IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 202

Suit 437/1998

Between

Pelican Engineering Pte Ltd

… *Plaintiff*

And

Lim Wee Chuan
Another

… *Defendant*

GROUNDS OF DECISION

Res Judicata — Issue estoppel; Civil Procedure — Summary judgment; Res Judicata — Issue estoppel

Version No 1: 20 Nov 2026 (01:16 hrs)

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Pelican Engineering Pte Ltd v Lim Wee Chuan and Another

[1999] SGHC 202

Suit 437/1998
Goh Joon Seng J
03 August 1999

1 : On 25 May 1995, the plaintiff company (`the Company`) commenced an action against the defendants in Suit 888/95. The particulars of Suit 888/95 are set out in [para] 18 infra. On 15 July 1997, four of the six directors cum shareholders resolved as directors to compromise the suit on payment of $4,657.28 by the defendants to the Company. Following payment of the said sum of $4,657.28, Suit 888/95 was discontinued on 13 August 1997. In the meantime, the other two directors cum shareholders Law Mui Hoon and Chow Eng Choon (`the plaintiffs`) commenced action in OS 888/97 for an order to restrain the other members of the board and the Company from discontinuing Suit 888/95. By the time OS 888/97 was heard, Suit 888/95 had been discontinued. The court then granted leave to the plaintiffs to commence this suit in the name of the Company with costs incurred by the Company to be borne by the plaintiffs.

2 Pursuant to that order, the Company commenced this action against the defendants. It was in fact prosecuted by Eng Sook Boon, the husband of Law Mui Hoon. I dismissed the Company`s claim with costs to be borne by the

plaintiffs. The Company has appealed to the Court of Appeal. I now give my reasons. [The appeal was withdrawn - Ed.]

3 ***The background***

4 Eng Sook Boon floated the idea of incorporating the Company. Before its incorporation, he called several meetings of potential investors amongst whom were the defendants.

5 The Company was eventually incorporated on 2 May 1989 by Eng Sook Boon. He then invited his business associates to invest in the Company as shareholders. When the Company began operation, its paid-up capital was 300,000 shares of $1each, held as follows:

6 (i) Law Mui Hoon - 100,000 shares

7 (ii) Chow Eng Choon - 25,000 shares

8 (iii) Lim Eng Siong - 50,000 shares

9 (iv) Lim Cheng Gee - 25,000 shares

10 (v) Goh Eng Hian - 50,000 shares

11 (vi) Teong Uk Choo - 50,000 shares

12 It is admitted that Law Mui Hoon holds the shares in trust for Eng Sook Boon and `is under Eng Sook Boon`s influence and control`.

Version No 1: 20 Nov 2026 (01:16 hrs)

13 Goh Eng Hian is the brother of the second defendant. In November 1989, he transferred his shares to his sister Goh Bee Leng who is still the holder of those shares. Teong Uk Choo is the wife of the first defendant.

14 The Company was active for just over two years, 1989 to 1991. During that period, it had three directors Law Mui Hoon, Chow Eng Choon and Lim Eng Siong. But it was Eng Sook Boon who was managing the Company`s affairs. He in fact received a salary of $3,500 paid to him under the name of Law Mui Hoon. But his attention was focused on his own company Cattell Engineering Pte Ltd.

15 In or about September 1989, the defendants and Eng Sook Boon came to know that the sole shareholder of TS Engineering & Electrical Pte Ltd (`TS Engineering`) Soh Cher Hee intended to sell his interest in TS Engineering. TS Engineering was eligible to tender for public sector construction projects.

16 The defendants and Eng Sook Boon had discussions with Soh Cher Hee. Eventually, Soh Cher Hee`s shares in TS Engineering were transferred to the defendants in two tranches. On 1 November 1989, Soh Cher Hee transferred 12,500 shares to each of them. The transfers stated that the price of the 25,000 shares was $36,750.00. In fact, it was $40,000.00. This discrepancy is not material to these proceedings. The payment of $40,000.00 was by cheque issued by the Company. Lim Eng Siong was one of the two signatories of the cheque.

17 After the transfer of the first tranche of shares, the defendants assumed control of TS Engineering. At that time, TS Engineering had secured a contract from the Public Utilities Board for some works in the western part of Singapore. TS Engineering subcontracted part of those works to the Company.

Version No 1: 20 Nov 2026 (01:16 hrs)

18 On 17 July 1990, the second tranche of 75,000 shares was transferred to the defendants at the stated price of $117,750. But Soh Cher Hee was in fact paid $65,000. The discrepancy is also not material to these proceedings.

19 TS Engineering is now a successful company.

20 In late 1990, there were negotiations between some of the shareholders and Eng Sook Boon with a view to Eng Sook Boon buying over their shares or the assets of the Company. However, no agreement was reached.

21 Following Eng Sook Boon`s refusal to buy over their shares or the assets of the Company, there was an attempt by those shareholders to sell off the Company`s assets to third parties. But this was prevented by an injunction obtained by Law Mui Hoon in OS 238/91 on 14 March 1991. Thereafter, Eng Sook Boon remained in full control of the Company through Law Mui Hoon and Chow Eng Choon.

22 Then, notwithstanding the objection of Lim Eng Siong, Eng Sook Boon was appointed the alternate director of Law Mui Hoon on 9 October 1991. This was the official position he held until his resignation on 16 May 1995. Although Eng Sook Boon was in total control, the Company remained inactive and its affairs neglected.

23 In 1992, Lim Eng Siong as a director of the Company was served a summons by the Registry of Companies for failing to file the annual returns of the Company. He paid a fine of $1,000.

24 Although the Company had ceased operations, Eng Sook Boon did not repatriate its foreign workers. Consequently, Keppel Insurance Pte Ltd`s bond

Version No 1: 20 Nov 2026 (01:16 hrs)

for securing the repatriation of these workers was called on by the Government. Keppel Insurance Pte Ltd having paid $12,000 to the Government, on 19 February 1993 demanded from Lim Eng Siong reimbursement of the same under the indemnity signed by him and Chow Eng Choon as directed by Eng Sook Boon. Eventually, Lim Eng Siong paid $6,000 in discharge of his liability under the indemnity.

25 On 25 May 1995, Eng Sook Boon, Law Mui Hoon and Chow Eng Choon commenced Suit 888/95 against the defendants in the name of the Company without the authority of a resolution of the board of directors. In that action, the Company alleged that the defendants were its trustees in respect of their shares in TS Engineering. They also alleged that the defendants were de facto directors of the Company and that they were in breach of their fiduciary duties to the Company by refusing to acknowledge the Company`s ownership of the shares in TS Engineering and by refusing to account therefor.

26 In or about 1995, the Attorney General sued the Company and obtained judgment in default of appearance for $9,651.20 for foreign workers levy and $700 for costs. The failure to repatriate the foreign workers resulted in the Company having to pay a further sum of $2,000 for foreign workers levy in 1996.

27 Because of the Company`s failure to repatriate its foreign workers, Lim Eng Siong as a director was `blacklisted` by the Ministry of Labour. Consequently, in July 1996, when he applied for permission to employ a foreign domestic maid for his family, his application was turned down. He had to pay $700 on behalf of the Company before his application was approved.

Version No 1: 20 Nov 2026 (01:16 hrs)

28 On 9 May 1997, Lim Eng Siong received another Registry of Companies summons for failing to hold the Company`s annual general meeting and for failing to lodge the annual returns. Because the affairs of the Company were being neglected by Eng Sook Boon and he as a director had to bear the consequences, Lim Eng Siong decided to take control of the Company to put it in order.

29 Accordingly, on 12 June 1997, Lim Eng Siong issued a notice as a director calling for an extraordinary general meeting (`EGM`) to be held on 2 July 1997. The meeting was to discuss, and if thought fit, to pass the resolutions appointing Teong Uk Choo, Lim Cheng Gee and Goh Bee Leng as additional directors of the Company. Another resolution sought was to authorise the directors to take necessary steps to file audited accounts of the Company for the year ended 30 September 1994.

30 The EGM on 2 July 1997 was attended by all the six shareholders and Eng Sook Boon even though he was not a registered shareholder. It began with the election of Lim Eng Siong as Chairman. Lim Eng Siong then listed the defaults of the Company under Eng Sook Boon`s control. He then said he wanted all shareholders to be appointed board directors so that the affairs of the Company could be attended to and problems resolved. Law Mui Hoon, Chow Eng Choon and Eng Sook Boon objected. They wanted the board to remain as it had been, that is with only three directors Law Mui Hoon, Chow Eng Choon and Lim Eng Siong. When it became apparent that they could not block the resolution from being passed, they stormed out of the EGM. The remaining shareholders then passed the resolutions proposed by Lim Eng Siong.

Version No 1: 20 Nov 2026 (01:16 hrs)

31 On or about 11 July 1997, Lim Eng Siong sent out a notice of meeting of the board of directors to be held on 15 July 1997 (`the Board Meeting`). The notice listed the following proposed resolutions for consideration:

> (i) To change Company`s registered office to Blk 16 Defu Lane 10 [num ]01-370 Singapore 539197 [Lim Eng Siong`s office].
>
> (ii) To appoint Mr Wee Cheng Hock as Company Secretary in place of existing Company Secretary, Ms Neo Lay Hiang Pamela.
>
> (iii) To discuss Company`s banking matters.
>
> (iv) To discuss High Court case, Re: Pelican Engineering Pte Ltd v Ts Engineering & Electrical Pte Ltd.
>
> (v) To appoint Mr Kong Kau and Mr Tan Chuan Hai as directors of the Company.

32 The notice of the Board Meeting was sent to all the directors. It was not disputed by Law Mui Hoon and Chow Eng Choon that they received the notice. But they claimed that they received it late. Hence, they could not attend.

33 The Board Meeting was thus attended by Lim Eng Siong, Lim Cheng Gee, Goh Bee Leng and Teong Uk Choo. The resolutions set out in the notice were passed by the board. In addition, Lim Eng Siong was appointed chairman of the board of directors. The material resolution is resolution (iv). It reads:

> (iv) High Court case
>
> *That M/S Chua Teck Leong & Partners` appointment as the Company`s solicitors, if valid, be and is hereby terminated.*
>
> *That upon receiving the final settlement of S$4,657.28 from Mr Lim Wee Chuan and Mr Goh Eng Chuan, the Company will withdraw all legal suits and claims against Mr Goh Eng Chuan, Mr Lim Wee Chuan, in particular High Court Suit 888/95.*
>
> *That Messrs WT Woon & Co, Advocates & Solicitors be appointed as the Company`s lawyer to act on behalf of the Company in respect of withdrawal of the above High Court Case: Pelican Engineering Pte Ltd v Mr Goh Eng Chuan and Mr Lim Wee Chuan*

Version No 1: 20 Nov 2026 (01:16 hrs)

> *with immediate effect. WT Woon & Co be and is hereby authorised to withdraw all actions against Mr Goh Eng Chuan and Mr Lim Wee Chuan.*

34 The amount of $4,657.28 was arrived on the basis that the $40,000 paid out of the funds of the Company for the purchase of TS Engineering shares was a loan to the defendants. After deducting part repayments, the balance was $4,657.28. Prior to the passing of the resolution, Lim Eng Siong had agreed with the defendants that upon payment of the balance, Suit 888/95 would be discontinued.

35 Pursuant to the agreement (`the compromise agreement`), the defendants paid $4,657.28 to the Company. On receipt of same, the Company discontinued Suit 888/95 on 13 August 1997.

36 On the same day, the plaintiffs commenced OS 888/97 against the Company and the other directors including Lim Eng Siong, Lim Cheng Gee, Goh Bee Leng and Teong Uk Choo (`the four directors`). The plaintiffs sought an order restraining them from discontinuing, withdrawing or compromising Suit 888/95.

37 By the time OS 888/97 came up for hearing on 5 December 1997, Suit 888/95 had already been discontinued. The court therefore granted leave to the plaintiffs to commence an action in the name of the Company against the defendants to set aside the compromise agreement. On 21 March 1998, these proceedings were commenced.

38 ***The proceedings***

39 By these proceedings, the plaintiffs sought to set aside the compromise agreement and reinstate Suit 888/95 on the following grounds:

Version No 1: 20 Nov 2026 (01:16 hrs)

40 (i) The compromise agreement was procured by the defendants through the exercise of actual undue influence over the four directors.

41 (ii) Alternatively, it should be presumed to have been procured by the exercise of undue influence over the four directors.

42 ***My decision***

43 On what is `undue influence`, LP Thean JA in **Lim Geok Hian v Lim Guan Chin** [1994] 1 SLR 203 at 216 stated:

> *Undue influence is the unconscientious use of one`s power or authority over another to acquire a benefit or to achieve a purpose.* ***Allcard v Skinner*** *[1887] 36 Ch D 145 established that cases of undue influence fall into two categories: first, cases where actual influence has been proved to have been exercised, and, second, cases where, by virtue of a particular relationship between the parties, the court presumes that undue influence has been exercised unless the contrary is proved.*

44 Judith Prakash J in **Rajabali Jumabhoy v Ameerali R Jumabhoy** [1997] 3 SLR 802 at 855 stated:

> *It is not enough to set aside a contract that one party tried to influence the other to enter it. There must be something wrong in the way that the influence was exercised, ie some unfair or improper conduct, some coercion or some form of misleading.*

45 On actual undue influence, Judith Prakash J in the ***Jumabhoy*** case at p 855 stated:

> *In order to establish a plea of actual undue influence, a plaintiff must show that:*
>
> (a) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant;
>
> (b) that the influence is exercised;

Version No 1: 20 Nov 2026 (01:16 hrs)

(c) that its exercise was undue; and

(d) that its exercise brought about the transaction.

46 The plaintiffs` case on actual undue influence was based on the following:

47 (a) that the defendants procured the appointment of additional directors of the Company for the sole purpose of compromising Suit 888/95;

48 (b) that the plaintiffs were intentionally given insufficient notice of the Board Meeting; and

49 (c) that the four directors compromised Suit 888/95 because they were accustomed to receiving and following the instructions of the defendants.

50 On the allegation referred to in [para] 35(a) supra, it was not disputed that from late 1991 to 2 July 1997, Eng Sook Boon was in control of the Company. During this time, the Company`s affairs were not attended to. No company meetings were held and annual returns were not filed. Foreign workers were not repatriated and foreign workers levy not paid. Because of these defaults, Lim Eng Siong as one of the directors was fined for breach of the Companies Act. He had to pay foreign workers levy to the Government. He also had to indemnify Keppel Insurance Pte Ltd whose bond had been called on because of the Company`s failure to repatriate the foreign workers. The Company itself was incurring liability for foreign workers levy when it was not operating. In addition, he was `blacklisted` and was refused a permit to employ a foreign maid. Lim Eng Siong therefore decided to assume control of the Company so that matters affecting the Company could be attended to and resolved including Suit 888/95. This was what he stated in his affidavit of evidence-in-chief:

Version No 1: 20 Nov 2026 (01:16 hrs)

> 47 I was incensed by these continuous defaults of Pelican. I strongly felt that Eng, Law and Chow were using Pelican for their own purposes or to benefit other persons. As a director of Pelican I was personally bearing the brunt of their mischief. I had two summons issued against me, been forced to appear in court and compelled to pay fines. I had also been forced to pay out on the indemnity given to Keppel Insurance Pte Ltd. I was even prevented from employing a foreign maid until I paid a sum due to the Ministry of Labour from Pelican.
>
> 48 By this time, I had also come to know of the frivolous suit Eng, Law and Chow had initiated against the defendants in Suit 888/95. I saw this as yet another potential liability arising from my regrettable investment in Pelican. Knowing that the allegations in Suit 888/95 were false, I was afraid that I would somehow end up footing the bill for Pelican`s legal costs.
>
> 49 I discussed the matter with other shareholders of Pelican and decided to remove Pelican from Eng`s control so that the issues surrounding Pelican could be resolved once and for all.

51 Lim Eng Siong is a man of substance. He runs a metal and welding works company, Soon Huat Welding Pte Ltd. He is not beholden to the defendants and would have a lot to gain if the Company succeeded in its claim in Suit 888/95. His support was solicited by Eng Sook Boon but he declined to go along with Eng Sook Boon. This was what he stated in his affidavit of evidence-in-chief:

> 72 I also brought to the attention of the board that in early 1997, soon after Eng came to know that I was going to give evidence in support of the defendants in Suit 888/95, Eng contacted me to meet him at Ponggol to discuss something very important. I agreed and met him there. Eng told me that if I supported him against the first and second defendants, Pelican stood to make a lot of money. He assured me that I would be amply rewarded for my support. I told him I did not wish to be part of his scam. Since then Eng has not contacted me.

52 Counsel for the plaintiffs tried to discredit, in my view unsuccessfully, Lim Eng Siong`s evidence on this point:

Version No 1: 20 Nov 2026 (01:16 hrs)

> Q: It was you who invited Eng Sook Boon out?
>
> A: No.
>
> Q: You wanted Eng Sook Boon to buy over your shares in plaintiff?
>
> A: Disagree.
>
> Q: You told Eng Sook Boon that if he purchased your shares, you would give evidence for him?
>
> A: Disagree.
>
> Q: Eng Sook Boon said no, but he wanted [you] to tell the truth and told you if the plaintiff company won the 1995 suit, you would benefit?
>
> A: No.
>
> Q: Did Eng Sook Boon say if you supported him you would benefit?
>
> A: Yes. But I told him the allegation in Suit 888/95 was not true. He wanted me to join him to go against the other parties.
>
> Q: So you then decided you would not support Eng Sook Boon but to support the defendants?
>
> A: Yes, because they are true.

53 Having heard Lim Eng Siong and observed his demeanour when testifying, I accepted his evidence that the appointment of additional directors at the EGM was not for the sole purpose of compromising Suit 888/95.

54 On the allegation referred to in [para] 35(b) supra, it was the plaintiffs` case that they were given insufficient notice of the Board Meeting at which it was decided to compromise Suit 888/95. Law Mui Hoon in her affidavit of evidence-in-chief, para 18, stated:

> *On the evening of 15 July 1997, I was handed a registered mail by my maid which was received a day before (ie 14 July 1997) enclosing a purported notice of a directors` meeting to be held at 10am on 15 July 1997. There was not enough notice given to*

Version No 1: 20 Nov 2026 (01:16 hrs)

> *myself to attend this meeting. I know Chow had also received such a notice as well. Like me, he received the notice late.*

55 On her own evidence, the notice reached her home on 14 July 1997. This notice was adequate if her maid had handed it to her on the day of receipt. On being referred to that paragraph of her affidavit, Law Mui Hoon said her maid handed the notice to her on 16 July 1997 at 1am. It is seems implausible that the maid would hand her the mail in the early hours of the morning. Be that as it may, Law Mui Hoon could not say when the maid had received the notice:

> Q: Did you receive a notice for meeting of the board of directors of plaintiff to be held on 15 July 1997?
>
> A: Yes, received it on 16 July 1997 at 1am.
>
> Q: Did your maid receive it or you?
>
> A: My maid received it.
>
> Q: When?
>
> A: 15 July 1997.
>
> Q: You are sure?
>
> A: Yes.
>
> Q: 2PAF/48, para 18, you stated it was received on 14 July 1997?
>
> Q: You said you received it at 1am, 16 July 1997?
>
> A: Yes.
>
> Q: So your maid would have received it on 15 July 1997?
>
> A: Yes. Sometimes she forgets to pass on to me.
>
> Q: So you do not know when your maid receive it?
>
> A: That`s so.

56 In the case of Chow Eng Choon, he stated in his affidavit of evidence-in-chief as follows:

Version No 1: 20 Nov 2026 (01:16 hrs)

> *My wife received a copy of this notice only in the afternoon of the same day of the meeting. The meeting was already over.*

57 Chow Eng Choon`s affidavit of evidence-in-chief was not consistent with what he was alleged to have told Law Mui Hoon. This was what Law Mui Hoon said in her affidavit in OS 888/97:

> *Whereas I am informed by the second plaintiff [referring to Chow Eng Choon] that he had received the said notice the day before the proposed meeting and he did not attend as he was not able to obtain leave from his employers.*

58 Under cross-examination, Chow Eng Choon admitted that his wife collected from the post office the notice sent to him by AR registered post before 15 July 1997. Therefore, at the latest, Chow Eng Choon`s wife would have collected the notice on 14 July 1997. In which case, the postman would have called at Chow Eng Choon`s home on 13 July 1997 when no one was at home. This was what Chow Eng Choon said under cross-examination:

> Q: Did you receive notice of board meeting to be held on 15 July 1997?
>
> A: It was too late for me to attend the meeting. When postman arrived I was not in. It was by AR post. When I collected it at the post office the meeting was over.
>
> Q: Did you collect it from post office?
>
> A: My wife collected it.
>
> Q: She collected it the day after the meeting?
>
> A: The day of the meeting.
>
> Q: See DB/87, Law Mui Hoon`s affidavit in OS 888/97, see para 8.5 there. She said you told her you received notice the day before the meeting, but you could not attend because you could not get leave, is that true?
>
> A: It could be. These events took place long ago. What I remember is when I received notice it was too late to attend.

Version No 1: 20 Nov 2026 (01:16 hrs)

> Q: Was it the day before or the day of the meeting that you received the notice?
>
> A: My wife collected it. I cannot recall the exact date I received notice.
>
> Q: Put you received notice before 15 July 1997?
>
> A: Yes, but too late for me to attend meeting.

59 According to Lim Eng Siong, the notices to the plaintiffs were posted on 11 July 1997. This was confirmed by the receipts issued by Singapore Post for the registered articles addressed to the plaintiffs.

60 I therefore found that adequate notice of the Board Meeting had been given. But plaintiffs chose to stay away because they knew they would be outvoted.

61 On the allegation referred to in [para] 35(c) supra, it is likely that Teong Uk Choo voted to compromise Suit 888/95 because of the interests of the first defendant. It is also likely that Goh Bee Leng did so because of the interests of the second defendant.

62 But acts of loyalty to a husband or a brother are not acts carried out under undue influence. In **Hong Leong Finance Ltd v Tay Keow Neo** [1992] 1 SLR 205 at 219, Rubin JC [as he then was] said:

> *The averments of both defendants in the present appeal have one common factor - that they signed the guarantee because of unflinching loyalty and act of obedience on their part to their master. It appears to me that the conduct of both defendants in this regard reflect an act of abiding faith in the ability of Ho as opposed to a situation where they were coerced or bulldozed into doing an act. What then is the underlying principle in such cases? The principle to be followed is set out in* ***Allcard v Skinner****, where Lindley LJ, in a famous passage ..., said:*
>
> *`The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and*

Version No 1: 20 Nov 2026 (01:16 hrs)

> *expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction.* ***Huguenin v Baseley*** *[1807] 14 Ves Jun 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.`...*

63 In the case of Lim Eng Siong and Lim Cheng Gee, there was no evidence to suggest that they were accustomed to taking instructions from the defendants. The evidence showed that the decision to compromise Suit 888/95 was a considered one based on the merits of the claim especially insofar as Lim Eng Siong and Lim Cheng Gee were concerned. See the evidence of Lim Eng Siong in his affidavit of evidence-in-chief:

> 85 It was for these rational and objective reasons that the resolution was passed to authorise the settlement of Suit 888/95. The objective facts clearly supported the defendants` position and I myself was absolutely convinced that Suit 888/95 was baseless because I knew for a fact that the $40,000 was a loan to the defendants. The decision to settle Suit 888/95 was certainly not a result of any undue influence exercised by the defendants over the directors of Pelican as alleged by the plaintiffs. It was simply a logical result of the objective facts.
>
> 86 I should also point out that everyone at the meeting of 15 July 1997 knew that GBL was the second defendant`s sister and Teong was the first defendant`s wife. However, both GBL and Teong were reasonably passive at the meeting. GBL and Teong did not actively try to persuade the meeting one way or the other. It was LCG and I who did most of the talking.

Version No 1: 20 Nov 2026 (01:16 hrs)

64 Lim Cheng Gee also voted to compromise Suit 888/95 for similar reasons:

> 38 …
>
> (a) LES confirmed that the $40,000 payment to Soh was just a simple loan to the defendants. I too had personal knowledge that this was true. There was never any intention for Pelican to own shares in TS Engineering. As such, it was clear to me that the allegations in Suit 888/95 were false and doomed to failure;
>
> (b) I was concerned about the legal costs being incurred by Pelican in pursuing a hopeless case;
>
> (c) the receipts produced by LES confirmed that the $40,000 was just a loan; and
>
> (d) the defendants were willing to repay the balance outstanding on the loan.
>
> 39 For these objective reasons, I decided to vote in favour of settling Suit 888/95. It was certainly not because the defendants exercised any undue influence or control over me.
>
> 40 I am aware that the plaintiffs have alleged that I am accustomed to following the defendants` instructions. This is ridiculous. I am not related to either defendant. I have my own labour supply business. I am totally independent of the defendants. I have no reason to follow the defendants` instructions in anything.
>
> 41 I should also say that at the meeting on 15 July 1997 I was aware that Teong was the first defendant`s wife and that GBL was the second defendant`s sister. However, I should also point out that Teong and GBL hardly said anything at the meeting on 15 July 1997. LES did most of the talking and Teong and GBL did not say anything to try and influence the other directors.

65 Kong Kau and Tan Chuan Hai were appointed directors after the resolution to compromise Suit 888/95 had been passed. Hence, they did not participate in the passing of the resolution.

66 I was therefore of the view that the plaintiffs had failed to prove that defendants had exercised actual undue influence on Lim Eng Siong, Lim Cheng

Version No 1: 20 Nov 2026 (01:16 hrs)

Gee, Goh Bee Leng and Teong Uk Choo and that undue influence had brought about the resolution to compromise Suit 888/95.

67 On the plaintiffs` case based on presumed undue influence, the dicta of Judith Prakash J in the ***Jumabhoy*** case at p 854 is instructive:

> *To succeed under the `presumed undue influence` category, the following elements need to be proved:*
>
> (a) the existence of a particular relationship which enabled one party to it to influence the decisions of the other;
>
> (b) that the resulting transaction was manifestly disadvantageous to the person subject to the influence.
>
> *Upon proof of the above elements, the burden shifts to the defendant to prove that no undue influence had been exercised. The presumption can only be rebutted by showing that the ascendant party did not abuse his position and that the subservient party understood what he was doing and was in a position to exercise a free judgment based on full information.*

68 There are thus three issues in the plaintiffs` cause of action based on presumed undue influence, namely:

69 (a) whether the relationship between the parties gave rise to a presumption of undue influence; if it did,

70 (b) was the compromise agreement manifestly disadvantageous to the Company, and, if it was,

71 (c) was the compromise agreement made in the exercise of the parties` free independent will.

72 On the issue referred to in [para] 54(a) supra, Goh Bee Leng is the sister of the second defendant. Chan Sek Keong JC [as he then was] stated in **Lai**

Version No 1: 20 Nov 2026 (01:16 hrs)

Kwee Lan & Anor v Ng Yew Lay & Anor [1989] SLR 863 , 872; [1990] 1 MLJ 211, 216:

> *Equity does not presume that a brother is in a confidential position to and therefore has undue influence over another sibling, not even an elder brother to a younger brother.*

73 This dicta was applied by LP Thean JA in **Lim Geok Hian v Lim Guan Chin** [1994] 1 SLR 203 at 216 to a brother and sister relationship:

> *The relationship of brother and sister is not one where the presumption of undue influence arises:* ***Lai Kwee Lan & Anor v Ng Yew Lay & Anor****.*

74 Teong Uk Choo is the wife of the first defendant. In **Kings North Trust Ltd v Bell & Ors** [1986] 2 All ER 423, 427; [1986] 1 WLR 119, 123, Dillon LJ said:

> *Inasmuch as the argument for the second defendant rests on the twin points that her execution of the mortgage of the Old Rectory was procured by her husband and she did not have independent advice, it is as well to have clearly in mind at the outset that there is no presumption of law that a transaction between husband and wife for the husband`s benefit was procured by undue influence on the part of the husband and there is no rule that such a transaction cannot be upheld unless the wife is shown to have had independent advice: see generally* ***Shears and Sons Ltd v Jones*** *[1922] 128 LT 218 and* ***Bank of Montreal v Stuart*** *[1911] AC 120.*

75 Lord Scarman affirmed the position in **National Westminster Bank plc v Morgan** [1985] AC 686 at 703:

> *There are plenty of confidential relationships which do not give rise to the presumption of undue influence (a notable example is that of husband and wife,* ***Bank of Montreal v Stuart*** *[1911] AC 120) ...*

76 The plaintiffs` case of presumed undue influence based on relationships of brother-sister, husband-wife therefore failed.

Version No 1: 20 Nov 2026 (01:16 hrs)

77 If, and only if, the plaintiffs could rely on presumed undue influence is it necessary to consider if the compromise agreement was manifestly disadvantageous to the Company. But for the sake of completeness, I will deal with the issue referred to in [para] 54(b) supra.

78 A transaction is manifestly disadvantageous if it is `explicable only on the basis that undue influence had been exercised to procure it` per Judith Prakash J in **Pek Nam Kee v Peh Lam Kong** [1996] 1 SLR 75 at 105.

79 Whether the compromise agreement was manifestly disadvantageous must depend on the strength of the plaintiffs` case that the defendants held their shares in TS Engineering as trustees for the Company. The evidence relied on by the plaintiffs is the Company`s cheque for $40,000 paid to Soh Cher Hee for the first tranche of the TS Engineering shares transferred to the defendants. Payment for the second tranche was not made with funds emanating from the Company.

80 On the cheque for $40,000, both Lim Eng Siong and Lim Cheng Gee, whom I regard as independent directors, confirmed that it was a loan to the defendants to enable them to take over TS Engineering on the defendants` promise to subcontract work to the Company. Lim Eng Siong was the co-signatory of the cheque. On the basis of their evidence, the chances of the Company`s success in Suit 888/95 are not such that the compromise agreement and the discontinuance of the said suit were manifestly disadvantageous to the Company.

81 The evidence of Lim Eng Siong and Lim Cheng Gee is supported by the entry in the Company`s ledger. It showed payment of this sum of $40,000on 1 October 1990 under `Loan Debtor - TS Engrg & Elect Pte Ltd`. This ledger

Version No 1: 20 Nov 2026 (01:16 hrs)

entry was made at the time when the Company was under the control of Eng Sook Boon. It is not consistent with the payment being made for purchase of the TS Engineering shares. It is more consistent with it being a loan to the defendants identified as `TS Engrg & Elect Pte Ltd`.

82 If the compromise agreement and consequently the discontinuance were manifestly disadvantageous to the Company, the defendants have proved that the board decision sanctioning the compromise agreement was an exercise of independent will by Lim Eng Siong and Lim Cheng Gee. Goh Bee Leng and Teong Uk Choo might have voted out of loyalty but this is not acting under undue influence.

83 The plaintiffs also alleged that the defendants were de facto directors of the Company, and as such might be presumed to have exercised undue influence over the Company. See **Cheong Kim Hock v Lin Securities** [1992] 2 SLR 349 at 356 E to I.

84 The plaintiffs contended that the defendants were de facto directors of the Company because of the following:

85 (a) The second defendant was in charge of the administrative and paper work of the Company.

86 (b) The defendants participated in meetings of directors and shareholders of the Company.

87 (c) The defendants carried business cards describing them as directors of the Company.

Version No 1: 20 Nov 2026 (01:16 hrs)

88 (d) The second defendant`s signature appeared on vouchers and invoices of the Company.

89 (e) The defendants received salaries from the Company.

90 For someone to be a de facto director, he must perform functions that only a director could perform. See **Re Hydrodam (Corby) Ltd** [1994] 2 BCLC 180. At 183, Millett J said:

> *A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company`s affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.*

91 The functions allegedly performed by the defendants are not those that could properly be discharged only by a director, that is by a member of the board of directors of a company. That aside, the defendants` explanations must be noted.

92 The name cards describing the defendants as `director` were printed on the instructions of Eng Sook Boon. This is confirmed by the order for the cards being in his handwriting. The defendants however did not use the cards printed for them. In any event, `director` does not necessarily mean a board director.

93 On the salaries allegedly received by the defendants, they were recorded in the Company`s 1989 general ledger as `consulting fee`. This is consistent with their claims that they were paid consultants.

Version No 1: 20 Nov 2026 (01:16 hrs)

94 On the vouchers and invoices, the second defendant`s explanation was that he was required in his capacity as consultant to check the vouchers and invoices before passing them on for signature by a director of the Company. If the vouchers and invoices checked by him were found to be in order, he would sign at the `approved` column leaving space for the director`s signature. The vouchers produced in court supported his explanation.

95 I was therefore of the view that the plaintiffs had not proved their case that the defendants were de facto directors of the Company. In any event, if the defendants were de facto directors of the Company, they would have ceased to be de facto directors when the Company ceased operation in 1991. They could not be de facto directors on 15 July 1997 when the resolution to compromise Suit 888/95 was passed.

96 For the reasons given above, I dismissed the plaintiffs` derivative action with costs to be borne by plaintiffs.

97 **Outcome:**

98 Plaintiffs` claim dismissed

Goh Joon Seng J

Version No 1: 20 Nov 2026 (01:16 hrs)

Joseph Liow Wang Wu (Derrick Ravi & Partners) for the plaintiffs
Cavinder Bull (Drew & Napier) and Catherine Lim Chui Ling
(Cheong Hoh & Associates) for the defendants

Version No 1: 20 Nov 2026 (01:16 hrs)