from the Company. He therefore remained under the duty to promote the best interests of Aussino USA. I accept his argument that this would have required him to request for the Company's email accounts to be blocked, since these email accounts carried the Aussino domain name, and their usage could have led the public to believe that the Company continued to be the licensee of the Mark.

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35 Anthony's Core Bundle at PCB 114.

36 Gao's AEIC at [155].

37 Gao's AEIC at [139].

Anthony's attempt to appoint one New Siau Yen as a director and manager of Aussino Asia

51 The Company also alleged that Anthony breached his fiduciary duty by attempting to appoint Ms New Siau Yen ("Yen") as a director and manager of Aussino Asia after his resignation from the Company.

52 It is not disputed that Anthony revoked his offer of employment to Yen. I do not see how a breach of Anthony's fiduciary duties arose on the facts. Even if this failed attempt *per se* amounted to a breach, the Company did not suffer any loss or damage, nor did Anthony make any gains.

The leases for Plaza Singapura, IMM, Westgate and Parkway Parade

53 The Company accused Anthony of breaching his fiduciary duties by appropriating the Company's business opportunities after his resignation. These business opportunities were said to be leases that the Company was negotiating for units at Parkway Parade, Plaza Singapura, IMM, and Westgate malls (collectively, "Malls"). According to the Company, Yen approached the landlord of the Malls to request that the lease be granted to Aussino Asia instead of the Company. Yen herself was fired from the Company on 23 May 2018.

54 The law on post-resignation appropriation of business opportunities has been comprehensively set out by Rix LJ in *Foster Bryant Surveying Ltd v Bryant and another* [2007] 2 BCLC 239 ("*Bryant*") at [8]. The pertinent principles are as follows:

> 2. A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any property or business advantage either belonging

> to the company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations.
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> …
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> 4. A fiduciary relationship does not continue after the determination of the relationship which gives rise to it. After the relationship is determined the director is in general not under the continuing obligations which are the feature of the fiduciary relationship.
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> …
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> 7. A director is however precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the company and where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.
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> 8. In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurs after termination of the relationship with the company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge.
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> 9. The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were the property of the company in relation to which the director had fiduciary duties. By seeking the exploit the opportunity after resignation he is appropriating to himself that property. He is just as accountable as a trustee who retires without properly accounting for trust property.
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> 10. It follows that a director will not be in breach of the principle set out as point 7 above where either the company's hope of obtaining the contract was not a 'maturing business opportunity' and it was not pursuing further business orders nor where the director's resignation was not itself prompted or influenced by a wish to acquire the business for himself.

55 Applying the principles espoused by Rix LJ, I find no evidence that Anthony breached his fiduciary duties in relation to the leases. First, these leases could not have been said to be "maturing" business opportunities. Gao admitted on the stand that the Company did not want the lease with Parkway Parade.[38] Therefore, after Anthony's departure from the Company, the Company would no longer have wanted this lease. There was also no evidence that the Company continued to negotiate for the leases with Plaza Singapura, IMM and Westgate after Anthony's and Yen's departure. Second, Anthony has not actually "obtained" any business opportunities, since he stopped negotiations for the leases pending the resolution of this dispute.

The closure of the UOB Account

56 I come next to the closure of the UOB Account. Anthony admitted that he closed the UOB Account, of which he was the only signatory, and withdrew the remaining sum of $12,036.27. He justified this on the basis that he was repaying to himself the loans he made to the Company before Gao joined it.

57 It is not disputed that Anthony had resigned shortly before he closed the account on 31 May 2018 and withdrew the funds remaining in it. At the same time, both sides are agreed that the term "director" in s 4 CA "includes the position of director of a corporation by whatever name called". Both sides are agreed that a *de facto* director – that is, someone who is in substance a director, though not formally appointed as such – would owe the same fiduciary duties and be held to the same standards as a director. These fiduciary duties would obviously include the duty not to misappropriate the company's assets.

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38 Transcript (11 December 2019) at 72–74.

58 Anthony says he was not a *de facto* director at the time he closed the UOB account on 31 May 2018; the Company says he was. On balance, taking into consideration the available evidence, I find that he was. The test of *de facto* directorship is an objective one: what matters is that Anthony undertook functions in relation to the company which could properly be discharged only by a director: *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2010] SGHC 163 at [58]. There is no dispute that the UOB Account was a corporate account. Nor can there be any dispute that the operation of the UOB Account, and in particular decisions as to what to do with the funds in the account, constitute a key area of decision-making within the Company. It also cannot be disputed that Anthony's ability to operate the UOB Account depended on his being a director of the Company. In deciding to close the UOB Account and to withdraw the funds in it, Anthony clearly chose to assume the status and functions of a company director despite his having tendered his resignation on 11 May 2018. He was subject to a director's fiduciary duty not to misappropriate the company's assets, and I find him in breach of such duty in paying the $12,036.27 to himself. The fact that he had previously made loans to the Company is a separate matter. He should have pursued the necessary demand for repayment with the Company instead of unilaterally deciding to close the UOB account and to pay himself the money in that account.

Anthony's failure to file the Company's financial statements

59 Next, the Company accused Anthony of failing to file the Company's financial statement for the financial year ending 30 June 2017, as well as withholding company documents and records from the Company.

60 In respect of the alleged failure to file the Company's financial statement for the financial year ending 30 June 2017, given that the last written resolution

of the sole shareholder of the Company at the time (*ie,* Anthony) in lieu of AGM was passed on 1 December 2016,[39] it follows that the financial statements must be filed within 13 months from the date of this resolution (one year to have the next AGM, and another month after that to file financial statements). Accordingly, the financial statements must be filed by 1 January 2018. Since Gao was appointed a director of the Company on 24 October 2017, the onus of preparing and filing the financial statement would fall on both her and Anthony, and not just Anthony alone. In any event, even assuming there was a breach of Anthony's duty to file financial statements, I did not find that there was any evidence to show the Company had suffered loss or damage as a result.

61 As to the alleged withholding of company documents and records, Gao admitted on the stand that she had access to the Company's bank statements and expenses lists prior to October 2017,[40] when she was appointed a director of the Company. The accusation of breach by Anthony in this respect is therefore unsustainable.

Reliefs

62 Having regard to the findings set out above, I make the following orders for reliefs.

63 I order Gao to pay Anthony $100,000, and the Company to pay Anthony $450,000.

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39 Agreed Bundle of Documents vol 1 at 109.

40 Transcript (11 December 2019) at 142.

64 I order Anthony to pay the Company $12,036.27, which was the amount he unilaterally withdrew from the UOB Account.

65 As for the oppression claim under s 216 CA, I set aside Gao's issuance of the additional 2,400,000 shares to herself on 21 May 2018. I also order Gao to buy Anthony's shares in the Company without discount. If there is no mutual agreement between Anthony and Gao on the price to be paid for Anthony's shares, the price will be valued by an independent valuer, to be appointed by mutual agreement between Anthony and Gao. Failing any mutual agreement on the appointment of the independent valuer, either party has liberty to apply to this Court for further directions.

66 The costs of any independent valuer shall be borne by Gao.

67 Anthony submitted that the date of valuation should be before 10 May 2018, which was the point when Gao refused to enter into the license agreement with Aussino USA. I disagree. As I mentioned earlier, it was open to Anthony to override Gao's decision, as provided for under the Shareholders Agreement. Nor was there any legitimate expectation on Anthony's part that Gao *must* negotiate for the license with Aussino USA. Accordingly, the date of valuation should be 20 May 2018, before Anthony's shareholding was diluted.

68 I will hear counsel's submissions on costs.

[**Postscript: After taking into account the fact that Anthony had succeeded on most of his claims, that Gao had failed on all her counter-claim, and that the Company had succeeded on one counter-claim for a sum much less than the claims on which Anthony had succeeded, the costs of this action were awarded to Anthony and fixed at a total of $45,000 (Gao and the Company**

to be jointly and severally liable for these costs). Interest was ordered to run on all the judgment sums at 5.33% per annum from the date of judgment.]

Mavis Chionh Sze Chyi
Judicial Commissioner

Soo Ziyang, Daniel and Cumara Kamalacumar (Selvam LLC) for the plaintiff;
Ravi s/o Madasamy (Carson Law Chambers) for the defendants.