IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 46

Civil Appeal No 29 of 2020

Between

Ong Heng Chuan

… *Appellant*

And

(1) Ong Teck Chuan
(2) Ong Boon Chuan
(3) Ong Siew Ann
(4) Tong Guan Food Products Pte Ltd

… *Respondents*

In the matter of Suit No 1086 of 2017

Between

Ong Heng Chuan

… *Plaintiff*

And

(1) Ong Teck Chuan
(2) Ong Boon Chuan
(3) Ong Siew Ann
(4) Tong Guan Food Products Pte Ltd

… *Defendants*

JUDGMENT

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

TABLE OF CONTENTS

Ong Heng Chuan
v
Ong Teck Chuan and others

[2021] SGCA 46

Court of Appeal — Civil Appeal No 29 of 2020
Judith Prakash JCA, Woo Bih Li JAD and Quentin Loh JAD
3 February 2021

5 May 2021 Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 The present appeal arises out of the decision of the High Court Judge (the "Judge") in *Ong Heng Chuan v Ong Teck Chuan and others* [2020] SGHC 161 (the "Judgment") dismissing the claim of the appellant, Ong Heng Chuan ("OHC"), of minority oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) (the "Act") against the first and second respondents, Ong Teck Chuan and Ong Boon Chuan (respectively, "OTC" and "OBC"). It is common ground that OHC had no quarrel with the third respondent, Ong Siew Ann ("OSA") and added her as a defendant to the action simply because of her shareholding in the fourth respondent, Tong Guan Food Products Pte Ltd ("the Company"). The siblings OHC, OTC, OBC and OSA are four of the ten children of the late Mr Ong Tong Guan ("Mr Ong"), the founder of the Company. Following a trial spanning 19 days, the Judge dismissed OHC's claim, having

found that the transactions impugned by him were undertaken by OTC and OBC in the best interests of the Company and for valid commercial reasons. They could not therefore be said to have breached their directors' duties owed to the Company at the material time. Furthermore, even assuming *arguendo* that OTC and OBC had breached their duties, the Judge concluded that OHC failed to demonstrate any distinct personal wrong occasioned to him that would constitute oppressive conduct capable of being vindicated under s 216 of the Act.

2 On appeal, OHC launches a wide-ranging attack on the Judge's factual findings and legal conclusions in seeking to reverse her decision.

Factual background

3 The facts are set out by the Judge in the Judgment and are largely undisputed. It is rather the characterisation of the relevant actions of OTC and OBC that is the subject of heated dispute between the parties. We thus summarise only the facts that are relevant for the purposes of the present appeal. Given the numerous individuals, companies and agreements involved in the present case, we provide a summary of the abbreviations adopted, in Annexures A, B and C below, with some details to the extent that such details were made available to the Court.

The Company, its subsidiaries and associated companies

4 The story of this family dispute begins in the 1960s. This was when Mr Ong first set up a sole proprietorship, Tong Garden Product Services. In 1980, the Company was incorporated and subsequently became the ultimate holding company for a number of subsidiaries and associated companies,

collectively referred to as the "Tong Garden Group". The Company was itself a pure holding company that did not conduct any business of its own. Its revenue was solely derived from investments in the business of its subsidiaries and associated companies. The Tong Garden Group was involved in the manufacture, marketing and sale of various snack products such as nuts, seeds and dried fruit.

5 Mr Ong, who remained in sole control of the Tong Garden business until his illness in early 1984, passed away later that year. Following his demise, Mr Ong's children took over the Tong Garden business. There was a multitude of legal proceedings over the years resulting in numerous changes in shareholdings and management of the Company. The only siblings who remained shareholders in the Company at the time of the present suit were OHC, OTC, OBC and OSA. OHC and OTC each held 520,000 shares, OBC held 1,760,000 shares and OSA held 200,000 shares in the Company. These shareholdings correspond to approximately 17.33%, 58.67% and 6.67% respectively of the Company's shares. The parties' positions in the Company, having shifted over the years, are chronicled as follows:

(a) OHC was a director from 16 August 1980 to 7 May 2003, during which period he was also managing director from 31 July 1999 onwards. OHC was declared a bankrupt on 3 December 2004 and obtained a discharge from bankruptcy on 16 September 2016.

(b) OTC was a director from 3 July 1984 to 14 April 2001, and from 30 December 2015 onwards. In addition, the Judge found that between 14 December 2008 to 29 December 2015, OTC acted as a *de facto* and/or shadow director as well. This finding was not challenged by OTC on appeal and we need not say anything further in this regard.

(c) OBC was a director from 16 August 1960 to 8 December 1983, as well as from 1 September 1999 to 30 December 2015.

(d) OSA was a director from 10 April 1999 to 15 July 2009.

On 12 July 2018, the Company was placed in compulsory liquidation.

6 We shall, for ease of reference, refer to the companies that form part of the Tong Garden Group as the Singapore Entities, Malaysian Entities and Thai Entities. These entities run the Tong Garden Group's operations in Singapore, Malaysia and Thailand respectively:

(a) Singapore Entities: Incorporated in 1994, Food Products (S) was the main operating entity in Singapore. It was a wholly-owned subsidiary of TGHPL, which was in turn a wholly-owned subsidiary of the Company. Food Products (S) was wound up by way of a voluntary members' liquidation on 8 July 2013.

(b) Malaysian Entities: Food Products (M) was the manufacturing arm of the Tong Garden Group in Malaysia while Snack Food (M) took care of sales and marketing in Malaysia. Both were subsidiaries of Tong Garden Holdings Sdn Bhd, itself a subsidiary of TGHPL.

(c) Thai Entities: Tong Garden (T) was the main operating entity of the Tong Garden Group in Thailand and Nut Candy (T) was its subsidiary. Another Thai company, NOI (T), was the subject of some dispute, with OHC alleging that the Company had an interest in NOI (T), while OTC asserted that NOI (T) "was never a subsidiary or an associated company of the Company, and the Company has never had any direct or indirect interest in it" (Judgment at [16]–[17]).

Companies owned or controlled by OTC

7 The alleged oppressive actions (see [8] below) further involve several companies that are not part of the Tong Garden Group but are either owned or controlled by OTC. These are:

(a) TGFS, which was incorporated on 7 March 2008 and was in turn wholly-owned by OTC FCPL. OTC is the sole director of TGFS.

(b) TGFM, which was incorporated on 3 April 2008 and was 99% owned by OTC FCPL. OTC is one of TGFM's directors. The other two shareholders of TGFM are OTC and his wife, YLC.

(c) OTC FCPL, which was incorporated on 12 September 2014 and was wholly-owned by OTC, who is also a director of that company.

(d) TGMSB, which was incorporated on 3 April 2008 and was a company ultimately controlled by OTC.

The alleged oppressive acts

8 OHC's claim of oppression centres around three categories of actions, broadly framed:

(a) First, the sale and diversion of the "Tong Garden" and "NOI" trademarks (collectively, the "Trademarks") from the Tong Garden Group to Villawood. We shall refer to this as the "Trademarks Sale".

(b) Second, a series of actions that the parties had referred to as part of a broad restructuring exercise of the Tong Garden Group. We shall

refer to this as the "Restructuring" for the sake of simplicity as the parties have done so.

(c) Third, the disposal of the business of the Tong Garden Group in Thailand to OTC's companies. We shall refer to this as the "Thai Entities Sale".

9 OHC pleaded that these acts breached his "legitimate expectations" as to how the Company should be run based on his strict legal rights, such rights being based on or derived from: the Articles of Association of the Company, s 157 of the Act, common law and equity, and OTC's and OBC's directors' duties owed to the Company. As such, these impugned acts constituted oppressive conduct under s 216 of the Act by the majority shareholders in the Company who exercised their powers in a manner that prejudiced him. The fundamental and predicate question was thus whether the impugned acts constituted breaches of the duties that OTC and OBC owed to the Company as its directors.

10 To remedy the alleged oppressive conduct, OHC sought an order for the buy-out of his minority stake in the Company or, in the alternative, an order for OTC to transfer to him a number of shares, to be determined, in Tong Garden (T), NOI (T), TGFS and TGFM for the nominal purchase consideration of $1.

The Trademarks Sale

11 By an agreement dated 13 March 2000 ("the 2000 Villawood Agreement"), the Tong Garden Group (through the Company, TGHPL, Food Products (S) and NOI Food Products Pte Ltd) sold, *inter alia*, the "Tong

Garden" and "NOI" trademarks, together with the goodwill of the business relating to the goods in respect of which these trademarks were registered, to Villawood. These trademarks, as specified in the Schedule contained therein, related to the Trademarks that were registered in Singapore and Malaysia.

12 Villawood was a company incorporated in the British Virgin Islands and was owned and controlled by OBC and his wife, who was also a director of Villawood at the material time. The consideration paid by Villawood in exchange for the Trademarks was $260,003 which was a price based on a desktop valuation of the "Tong Garden" brand conducted by PricewaterhouseCoopers Management Services Pte Ltd ("PwC"). PwC had been engaged by OHC in his capacity as the then-managing director of TGHPL. In its report dated 17 February 2000 (the "Report"), PwC opined that the value of the "Tong Garden" and the "NOI" brand names was "estimated to be in the range of S$200,000 – $260,000". The 2000 Villawood Agreement was signed by OHC and OTC (in their capacity as directors, and on behalf of the Tong Garden Group of companies) and OBC (in his capacity as director, and on behalf of Villawood). The 2000 Villawood Agreement was then approved by a TGHPL director's resolution on 17 March 2000, likewise signed by OHC and OTC.

13 Sometime in October 2002, Villawood granted a ten-year licence to Food Products (S) and Snack Food (M) to manufacture and sell products bearing, among other things, the Trademarks ("the October 2002 Licence"). The October 2002 Licence was to run from 13 March 2000 and would have expired on 13 March 2010. On 8 February 2010, prior to the expiry of the October 2002 Licence, Villawood informed Food Products (S) and Snack Food (M) that that licence would not be renewed.

14 On 13 March 2010, Villawood entered into trademark licensing agreements with TGFS and TGFM. Through these agreements, Villawood granted each company a perpetual, irrevocable and exclusive licence to market, manufacture and sell products under, *inter alia,* the "Tong Garden" and the "NOI" trademarks in, respectively, Singapore and Malaysia.

15 On 9 November 2015, Villawood transferred the Trademarks to TGFS. On 8 April 2016, TGFS transferred the Trademarks to OTG Enterprise Pte Ltd. OTG Enterprise Pte Ltd was incorporated on 8 April 2016 and is wholly owned by OTC.

The Restructuring

16 OHC also pointed to a series of actions which took place in the course of 2008 to 2010. This was referred to by the parties as the "Restructuring" exercise. Although they used this nomenclature, we stress the importance of precisely identifying which acts formed part of this Restructuring exercise. This is because the term "restructuring" may be used to refer to *corporate* actions or to *shareholder* actions or to both.

17 By 2007, OBC and OSA were the only two directors left in the Company. On 6 August 2007, OBC sent Ong Siew Lay ("OSL"), his sister who was then suing him, a letter. This letter was copied to OHC, OSA and two other siblings (Ong Siew Kuan and Ong Siew Chin), and it stated OHC's intention to extricate himself from the Tong Garden business and his offer to hand the reins over to OSL:

> Dear Siew Lay,
>
> … I do not wish to clash with you in the court. I just want to pull out and leave the business to you and those whom you can

> gather together to manage. I just want to have a peace of mind to do my own things.
>
> …
>
> "Tong Garden" is the legacy of our parents. Among all of us, we wish to leave behind some of our glory to the next generation too. However, this is not so in our current situation. Tong Garden doesn't flourish in our hand; sad to say the business has caused too much hatred and suspicion amongst the sibling [*sic*]. …
>
> I have my own business pursuit. I never had intended to move into "Tong Garden". Mother requested my involvement was also to "salvage" Tong Garden. … However what I could do was only to provide as much financial support and cash flow to the company. I had silently contributed four to five million dollars of capital fund into Tong Garden to help solve much of its financial difficulties. …
>
> …
>
> Now I am tired, and, I wouldn't want to get involved in Tong Garden business anymore. I surely do not wish to leave behind my suspicion or hatred to our next generation. Hence I would like to inform you that all my shares interest in Tong Garden will be transferred to you, Siew Lay. I shall pull out in total from Tong Garden. *The "Tong Garden" logo and its trade mark I shall leave it under the custody of [OTC].* As for my estimated four to five million dollars capital loan to Tong Garden, the company may return it to me over a period of five to ten years.
>
> My only wish and hope are, you could continue to grow this business. We cannot let our parents' legacy fall into the hand of any third party. Our parents will be very sad to see that to [*sic*] happen. I hope you all could band together and come out with some plan for "Tong Garden" to continue its growth.
>
> [emphasis added]

18 OSL did not take up the offer. On 14 January 2008, OBC circulated a memorandum within the Tong Garden Group, stating that with effect from that date, the business operations in Singapore and Malaysia would be taken over by OTC, and OSA would retire from the day-to-day management of the business.

19 On 15 March 2008, OBC and OTC entered into an agreement for OTC to purchase from OBC, for the price of $7m, the following:

(a) all of OBC's shares in the Tong Garden Group;

(b) all of the debts owed to OBC by the Tong Garden Group; and

(c) the trademark "Tong Garden" owned by Villawood.

We shall refer to this as "the March 2008 Agreement". OTC then made payment to OHC under the March 2008 Agreement, through a series of instalments.

20 On 14 August 2009, two companies controlled by OTC entered into distributorship agreements with companies that were part of the Tong Garden Group (collectively, "the 2009 Distributorship Agreements"). First, TGFS entered into a distributorship agreement with Food Products (S) and Food Products (M). Second, TGMSB entered into a distributorship agreement with Snack Food (M) and Food Products (M). Pursuant to both these Distributorship Agreements, TGFS and TGMSB were respectively appointed the sole and exclusive distributors of peanuts and other snack foods in Singapore and Malaysia. Food Products (S) and Snack Food (M) were to cease carrying on the business of developing and selling these snack foods, while providing TGFS and TGMSB with such promotional materials, information, expertise, know-how and other assistance as the latter two companies might have reasonably required. It was also agreed as part of these Distributorship Agreements that, starting with the profits for the period from 1 April 2009 to 1 April 2010, the profits from the sale and distribution of the products would be shared among the various entities in the following proportions: 60% to TGFS or TGMSB (as the

case might be), and the remaining 40% to Food Products (S) or Snack Food (M) (as the case might be).

21 Food Products (S), Food Products (M) and Snack Food (M) went into voluntary liquidation between 2012 and 2014.

The Thai Entities Sale

22 It is common ground between the parties that OTC was responsible for managing the Tong Garden Group's business in Thailand from no later than 1990 onwards, and that over the years, OTC had found it difficult to work with his siblings. Consequently, and sometime in or around 2000, he sought to focus on managing the Thai business. On 4 January 2001, OTC and the Company entered into two sale and purchase agreements:

(a) The first was an agreement whereby OTC contracted to purchase from the Company, "the whole of the undertaking of Tong Guan in the Territory, the goodwill and all other assets whatsoever and wheresoever situated of Tong Guan in the Territory" ("the 2001 Thai SPA") with the exception of the "Tong Garden" and "NOI" trademarks. The "Territory" was defined as "Thailand, Laos, Cambodia, Vietnam and Burma (Myanmar)". Clause 2 provided that, instead, the Company would grant to OTC "an exclusive, perpetual and irrevocable licence to use the said trademarks in the Territory. As cl 4 stated, the purchase price was "based on the Net Tangible Assets of all the companies listed in the First Schedule to this Agreement as per the audited accounts for the year [ending] 31 December 2000, after making appropriate adjustment for difference in inter-company balance" (it bears mention here that no First Schedule was apparently attached to the 2001 Thai SPA). Clause 9

stated that the completion of the agreement "shall take place at the office of M/s Tan Cheng Yew & Partners … on 17 April 2000 at 2.00pm or such other date as may be mutually agreed by the parties", while cl 17 stated that the "effective date of the Agreement shall be 2 weeks from the date of signing this Agreement". Clause 19 stated that by the effective date, OTC "shall … deliver to [the Company] his duly executed letter of resignation as a director of [the Company] and all companies listed in the Third Schedule of this Agreement" (however, the Third Schedule was also not attached to the 2001 Thai SPA).

(b) The second was an agreement between OTC and OHC, OBC and OSA to sell them "all his shares and interest in [the Company]", which referred to OTC's 780,000 ordinary shares in the Company ("the 2001 Singapore SPA"). Clause 2 of this agreement provided that the purchase price "shall be based on the Net Tangible Asset of [the Company] as at 31 December 2000 as per the audited accounts, after making the appropriate adjustment for differences in inter-company balances" and that the purchasers (*ie,* OHC, OBC and OSA) would pay OTC "the consideration by way of 5 yearly equal instalments" (cl 4). Other clauses in the agreement provided for, *inter alia*, the completion date (cl 5) and the effective date (cl 7) of the agreement.

23 On 23 February 2001, OTC sent the Company a letter stating his resignation as director of the following companies: (a) the Company; (b) TGHPL; (c) Food Products (S); (d) Food Products (M); (e) NOI Food Products Pte Ltd; and (f) Tong Garden Holdings Sdn Bhd.

24 On 20 July 2009, the Company and OTC entered into an agreement intended to vary the 2001 Thai SPA ("the 2009 Variation Agreement"). Among other things, the 2009 Variation Agreement provided for the completion date of the 2001 Thai SPA to be varied to 28 July 2009 (cl 2.1), while the effective date of that SPA was varied to the "14th day after the date of the execution of the [Variation] Agreement" (cl 2.3). Clause 2.4 also deleted cl 19 of the 2001 Thai SPA that had provided for OTC to tender his resignation from the Companies and other entities. Notably, the 2009 Variation Agreement did not alter cl 4 of the 2001 Thai SPA, which provided that the purchase price "shall be based on the Net Tangible Assets of all the companies listed in the First Schedule to this Agreement as per the audited accounts for the year [ending] 31 December 2000, after making appropriate adjustment for difference in inter-company balance". Clause 2.5 of the 2009 Variation Agreement stipulated that "the entity listed" in the (missing) First Schedule was to be Tong Garden (T).

25 For the purpose of establishing the amount of consideration to be paid by OTC under the 2001 Thai SPA (as amended by the 2009 Variation Agreement), a firm of valuers – CC Koh & Co – was appointed to give an opinion. The report, dated 30 July 2009, opined that the "fair market value of the shares of [Tong Garden (T)] as at 31 December 2000 is **a negative value of Baht 95.73 per share**, computed using the Net Tangible Assets method … technically the fair market value of the shares of [Tong Garden (T)] as at 31 December 2000 have **nil value**" [original emphasis]. In addition, the fair market value was defined as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under compulsion to sell, and both parties have reasonable knowledge of the relevant facts".

26 On 20 July 2009, the Company and OTC entered into a deed of waiver, wherein the Company waived unconditionally its inter-company claims against Tong Garden (T) ("the 2009 Deed of Waiver"). The 2009 Deed of Waiver stated, as per cl 2.1, that the Company would "hereby irrevocably and unconditionally waive any and all claims against [Tong Garden (T)] and to any and all claims to whatsoever interests in [Tong Garden (T)], of whatever nature and however arising, upon legal completion of the transactions contemplated under the [2001 Thai SPA]".

27 On the same day, the Company and OTC further entered into a licensing agreement ("the 2009 Trademarks Licence Agreement"), wherein the Company granted OTC a perpetual, irrevocable and exclusive licence to market, manufacture and sell Tong Garden products in Thailand, Laos, Cambodia, Vietnam and Myanmar under the trademarks stated in Schedule 1 of the agreement. The 2009 Trademarks Licence Agreement stated that the agreement was being executed pursuant to the parties' obligations under the 2001 Thai SPA and that the consideration of the licence would be a "one-time nominal licence fee of S$1.00" that "shall be paid to [the Company] upon the signing of this [2009 Trademarks Licence Agreement]" (cl 4). The 2009 Trademarks Licence Agreement was signed by OBC, as director for and on behalf of the Company.

The decision below

28 In the court below, the Judge dismissed OHC's claim of minority oppression. Among other things, the Judge found that in undertaking the allegedly oppressive actions, OTC and OBC both had valid commercial reasons for doing so. Therefore, it could not have been said that they had breached their

directors' duties owed to the Company. With respect to the particular acts complained of, the Judge found as follows:

(a) The Trademarks Sale: The evidence did not support OHC's assertion that the 2000 Villawood Agreement was not a genuine sale or that the Company retained beneficial ownership of the Trademarks post-sale. Further, OHC's assertion that the Trademarks were sold at an undervalue was a mere assertion, uncorroborated by any objective evidence. The fact that the Tong Garden entities did not make royalty payments to Villawood during the licence period had an entirely innocuous and, indeed, well-founded explanation: simply that Villawood had waived the royalty fees given the cashflow position of Food Products (S) (Judgment at [178]–[195]).

(b) The Restructuring: Given the Company's parlous financial position in 2008, it was clearly in the Company's interests for its business to be wound up in a gradual and orderly manner. It made eminent sense for the Trademarks to be transferred to the new entities set up by OTC to carry on the Tong Garden brand name. This was also the case for the secondment of employees, the acquisition of vehicles and the Distributorship Agreements (Judgment at [196]–[215]). Further, the March 2008 Agreement and the ensuing actions were carried out transparently. The correspondence between OTC and OHC revealed that as early as 4 February 2010, OHC already knew that OTC and OBC had entered into an agreement and that OTC had taken over the family business (Judgment at [216]–[221]).

(c) The Thai Entities Sale: The evidence did not support OHC's contention that the sale of the Thai Entities was a surreptitious scheme

engineered by OTC and OBC to acquire these entities at an undervalue, as OTC and OBC had a valid explanation as to why the price was based on Tong Garden (T)'s Net Tangible Assets ("NTA") value as at 31 December 2000. Further, there was no attempt by them to conceal the completion of the sale, as the 2009 Variation Agreement was put up for approval at the Company's Extraordinary General Meeting, with notice given to the Official Assignee (at the time, OHC's trustee in bankruptcy) as well as OSA (Judgment at [261]).

29 In addition, the Judge held that even assuming that the alleged breaches of directors' duties by OTC and OBC had been proven, OHC's claim would nevertheless fail as he was unable to show that such breaches amounted to wrongs against him in his personal capacity as a minority shareholder. Rather, OHC's case "*really amounted to allegations of breaches by OTC and OBC of the fiduciary duties they owed as directors to the Company*" and that "the loss he claimed was really the resulting diminution in the value of his shareholding in the Company"; the breaches, as pleaded and as presented at trial, were corporate wrongs and the loss he sought to recover was reflective loss [emphasis in original] (Judgment at [270]–[271). OHC's action of minority oppression under s 216 of the Act was thus an abuse of process (Judgment at [293]–[298]).

The issues in the appeal

30 The issues that lie to be determined in this appeal are hence:

(a) whether the actions impugned by OHC constitute a breach by OTC and/or OBC of their directors' duties; and

(b) if so proven, whether these breaches of directors' duties amount to a mere corporate wrong as opposed to a personal wrong suffered by OHC in his capacity as a minority shareholder of the Company.

The applicable legal principles

31 The parties are in agreement as to the relevant principles governing an action for minority oppression under s 216 of the Act. These principles have been very helpfully summarised by the Judge in the Judgment at [94]–[107]. The common thread underpinning the four limbs under s 216 of the Act is, as this Court explained in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776, "some element of unfairness which would justify the invocation of the court's jurisdiction under s 216" (at [77]).

32 In an oppression action under s 216 of the Act, it is necessary for the plaintiff to demonstrate that the wrong occasioned to him is a wrong occasioned to him in his personal capacity as a minority shareholder, as opposed to a wrong occasioned to the company. This flows from a company's separate legal personality, distinct from that of its shareholders, which finds expression in the proper plaintiff rule as well as the rule against recovery of reflective loss. A wrong sustained purely by the company is thus incapable of being vindicated under s 216 of the Act and bringing such an action constitutes an abuse of process. The instructive case on the conceptual distinction and delineation between personal and corporate wrongs is *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Sakae Holdings*"). In determining whether an action brought under s 216 of the Act constitutes an abuse of process, the analytical framework to be adopted is as follows (*Sakae Holdings* at [116] and [119]–[120]):

116 … 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?

(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?

…

119 That said, we think it appropriate to highlight the words of caution of Bokhary PJ and Lord Scott in *Re Chime* … 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 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 … 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. … 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.
>
> [emphasis in original]

33 What is clear is that a corporate wrong may, in some instances, *also* amount to a personal wrong capable of vindication under s 216 of the Act, simply because the breadth of the concept of commercial unfairness also appears to encompass "wrongs done to the company" (*Sakae Holdings* at [86]). But asserting a purely corporate wrong is in and of itself insufficient, and inappropriate, to bring a claim within the strictures of s 216 of the Act (see *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [85]). This point bears reiteration especially when a claim of oppression is brought, as in the present case, on the basis of what is, at its core, a breach of directors' duties or fiduciary duties – duties that, properly characterised, are owed to the company itself. These are *prima facie* corporate wrongs that are appropriately dealt with either through a direct action brought by the company, or in more exceptional circumstances, through the statutory derivative action mechanism provided under s 216A of the Act. Simply put, in the case of a corporate wrong, the exclusive and proper plaintiff to address the wrong would be the corporate body. It is thus incumbent on the claimant to go a step further, and to show how such a breach is also a wrong suffered by him *qua* shareholder. While the legal proposition is easily stated, it is, as is often the case, the application of the legal

principles to the facts that is less straightforward. It is to that that we now turn our attention.

Do the impugned acts constitute acts of oppression?

The Trademarks Sale

34 OHC's case on appeal in respect of the Trademarks Sale may be stated simply. He alleges that when the parties were entering into the 2000 Villawood Agreement, there was an agreement that the Trademarks would "continue to be available for use by the Group" and/or "eventually [be] returned to the Company". In thereby diverting the Trademarks perpetually and irrevocably to Villawood, OTC and/or OBC committed an act of oppression. Put another way, the 2000 Villawood Agreement did not represent a genuine sale of the Trademarks and therefore the Company was to retain beneficial ownership of the Trademarks post-sale.

35 The Judge found that the 2000 Villawood Agreement represented a genuine sale of the Trademarks and hence rejected OHC's allegation that there was some form of collateral understanding or agreement. The Judge proffered several reasons for her conclusion. First, the Judge considered that OHC's evidence as to why the sale to Villawood was not a genuine sale was inconsistent and vacillated (Judgment at [183]–[187]). Second, PwC, as an independent accounting firm, had been engaged to provide a desktop valuation of the "Tong Garden" brand, on which the purchase consideration stated in the 2000 Villawood Agreement was based (Judgment at [188]–[191]). Third, it was undisputed that the 2000 Villawood Agreement was executed at a time when the Tong Garden Group was facing financial pressure from UOB Ventures Investments Limited ("UOBVI") in respect of an investment agreement entered

into in 1995. The sale moneys from the 2000 Villawood Agreement went towards part-payment of TGHPL's liability to UOBVI (Judgment at [34], [158] and [183]) and creditors were aware of and had made queries about the sale (Judgment at [182]).

36 Further, in concluding that there was a genuine sale of the Trademarks to Villawood, the Judge was of the view that:

(a) there was no documentary evidence to support OHC's allegation that the sale was not a genuine one;

(b) the value of the Trademarks had been determined by a reputable accounting firm, *ie*, PwC. OHC had been the main representative of the Company communicating with PwC;

(c) the Company was truly in need of funds to pay creditors who would have scrutinised the sale; and

(d) OHC's original version of events in his Statement of Claim had changed as alleged by OTC and OBC, and there were instances of other inconsistencies by OHC.

37 Having considered the evidence in its totality, we have reservations regarding the Judge's finding that the 2000 Villawood Agreement represented a genuine sale of the Trademarks.

38 While we agree that there was some inconsistency in OHC's allegations pertaining to the trust arrangement, we are of the view that the Judge placed too much weight on the factors she took into account and had overlooked other material evidence which we elaborate on later.

39 While OTC and OBC, in their respective cases and in oral submissions, emphasised OHC's change of position with regard to the *details* of the alleged agreement as giving lie to the existence of such an agreement, we consider these arguments to be overstated. Overall, in our opinion, these positions are not actually inconsistent with the substance and general tenor of OHC's underlying allegation: that the Trademarks Sale was instituted in order to prevent the Trademarks from "*falling into the hands of*" the Tong Garden Group's execution creditors. This was the allegation in OHC's original Statement of Claim. While OHC's amended Statement of Claim (and Appellant's Case) characterised the 2000 Villawood Agreement as representing an internal transfer to "*protect*" the Trademarks from creditors given the understanding that the Trademarks would eventually be returned to the Company (or at least continue to be made available for the Tong Garden Group's use), it is our view that such language was merely *euphemistic* and did not detract from OHC's real assertion that the purpose was to place the Trademarks out of reach of creditors. He eventually decided not to say this explicitly as he was party to the arrangement. The fact that OHC would have been a party to any trust arrangement did not necessarily mean that his allegation regarding the existence of such an arrangement was untrue.

40 As for the absence of any documentary evidence of a trust arrangement and OBC's contention that if the trust arrangement were true, there would be documentary evidence of the arrangement as the siblings did not trust each other, we are of the view that the absence of any documentary evidence is equivocal. Regard must be had to the circumstances prevailing at the time of the 2000 Villawood Agreement. At that point in time, *if* the concern was, as OHC alleged, to protect the Trademarks from the creditors, recording such an agreement in writing would have meant that any of the siblings could effectively

hold the others to ransom. Furthermore, the furtive nature of the arrangement would have militated against any paper trail being left by the parties. Hence, the lack of any agreement in writing is unsurprising.

41 Moreover, in so far as OHC was alleging that PwC's desktop valuation did not reflect the true value of the Trademarks, we note that OHC's argument on appeal was not that PwC *deliberately* undervalued the Trademarks or that PwC was not acting independently. Rather, OHC's complaint was that PwC was constrained by certain assumptions made in the Report, namely that the royalty rate that PwC employed had been "lowered to account for" the fact that the responsibility to maintain and develop the "Tong Garden" and "NOI" brand names rested with the licensee rather than the licensor. The Judge had also not taken into account the fact that PwC was instructed to confine its efforts to one specific method of valuation. Another point bears mention. PwC had been engaged to provide the valuation for the purposes of the sale of the Trademarks to a "new company … which is yet to be formed and which the current shareholders may have interest in". In other words, the valuation was to be conducted by PwC on the basis that there was to be *only* one nominated purchaser of the Trademarks, and likely an associated entity at that. This point undermines the allegation by the respondents that the sale was a genuine one to raise money to pay creditors. There was no evidence that the Company sought to find *any other* purchaser for the Trademarks, which would ordinarily be the case if it were truly seeking the best price possible.

42 As for the scrutiny of creditors, the fact that the creditors eventually decided not to challenge the sale is equivocal. The exact *extent* and *nature* of the creditors' knowledge of the terms of Trademarks Sale were unclear. There could conceivably have been other reasons for the creditors' decision not to

pursue the sale any further, for example, if other arrangements had been made to pay them. In any event, the creditors did not have the benefit of the knowledge of other developments regarding the Trademarks that this Court now does.

43 We come now to other evidence which suggests that the 2000 Villawood Agreement was not entirely above board and, instead, was actually factually probative of OHC's allegation that a trust arrangement existed. With respect, the Judge did not give due weight to this evidence.

44 Notwithstanding the fact that the Trademarks had been assigned to Villawood on 13 March 2000 pursuant to the 2000 Villawood Agreement, OTC entered into the 2001 Thai SPA with the Company on 4 January 2001. Under the 2001 Thai SPA, the Company contracted to "grant to OTC an exclusive, perpetual and irrevocable licence to use" the "Tong Garden" and "NOI" trademarks in the Territory that was defined as Thailand, Laos, Cambodia and Myanmar. The fact that OTC entered into the licence agreement with the Company suggested that OTC (and OBC as well) knew that the Company *continued* to own the Trademarks, post the 2000 Villawood Agreement. This licence apparently continued in force up until 20 July 2009, when the Company and OTC entered into the 2009 Variation Agreement that varied the completion date of the 2001 Thai SPA to 28 July 2009.

45 To explain why the Company was still granting a licence to use the Trademarks in the Territory after it had sold them to Villawood, OHC said during the trial that the Trademarks Sale only concerned the sale of the Tong Garden Group's "Tong Garden" and "NOI" trademarks in Singapore and Malaysia and did not cover other territories. We do not find this explanation convincing.

46 First, it was unclear why the group was selling some trademarks to Villawood while retaining a trademark for other territories only to grant a perpetual licence of the latter subsequently.

47 Second, the 2000 Villawood Agreement appeared to be a sale of *all* the rights associated with the trademarks owned by the group. The recital of the 2000 Villawood Agreement stated that the assignor was the registered proprietor of the registered trademarks "in Singapore and elsewhere or has applied in Singapore or elsewhere to register the said trademarks … listed in the Schedule hereto". Clause 1 stated that the assignor was assigning "all the said trademarks together with the goodwill of the business relating to the goods in respect of which the said trademark is registered …". While it is true that the schedule mentioned only trademarks registered in Singapore and in Malaysia, the reference in the recital to trademarks "in Singapore and elsewhere" instead of "Singapore and Malaysia" raises suspicion. In addition, the 2001 Thai SPA simply mentioned that the sale to OTC excluded (a) the Trademark to the "Tong Garden" brand and any variation thereof, and (b) the Trademark to the "NOI" brand and any variation thereof. It then provided for the Company to grant OTC an exclusive, perpetual and irrevocable licence to use "the said Trademarks" in the Territory. There was no mention of any trademark other than those which had already been sold under the 2000 Villawood Agreement. Furthermore, OTC had given a different explanation in his affidavit from that proffered by OBC during trial. OTC said that the reason why the Company was granting the licence to OTC to use the Trademarks in the Territory, even though the Company had sold the Trademarks to Villawood, was that the legal title to the Trademarks had not yet been transferred to Villawood. Therefore, the 2001 Thai SPA was drafted to place the obligation on the Company to ensure that OTC would obtain the right to use the Trademarks in the Territory. This suggested

that the Trademarks that had been sold to Villawood were the same as those for which a licence was to be granted to OTC under the 2001 Thai SPA.

48 Third, it will be recalled that on 6 August 2007, OBC had sent a letter to OSL to offer to transfer his shares in the Tong Garden group to her (see [17] above). In that letter, OBC had said, "The 'Tong Garden' logo and its trademark I shall leave it under the custody of [OTC]". The letter was telling. It suggested that OBC was holding the logo and trademark for someone else and he would "leave it" under "the custody" of OTC. This was contrary to the Trademarks Sale to Villawood in 2000. If that sale were genuine, the logo and trademark would belong to OBC beneficially as he controlled Villawood, and OBC would not be holding it in custody for someone else. Furthermore, the fact that OBC mentioned to OSL that he would leave the logo and trademark to the custody of OTC suggested that OBC knew that they did not belong to him. Otherwise there was no need for him to mention to whom he would be handing the custody of the assets. OBC's explanation was that OTC would "hold the [Trademarks] pending repayment of my loans" by the buyer of OBC's shares so that OTC could "procure that Villawood transfers the [Trademarks] it holds to them". Yet, this explanation was not borne out in the letter itself. The letter was simply to ask if OSL was interested in buying OBC's shares. The mechanics of the transaction had not been raised yet. OSL had not yet even decided in principle to accept the offer.

49 Furthermore, OBC said that the offer made on 6 August 2007 was met with a cynical response from OSL, who did not understand why she would give up her claim of $2m for a bankrupt company. However, this was precisely the point. OBC's premise was that when he made the offer to OSL, the group was already in a parlous financial position. If his offer was a serious one, it would

have meant that there was still value in the shares notwithstanding the parlous financial situation and that value would have come from the Trademarks. His letter suggested that he and OSL knew that.

50 Fourth, even if the 2000 Villawood Agreement was confined only to trademarks registered in Singapore and Malaysia, OTC had subsequently contracted to pay $7m to OBC under the March 2008 Agreement. At the time of the March 2008 Agreement, OBC held 1.76m shares in the Company, representing approximately 58.6% of the Company's total shareholding. OBC stated that to his mind, the sum was "derived by the $5 million or so that I thought I had put into Tong Garden business, plus $2 million which was then being claimed by Ong Siew Lay against me in connection with my involvement in the Company". In contrast, sometime in February 2010, OTC had offered OHC $50,000 to purchase the latter's 520,000 shares in the Company.

51 In view of the parlous financial state that the Company was in around 2008, it appears to us that there was scant commercial sense in OTC undertaking to pay off the debts owed by the Tong Garden Group to OBC, especially if the Company was already insolvent and had trouble paying its debts as they fell due. In our view, this discrepancy in price raises the suspicion that there was more value to the Company and/or the Trademarks than OTC and OBC have suggested, and that the sale of the Trademarks was not entirely above board. This is compounded by OTC's and OBC's vague explanations regarding the breakdown of the $7m figure in the March 2008 Agreement.

52 OBC's explanation at the appeal was that the impetus for the March 2008 Agreement was two-fold: (a) for posterity, to preserve Mr Ong's legacy by ensuring continuity for the "Tong Garden" family name and business; and

(b) to pay off the Company's creditors in a full and systematic fashion, OBC being a substantial creditor for $5m. This explanation was wanting. Under the March 2008 Agreement, OTC was paying OBC $5m. OTC was not giving or lending the Company $5m. So, it was incorrect to say that this $5m sum was being used to pay off the Company's creditors. OBC's explanation in fact raised more questions than it answered. If the Company would not be able to repay OTC, why did he voluntarily undertake to pay off the debt unless the group's financial position was not as parlous as suggested and/or the value of the Trademarks sold under the 2000 Villawood Agreement was much higher than that agreement suggested? In our view, the March 2008 Agreement casts further doubt on whether the sale of the Trademarks to Villawood was genuine.

53 Nevertheless, even assuming that there exists some basis for the allegation that there was an undisclosed arrangement, whether by agreement or understanding (as OHC put it), that the Trademarks were to be placed out of the reach of creditors and were supposed to be held for the benefit of the Tong Garden Group, we do not think that this ultimately supports OHC's claim of minority oppression. This may be analysed on two separate levels, depending on (a) whether the alleged agreement is characterised as an agreement between the shareholders of the Company *inter se*, or (b) whether the agreement is characterised as an agreement between the shareholders of the Company and the Company itself.

54 In the former scenario, OTC's and OBC's failure to return the Trademarks to the Company and/or to continue to make the Trademarks available for the Tong Garden Group's use would be a breach of the separate agreement *vis-à-vis* the shareholders *simpliciter* that does not affect the rights and obligations of the Company. This would be a wrong committed against

OHC himself, as a party to this underlying agreement, and would be a dispute between the parties to the agreement. An oppression action under s 216 of the Act would have no role to play in such a scenario.

55 The second scenario assumes that OTC's and OBC's decision to renege on the agreement is a breach of an agreement with the Company and has caused loss to the Company, by depriving it of a benefit. However, OHC did not allege that the Company was a party to any underlying agreement in respect of the sale of the Trademarks to Villawood. Instead, by alleging that the original intention was to set up a Mauritian company owned by the same shareholders (as in the Company) to hold the Trademarks, before Villawood was used instead, OHC acknowledged that the Company would not be the legal owner of the Trademarks in that event. Furthermore, if OBC and OTC had kept the Trademarks for themselves, this might have constituted a breach of OTC's and OBC's directors' duties owed to the Company because it diminished the value of the Company's assets. However, this would be a corporate wrong, which is *per se* insufficient to ground a claim for oppression. OHC has failed to show how this is a real injury suffered by him as a "*shareholder* [that] is distinct from and not merely incidental to the injury which the *company* suffers", which an action under s 216 of the Act is aimed at vindicating (*Sakae Holdings Ltd* at [120]). In our view, the Judge was correct to reject the legal proposition proffered by OHC: namely, that a minority shareholder should be able to establish a personal wrong against himself merely by characterising the majority's breaches of their directors' duties as breaches of his own "legitimate expectations" that directors should fulfil their legal duties to the company. If accepted, every allegation of a breach of director's duty *simpliciter* would be tantamount to *always* permitting a plaintiff to commence a minority oppression action, and this would obviate the distinction between personal and corporate

wrongs. Indeed, this would, in the Judge's words, "make nonsense of the proper plaintiff rule and the reflective loss principle" (Judgment at [277]).

56 We agree with the Judge and reject OHC's claim of oppression in relation to the Trademarks Sale.

The Restructuring

Solvency of the Company

57 As a preliminary question on the Restructuring issue, we consider the financial position of the Company in the months leading up to 2008, *ie*, the material time at which the impugned acts that OHC says formed part of the broader "Restructuring" took place. This sets the context in which the acts must be considered.

58 On appeal, OHC emphasises that he does not accept the Judge's finding that the Company was in a parlous financial situation at the material time. It was not in such a state, he argues, because the sale of the factory at 33 Chin Bee Crescent owned by Food Products (S) (the "Factory") sometime in November 2008 for $4,868,500 "turned things around; the money from the sale, after paying off OCBC, would have been more than sufficient to pay off other creditors who were owed smaller sums". He thus asserts that the Judge had erred in not taking the market value of the Factory into account when making the finding that the Company was insolvent by 2008.

59 Yet, OHC's argument is noticeably bereft of details. It appears to be a cherry-picked assertion that is not borne out by the evidence. For starters, he did not specify whether he was referring to balance sheet or cash flow insolvency. He barely attempted to even address *any* of the Judge's factual findings in

respect of the Company's financial position. OTC merely asserted first, that the Judge had erroneously focussed on the Company's financial position in the period leading up to 2007, and second, that the financial position of the Company in 2008 was fine, simply because the Factory was sold. Indeed, this assertion deftly circumvented the fact that in mid-July 2007, Overseas-Chinese Banking Corporation had demanded repayment of some $3.7m and the Inland Revenue Authority of Singapore ("IRAS") had issued notices against Food Products (S) for unpaid taxes totalling approximately $1.3m. Granted, the IRAS claim was resolved in the end, but it was resolved *only* after OSA had written to IRAS to put on record Food Products (S)'s sizeable losses, and that the bad debts owing to the company were in excess of its estimated chargeable income (see Judgment at [74] and [168]).

60 It was one thing to contend that the sale of the Factory brought cash into the Company; it remained necessary to, as well, reconcile these sale proceeds with the outstanding debts and liabilities of the Tong Garden Group at that time. Overall, OHC's argument that the sale of the Factory was a panacea that enabled the Company to overcome its financial woes and to pay its debts as they fell due was speculative and unsupported by the evidence. We thus see no reason to disturb the Judge's findings that the Company was in a parlous financial position in 2008.

The impugned transactions and s 160 of the Act

61 We now come to the discrete events that form the basis of the Restructuring. OHC's argument on appeal was that in carrying out the Restructuring, neither the Company nor its subsidiaries ensured compliance with the requirements of s 160(1) of the Act, which reads as follows:

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

OHC deemed this failure to be, "in itself … oppressive as it deprived OHC of his rights *qua* shareholder". OTC and OBC, in flagrantly and deliberately failing to hold the meeting, thus "usurped the powers of the shareholders acting in a general meeting to obtain a benefit for themselves at the expense of the other shareholders" and deprived OHC of "the opportunity of applying to court under s 160(2) for an injunction restraining the disposal of the undertaking or property of the Company or its subsidiaries". We are unpersuaded by OHC's argument and reject it. We explain.

62 In so far as the parties seem to have referred to the March 2008 Agreement as part of the Restructuring, we fail to see how this agreement may be characterised as an oppressive action targeted at OHC. It is undisputed that the March 2008 Agreement was a private agreement entered into between OTC and OBC. The Company was not a party to this agreement and certainly, the March 2008 Agreement did not *per se* purport to alter any of the Company's legal rights and obligations. To the extent that OHC could have relied on the March 2008 Agreement as part of a broader scheme to divert the Trademarks from the Tong Garden Group, this was an allegation that we have already addressed above. Certainly, the allegation of non-compliance with s 160 of the Act raised by OHC on appeal simply did not apply to the March 2008 Agreement, *prima facie*, as it involved no disposal of the Company's assets. In

fact, the March 2008 Agreement pertained to the Company only peripherally: it merely involved the private sale of OBC's shares in the Company to OHC.

63 We also address OHC's allegation that he was unaware of the March 2008 Agreement or any of the disposals implemented as part of the Restructuring, and had only found out about these matters in December 2015. What belied OHC's allegation that he was kept in the dark was his insinuation that the entire Restructuring was carried out by OTC surreptitiously, to the detriment of the Company and the Tong Garden Group at large. He contended that OTC wanted to conceal any misfeasance or wrongdoing on his part in disposing of the Company's assets. We reject this argument. In an email sent to OTC dated 4 February 2010, OHC stated that he did not believe that OTC had "[taken] over our family business with NO plan" and referred to an "agreement [that] [OTC] had with … [OBC]". What is abundantly clear from the correspondence is that even though OHC had claimed that he did not receive any notice of the Company's meetings, he was aware in 2010, if not earlier, of arrangements being made between OTC and OBC to take over the family business. Even if OHC might not have been apprised of the *specific* details of the March 2008 Agreement, he was not entirely in the dark as he portrayed himself to be.

64 As OHC's allegation of ignorance has been rejected, what is the basis of OHC's objection to the so-called Restructuring? As OBC rightly pointed out, the objection must then only refer to the specific disposals of the Tong Garden Group's assets. OHC took umbrage with the fact that no general meeting was called pursuant to s 160 of the Act, which mandates that proposals to dispose of the whole or substantially the whole of the company's undertaking (or property) be approved by the company in a general meeting. Leaving aside the quite

fundamental issue that the s 160 non-compliance was not pleaded as a ground of oppression in OHC's Statement of Claim, it is in our view quite telling that OHC did not particularise which transactions ought to have been approved under s 160 of the Act apart from an assertion pitched at a high level of generality, namely, that "neither the Company nor any of its subsidiaries ever adhered to s 160". Further, he has not demonstrated how such assets represent the "whole or substantially the whole of the company's undertaking" within the meaning of s 160. In any event, none of the alleged disposals highlighted in OHC's case are adequate to constitute minority oppression, for the following reasons.

65 First, in respect of the disposal of the Tong Garden Group's factory, plant and machinery, OHC did not challenge the valuations done in this regard. As he failed to do so, we are unable to see how any loss would have been occasioned to the Tong Garden Group, *even* in the absence of approval at a general meeting. There is no basis for OHC to contend that these disposals constitute an oppressive act.

66 Second, OHC took issue with the fact that OTC and his companies failed to pay any consideration for the Tong Garden Group's customer base, which he contended was "worth a significant amount". The burden was on OHC to adduce evidence of this "significant amount", but OHC failed to adduce any such evidence. OHC merely asserted that supermarkets with favourable long-term relationships with certain suppliers will have a higher propensity for giving those suppliers certain perks and cited an academic article to this effect. OHC did not, however, attempt to adduce any evidence at trial that such a practice existed, or that the Tong Garden Group was in fact a recipient of such perks as alleged. OHC also failed to explain how this, even if proven, had anything to do

with the value of a customer base. We agree with the Judge's finding that OHC's argument presupposed that "there was a customer base that was somehow unique and confidential to the Tong Garden Group" (Judgment at [211]), and yet, OHC had adduced no evidence to support such a proposition.

67 Relatedly, OHC also characterised the Distributorship Agreements as a "naked profit grab" on the part of OTC that did not benefit the relevant Tong Garden Group entities.

68 This argument was without merit. OHC did not plead the entry into the Distributorship Agreements as part of the oppressive conduct. Also, at trial, OTC gave unchallenged evidence that OTC's companies absorbed the administrative and operational costs of running the business, *whilst* continuing to share the profits with the Company (by way of its subsidiaries). OTC had also raised money for the operations. There was therefore commercial sense for the companies in the group to enter into the Distributorship Agreements. Furthermore, in so far as OHC's allegation was that there was "no good reason for Food Products (S) and Snack Food (M)" to give up their perpetual distributorship rights in exchange for a split of the profits" made by OTC's companies, this is contrary to the evidence. On 17 July 2008, OHC wrote to the Official Assignee, suggesting to her that the Tong Garden Group be wound up. Even though this did not mean that OHC accepted that the Tong Garden Group was insolvent, he clearly did not intend for the Group's business to carry on. Hence, we reject OHC's argument on this point.

69 Third, OHC also alleged that OTC "never paid any consideration or accounted for the fact that his new companies availed [themselves] of credit facilities *inter alia* because of the past track record of the Tong Garden Group".

This was misconceived. As the Judge quite rightly found, this was a bare assertion and on the contrary, OTC gave unchallenged evidence that he had injected his own capital into his companies, and had taken numerous loans as well as personal guarantees in respect of these loans (Judgment at [214]). We simply see nothing objectionable in how OTC was able to make credit facilities to his companies. This could not constitute oppressive conduct.

70 Fourth, OHC submitted that OTC had caused five vehicles owned by the Company "to be sold to his own companies at a gross undervalue, far below the prices provided in third-party valuation reports". We reject this argument. We observe that OHC's original case in the Court below was not that the vehicles and machinery were sold at an *undervalue* but rather that OTC was "able to acquire the critical aspects of the business…*without any payment*". The Judge also observed that OHC had failed to even specify the number of vehicles allegedly acquired by OTC for free, let alone the make or model of these vehicles" (Judgment at [208]).

71 Fifth, in respect of OHC's allegation as to the improper secondment of staff from the Tong Garden Group to OTC's companies, the Judge found that "the only evidence which OHC produced of such secondment related to one Ng Chee Seng", such evidence being that Ng "had appeared to be receiving salary payments from TGFS from May 2009 onwards". This could not be said to constitute a breach of OTC's directors' duties because secondment legitimately avoided disruption to the staffer's employment in light of the winding down of the business of the Company. Further, OTC had also given evidence that his companies had paid secondment fees to the entities within the Tong Garden Group (Judgment at [205]-[206]). We agree with the Judge's findings and note that OHC has not challenged any of her findings on this point.

He has failed to explain how the conduct in respect of one such employee can be considered oppressive or to explain how a *single* employee can even be considered the "whole or substantially the whole of the company's undertaking" for the purposes of s 160 of the Act.

72 Overall, this series of actions and/or disposals as highlighted by OHC amounted to nothing more than an attempt by OHC to transmogrify morsels into a banquet. We accordingly reject OHC's claim of oppression under s 216 of the Act in respect of the Restructuring.

The Thai Entities Sale

73 Finally, we consider OHC's argument that the sale of the Tong Garden Group's Thai Entities in 2009 by way of the 2001 Thai SPA and the subsequent 2009 Variation Agreement was oppressive. In short, OHC's contentions were that (a) the 2001 Thai SPA was either repudiated or abandoned such that the 2009 Variation Agreement represented a deliberate, calculated and commercially unfair circumvention of an agreement that had otherwise already been brought to an end; (b) the Thai Entities were sold at an undervalue; and (c) there was no valid commercial reason for the Company to execute the 2009 Deed of Waiver on 20 July 2009. We address each contention in turn.

Repudiation and/or abandonment of the 2001 Thai SPA

74 OHC's argument that the 2001 Thai SPA was "repudiated right from the word go", or alternatively "abandoned by the time the 2009 Variation Agreement was entered into", holds no water. For starters, he did not plead either of these two grounds in his Statement of Claim. He had merely pleaded that the "sale was never completed pursuant to the terms of the [2001 Thai

SPA]". This was quite different from an allegation of either repudiation or abandonment of a contract. Saying the sale pursuant to the 2001 Thai SPA was not completed was quite different from saying that the 2001 Thai SPA was no longer valid by the time of the 2009 Variation Agreement.

75 In any case, the evidence before the Court did not support either of OHC's allegations of repudiation and/or abandonment:

(a) OHC's argument about repudiation presupposed an acceptance of OTC's repudiatory breach to bring about termination of the contract. OHC, however, had failed to demonstrate factual acceptance of repudiation, even assuming that there was a repudiatory breach by OTC of the 2001 Thai SPA. The correspondence between OHC's solicitors and OTC's solicitors, which OHC relied on in this regard, simply intimated threats to act on repudiation, which were *never* acted upon. Further, on 3 June 2003, Messrs Michael Khoo & Partners wrote to OBC and OSA, enclosing a copy of Messrs Phau Wai Partnership's letter of the same date in which OTC stated that he was "willing and ready to proceed with the [2001 Thai SPA]" and sought to enquire whether TGHPL would be "prepared to proceed with the Agreement". Clearly, OSA, as a director of the Company from the time of inception of the 2001 Thai SPA up until 2009, must have known of the agreement and did not protest. Nothing else transpired. Nor did the Company say that repudiatory breach of the 2001 Thai SPA had occurred and had been accepted or that it would terminate that agreement.

(b) In so far as OHC now claims that there was an abandonment of the 2001 Thai SPA, it is clear that there was no mutual abandonment as OTC had been acting on the basis that he owned and operated the Thai

> subsidiaries pursuant to the 2001 Thai SPA. OTC had been led to believe that the Thai Entities were his. Even though OHC referred to the minutes of the Company's board meeting dated 28 April 2001, which stated that the "Thailand operation is still part of the TG Group of companies", this is unsurprising given that it was common ground that the 2001 Thai SPA was yet to be completed, hence the need for the 2009 Variation Agreement in the first place. It is undisputed that OTC ran Tong Garden (T)'s business separately from the Tong Garden Group's business in Singapore and Malaysia, without any help from the Company or its subsidiaries. Furthermore, in accordance with cl 19 of the 2001 Thai SPA, OTC had tendered his resignation to the companies listed in the Third Schedule of said agreement on 23 February 2001 (see [22(a)] above).

76 Consequently, we have no hesitation in rejecting OHC's allegation that the 2001 Thai SPA was either repudiated or abandoned.

77 To the extent that OHC referred to various provisions in the 2009 Variation Agreement to support his contention that the 2001 Thai SPA had come to an end and hence obviated the need for those provisions, we are of the view that even if the agreement had come to an end, the parties thereto were at liberty to agree to continue with it. OHC did not disagree with this but he alleged that it was not in the interests of the Company to do so when the same date of valuation, *ie*, 31 December 2000, was to be used. This brings us to the next allegation about the undervaluation of the Thai Entities.

The undervaluation of the Thai Entities

78 OHC's next allegation was that the Thai subsidiaries were sold at an undervalue. This allegation was two-pronged: that (a) the value of Tong Garden (T) should not have been based on its NTA value as of 31 December 2000; and (b) the purchase price should not have been confined to the assets of Tong Garden (T) and should have also included the value of NOI (T). In our view, there were obstacles facing this argument.

79 First, the purchase price of the Thai subsidiaries under the 2001 Thai SPA was contractually provided to be "based on the [NTA] of all the companies … as per the audited accounts for the year ended 31 December 2000", pursuant to cl 4. OHC had himself signed the 2001 Thai SPA on behalf of the Company, in his capacity as director of the Company.

80 What OHC was really contending was that since the 2001 Thai SPA had come to an end, the Company should not have abided by the stipulated date of 31 December 2000 and should have instead insisted on a more current date, *eg*, based on the Company's NTA as of 31 December 2008. However, he did not dispute that since the 2001 Thai SPA, OTC had been operating the Thai Entities on the basis that they belonged to him and not the Company, and that the Company was aware of and had acceded to this. It seems to us that, far from being oppressed, OHC was trying to gain an undue advantage even if the 2001 Thai SPA had come to an end because the parties had allowed it to lapse. He was trying to benefit from the efforts of OTC by using an alleged right belonging the Company. In our view, the Company did the right thing by sticking to the original date for valuation when it had acquiesced to the state of affairs we have mentioned.

81 Second, we do not accept OHC's attempt before us to claim that the plural term of "companies" used in cl 4 of the 2001 Thai SPA must have necessarily referred to Tong Garden (T) *and* NOI (T). This argument overlooked the fact that OHC's position on appeal was contradictory to his closing submissions below that "Parties accept that the reference to Thai Entities referred to Tong Garden (T) and its subsidiary Nut Candy". He did not mention NOI (T) then. He should not be entitled to do so now. We accordingly reject his argument.

82 In oral submissions before us, counsel for OHC also sought to attack the *validity* of the 2009 Variation Agreement. But this was not pleaded or argued in the Court below. OHC pleaded that the 2009 Variation Agreement and/or 2009 Deed of Waiver was entered into "for the collateral purpose of benefitting [OTC] at the expense of the Company and its shareholders", but nothing about this impugns the validity of the 2009 Variation Agreement. In our judgment, this argument does not pass muster. The 2009 Variation Agreement was approved by the Company at an EGM held on 8 October 2009. The notice of the EGM was sent to the Official Assignee (as OHC's trustee in bankruptcy), OTC, OBC and OSA, as the shareholders of the Company. Neither OHC (nor any representative from the Official Assignee's office) nor OSA attended the EGM or raised *any* objection to the 2009 Variation Agreement being tabled at the EGM that would enable completion of the 2001 Thai SPA (see also Judgment at [245]). Their failure to do so suggests strongly that any present challenge to the 2009 Variation Agreement is simply an afterthought, lacking in merit. And the basic proposition remains: OHC had *himself*, as representative of the Company, agreed to the sale of the Thai Entities to OTC on those terms specified within the 2001 Thai SPA. The 2009 Variation Agreement merely extended its date of completion.

2009 Deed of Waiver

83 Finally, OHC also took issue with the 2009 Deed of Waiver. He alleged that the decision to waive the inter-company balances was what ultimately led to OTC being able to purchase the Thai Entities for $1.00. The crux of OHC's complaint was that the decision to waive the inter-company balances led to OTC being able to purchase the Thai Entities at an undervalue, which is emblematic of commercially unfair, and in fact oppressive, conduct.

84 OTC and OBC suggested that the waiver was contemplated under cl 4 of the 2001 Thai SPA, which provided that the purchase price would be based on the "NTA … after making appropriate adjustment for difference in inter-company balances" (see [22(a)] above). However, we agree with OHC that this provision did not stipulate that inter-company debts were to be waived. On the contrary, it suggested that these were to be set-off and the net balance was to be taken into account.

85 The Judge found that there was valid reason for the 2009 Deed of Waiver to be provided because the inter-company debt would have been time-barred as at July 2009 (Judgment at [255]–[256]). We are of the view that if the sole rationale for the waiver was that the inter-company debt was time-barred, that would not be a sufficient reason to enter into the 2009 Deed of Waiver. As mentioned, cl 4 of the 2001 Thai SPA suggested that any inter-company debt was to be taken into account. This term was quite the opposite of a waiver. Even if the debt were time-barred, that was not the point. It was supposed to be taken into account for the purpose of the valuation.

86 However, for OHC's argument on oppression to succeed, it is incumbent on him to further *affirmatively* demonstrate the existence of a net balance of

debt in favour of the Tong Garden Group, and, if so, the quantum of such debt that was waived. While there was some evidence to suggest the existence of a debt from the Thai Entities to the Company, the evidence was insufficient to establish on a balance of probabilities the existence of the debt. A $3m figure was mentioned in the minutes of the Company's board held on 6 April 1999: Ong Leong Chuan ("OLC"), another of the Ong siblings, recorded therein that he had "written to OTC requesting him to explain the S$3 million transfer transaction". But this is hardly unequivocal evidence of the assertion that OHC is seeking to make. It was OLC, and not OHC, who raised this concern then. It is also inaccurate to say that OTC did not dispute this debt, either in nature or in quantum. Indeed, in the same set of minutes, it was recorded that "OTC rebuked that the $3.0 million was only a paper transfer, [Tong Garden (T)] had not actually received the money" and instead intimated that the transaction "had been orchestrated by OLC himself and he should be able to instruct the Group Accountant how this transaction should be booked". OHC did not point to any evidence that this grievance was pursued any further beyond the single instance of OLC's concern raised in 1999. Similarly, no evidence was given to substantiate the terms of this debt.

87 In the course of oral submissions, when pressed on what difference the 2009 Deed of Waiver would have made, OHC asserted that OTC had conceded that the inter-company debt owing from the Thai Entities to the Company was $3m. Put differently, the purchase price of the Thai Entities should have been $3m instead of $1. However, if there was a $3m debt owing from the Thai Entities to the Company, this would have reduced, rather than increased, the value of the Thai Entities. That said, the value would not have been reduced much below $1 and hence any complaint should have been on a different basis,

ie, that the Company would have been able to claim the debt but for the 2009 Deed of Waiver.

88 However, if the Company should not have entered into the 2009 Deed of Waiver, this was a wrong committed against the Company. It was not a personal wrong against OHC.

The remedies sought

89 We also note that by the time OHC commenced the present action for oppression, there was no continuing state of oppression. OHC's application was therefore not to put an end to any oppressive conduct. While this is not determinative, it is a factor that we take into account. As cautioned in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [158], notwithstanding s 216(2) of the Act conferring the Court an extensive discretion to "make such order as it thinks fit", this discretion must necessarily be exercised judiciously:

> … *any order granted must be made with a view to bringing an end to or remedying the matters complained of*: *Walter Woon* ([131] *supra*) at para 5.96. The purpose of s 216 is to relieve minority oppression, not to proscribe majority rule. It is for that reason that in most cases, the only practical mechanism to end minority oppression is a corporate divorce where one party buys the other out. …
>
> [emphasis added]

90 By the time OHC had commenced his oppression action on 23 November 2017, close to a decade had elapsed since the acts cited in support of his claim had occurred.

91 In so far as OHC's first head of relief sought was for OTC and/or OBC to purchase his shares in the Company, we note that in 2015 and 2016, OTC had

made several offers to OHC to buy out his shares ranging from $50,000 to $230,000 or at a price to be determined by an independent valuer, none of which OHC pursued in any meaningful way (Judgment at [288]–[290] and [293]). Likewise, OBC had also offered to buy out OHC's shares on 2 July 2018, either for $500,000 or at a price based on an independent professional valuation (Judgment at [292]), but OHC did not pursue this either.

92 OHC may very well have believed the offers to have been made insincerely and at too low a price. But the offers made by OTC and OBC were also accompanied by alternative proposals for an independent valuation of OHC's shares. Although OHC alleged that his wife did approach OTC or OBC on the offers, no details were provided. While it is true that some of the matters he complained of would have had to be resolved to determine the parameters of any valuation, OHC sought neither to define the parameters of a valuation nor to make any counter proposal. This is anathema to what he claims is his genuine desire to now have his shares in the Company bought out by OTC and/or OHC. It appears to us that OHC was more preoccupied with instituting litigation. In the circumstances, we would not have granted OHC that relief.

93 In so far as OHC's alternative head of relief was an order to acquire a number of shares in the entities controlled by OTC, including the Thai Entities, at the price of $1, it is apparent that OHC *knew* that OTC would be, and was *willing* for OTC to be, left to run the Thai Entities entirely separately from the Tong Garden Group. We thus find the present action to be a thinly-veiled attempt to take advantage of the efforts put in by OTC. Furthermore, this alternative head of relief was inconsistent with any concern of OHC about oppressive conduct by OTC. He was seeking a corporate marriage and not a corporate divorce. Clearly such a relief was contrary to his allegations of

misconduct against OTC and it suggested a lack of *bona fides* in his present action. We are of the view that the desire to participate in the improved fortunes of OTC's companies might well have been OHC's real agenda. This would also explain why, despite having been aware for nearly a decade of the impugned actions that he claimed were oppressive acts, he did not file the action earlier.

Conclusion

94 For the reasons given above, we dismiss the appeal. The first and second respondents are to have the costs of the appeal. No order as to costs in respect of the third and fourth respondents should be made as neither of them participated in the present appeal. They did not file any documents for the appeal either.

95 OHC is to pay each of OTC and OBC $65,000 as costs of the appeal, inclusive of disbursements forthwith. The initial security of $20,000 provided by OHC for the costs of this appeal is to be paid in equal shares to OTC and OBC to account for the costs payable by OHC. The additional security of $20,000 provided by OHC for the costs of this appeal is to be paid to OTC to account for the costs payable by OHC.

96 In addition, we deal with costs of the interlocutory applications leading up to the appeal. CA/SUM 69/2020 was OTC's application for OHC to furnish additional security for costs. OHC is to pay OTC $3,800 as costs of this application, inclusive of disbursements, forthwith.

97 CA/SUM 107/2020 was OHC's unsuccessful application for leave to adduce further evidence. OHC is to pay each of OTC and OBC $3,300 as costs of this application, inclusive of disbursements, forthwith.

Judith Prakash
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Lin Weiqi Wendy, Zhuang Wenxiong, Kara Quek Tze-Min and Charlotte Tang (WongPartnership LLP) for the appellant;
Tan Gim Hai Adrian, Ong Pei Ching, Veluri Hari, Yeoh Jean Ann and Lim Jian Wei Joel (TSMP Law Corporation) for first respondent;
Chiok Beng Piow Andy and Lee Hui Zhen Margaret (AM Legal LLC) for the second respondent;
The third respondent absent and unrepresented;
The fourth respondent absent.

ANNEX A

Name of individuals	Abbreviation employed
Ong Heng Chuan, the appellant	OHC
Ong Teck Chuan, the first respondent	OTC
Ong Boon Chuan, the second respondent	OBC
Ong Siew Ann, the third respondent	OSA
Ong Siew Lay	OSL
Ong Tong Guan	Mr Ong
Yeo Lian Choo	YLC

ANNEX B

Name of companies	Abbreviation employed	Particulars
<u>Tong Garden Group</u>		
Tong Guan Food Products Pte Ltd	Company	Incorporated in Singapore on 16 August 1980 Placed in compulsory liquidation on 12 July 2018
Tong Garden Holdings Pte Ltd	TGHPL	Incorporated in Singapore on 16 April 1994 Dissolved by way of members' voluntary liquidation on 14 November 2016
Tong Garden Food Products Singapore Pte Ltd	Food Products (S)	Incorporated in Singapore on 14 May 1994 Dissolved by way of members' voluntary liquidation on 8 July 2013
Tong Garden Holdings Sdn Bhd	-	Incorporated in Malaysia on 20 September 1993
Tong Garden Food Products Sdn Bhd	Food Products (M)	Incorporated in Malaysia on 15 September 1981
Tong Garden Snack Food Sdn Bhd	Snack Food (M)	Incorporated in Malaysia on 21 September 1984
Tong Garden Co Ltd	Tong Garden (T)	Incorporated in Thailand

Name of companies	Abbreviation employed	Particulars
Nut Candy House Co Ltd	Nut Candy (T)	Incorporated in Thailand
NOI Food Industry Co Ltd	NOI (T)	Incorporated in Thailand
Companies owned/controlled by OTC		
Tong Garden Food (Singapore) Pte Ltd	TGFS	Incorporated in Singapore on 7 March 2008
Tong Garden Food (Malaysia) Sdn Bhd	TGFM	Incorporated in Malaysia on 3 April 2008
OTC Food Corporation Pte Ltd	OTC FCPL	Incorporated in Singapore on 12 September 2014
Tong Garden Marketing Sdn Bhd	TGMSB	Incorporated in Malaysia on 3 April 2008
Companies owned/controlled by OBC		
Villawood Holdings Limited	Villawood	Incorporated in the British Virgin Islands

ANNEX C

Agreements	Particulars
2000 Villawood Agreement	Entered into on 13 March 2000 between the Tong Garden Group (through the Company, TGHPL, Food Products (S) and NOI Food Products Pte Ltd) and Villawood for the sale of the Trademarks
2001 Thai SPA	Entered into on 4 January 2001 between the Company and OTC for OTC to purchase the Thai Entities and the Company to grant a licence to OTC to use trademarks in Thailand, Laos, Cambodia, Vietnam and Myanmar
2001 Singapore SPA	Entered into on 4 January 2001 between OTC, OHC, OBC and OSA for the purchase of OTC's shares in the Company
March 2008 Agreement	Entered into on 15 March 2008 between OHC and OTC for OTC to purchase all of OBC's shares in the Tong Garden Group
2009 Variation Agreement	Entered into on 20 July 2009 between the Company and OTC to vary the terms of the 2001 Thai SPA
2009 Deed of Waiver	Entered into on 20 July 2009 between the Company and OTC for the Company to waive its inter-company claims against Tong Garden (T)

Agreements	Particulars
2009 Trademarks Licence Agreement	Entered into on 20 July 2009 between the Company and OTC for the Company to grant OTC a perpetual, irrevocable and exclusive licence to market, manufacture and sell Tong Garden Products in Thailand, Laos, Cambodia, Vietnam and Myanmar under the trademarks specified therein
Distributorship Agreements	Entered into on 14 August 2009, (a) between TFGS, Food Products (S) and Food Products (M) and (b) between TGMB with Snack Food (M) and Food Products (M), for TGFS and TGMSB to be the sole and exclusive distributor of peanuts and other snack foods in Singapore and Malaysia respectively