IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 217

Suit 747/1997

Between

Mustafa Ali R Jumabhoy

… *Plaintiff*

And

I H C Private Limited

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Mustafa Ali R Jumabhoy v I H C Private Limited

[1999] SGHC 217

Suit 747/1997
Goh Joon Seng J
23 August 1999

1 **JUDGMENT:**

2 **GROUNDS OF JUDGMENT**

3 1 This is a claim by the Plaintiff, Mustafa Ali Rajabali Jumabhoy, against the Defendant for delivery to him of 2,167,000 shares in Scotts Holdings Ltd ('SHL') and the dividends received in respect thereof with interest. I gave judgment for the Plaintiff. The Defendant has appealed to the Court of Appeal. I now give my reasons.

4 The background

5 2 The Plaintiff is one of the beneficiaries under the settlements created by his father, Rajabali Jumabhoy ('Rajabali'), and his mother, Fatimabai. The settlements related to their properties being No. 8 and No. 6, Scotts Road, Singapore, respectively.

6 3 In 1979, SHL was incorporated as a private limited company. It then purchased from the trustees of the two settlements the two properties at $625.00

per square foot for development into a commercial complex. Payment was by way of shares in SHL issued as fully paid.

7 4 In the late 1980s, members of the Jumabhoy family decided to have the SHL shares listed on the Stock Exchange of Singapore Ltd. Listing was achieved on 12 July 1991.

8 5 To ensure that control of SHL remain with the Jumabhoy family, Scotts Investments (S) Pte Ltd ('SIS') was incorporated. The shares in SHL held by the trustees of the two settlements and other Jumabhoy family trusts were transferred to SIS in exchange for a proportionate number of shares in SIS. SIS thus became the largest shareholder of SHL. The Plaintiff is a director and member of SIS because he is a trustee of several trusts that are shareholders of SIS.

9 6 As part of the listing exercise of SHL shares, two loss making subsidiaries, A&W (S) Pte Ltd ('A&W') and Scotts Weitnauer Retailing Pte Ltd ('SWR') were transferred to the Defendant which subsequently became a subsidiary of SIS.

10 7 The Plaintiff is one of the directors and holds 9% of the shares in the Defendant. The other shareholders are Croissant Investment Pte Ltd ('Croissant'), Ameerali Rajabali Jumabhoy ('Ameer'), Yusuf Rajabali Jumabhoy ('Yusuf') and SIS. SIS holds 57% of the shares in the Defendant. Ameer and Yusuf are brothers of the Plaintiff. The Plaintiff was not personally involved in the management of either SIS or the Defendant or any of their subsidiaries. He works and resides in Penang. It was Ameer and his sons Rafiq Jumabhoy ('Rafiq') and Iqbal Jumabhoy ('Iqbal') who were in charge of these companies.

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11 8 Both A&W and SWR required banking facilities for their operations. These facilities were secured by guarantees issued by SIS and pledges of some of its SHL shares.

12 Family meeting of 21 September 1992

13 9 A&W had accumulated sizeable losses. At this family meeting , Rafiq proposed that except Croissant, the Defendant's shareholders namely SIS, Ameer, Yusuf and the Plaintiff, provide funds to pay off A&W's bank loans. The minutes on this proposal read:

14 "**I.H.C.**

> Rafiq Jumabhoy presented the amounts due to clear the debts of A&W. Shares would have to be sold by the shareholders of I.H.C. to pay the shortfall.
>
> Rafiq Jumabhoy also informed the meeting that the companies under IHC could then be retained or sold, this decision to be taken in association with Orix [referring to Croissant] who are also shareholders. (It was to be noted that SWR is in substantial profit but not A&W.)
>
> Y R Jumabhoy expressed that the funds must be made available and that of course they would.
>
> It was resolved: that funds would be made available by all shareholders (i.e. ARJ, YRJ, MRJ, Scotts Investments) in the proportion of shares held to IHC in order to clear A&W's bank loans."

15 10 The amount of these bank loans was not disclosed in the minutes and there was no evidence before me on that either.

16 Family meeting of 26 September 1992

17 11 On 19 September 1992, the Plaintiff had a telephone conversation with his two sons who were then in the office of A&W. Unknown to them, their

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telephone conversation was being taped. The Plaintiff referring to his father said 'my conscience is clear, if he drops dead I am not the cause of it…'

18 12 At the family meeting of 26 September 1992, the tape recording was played. This infuriated Rajabali who took those words to mean that the Plaintiff wished him dead. This led to the Plaintiff being estranged from his father for the ensuing two and a half years. According to the Plaintiff, this estrangement made it difficult for him to comment on family matters.

19 13 In or about January 1993, the Company Secretary of the Defendant, Elizabeth Chelliah, prepared a draft capitalisation agreement for injection of funds into the company.

20 14 The parties to the draft capitalisation agreement were the existing shareholders of the Defendant. It contemplated a two-stage process. The first was the sale by Croissant of its 20% shareholding to the other shareholders. This would require a valuation of the Defendant by the auditors. The second stage would only commence after the completion of the first stage. It was the capitalisation of the company by an allotment of 13,000,000 ordinary shares of $1.00 each. It would be made by 'renounceable letters of allotment'. The shares were to be paid for with SHL shares by the remaining shareholders. The number of SHL shares to be transferred by each of the remaining shareholders as payment to take up the allotment of 13,000,000 additional shares was calculated at $0.72 per share. On this basis, the number of SHL shares to be transferred by the remaining shareholders to the Defendant would be:

21 SIS - 12,820,000

22 Ameer - 1,264,000

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23 Yusuf - 1,806,000

24 Plaintiff - 2,167,000

25 15 The relevant clauses of the draft capitalisation agreement are cll 1, 2, 6 and 7. They read:

"

TRANSFER OF SHARES BY ORIX

1. IHC shall upon the receipt of a transfer notice from ORIX of ORIX'S proposal to transfer all of its interest in IHC amounting to 4,724,800 ordinary shares of Singapore Dollars One each (S$1.00) (hereinafter called "the Shares"), the receipt whereof shall constitute IHC as its agent of the sale of the Shares to any member or members of IHC, (a) cause an auditors' valuation of IHC to be carried out to certify the fair value of a share of IHC; (b) within seven (7) days of receipt of the certificate of valuation referred to above, IHC shall offer the Shares to the remaining members of IHC in proportion (or nearly as may be) to the number of shares held by them respectively together with a copy of the said certificate of valuation to the remaining members of IHC. Every such offer shall be made in writing specifying the number of shares offered ("the proportionate entitlement") and shall be accompanied by a form of application for use by the member in applying for all, and not some only, of his proportionate entitlement. The price for the Shares shall be the certified valuation value multiplied by the Shares (hereinafter called "the offer price") Every such offer shall be open for acceptance within …….. days from the date of its despatch. (c) Upon all of ORIX's shares being taken up, the Directors of IHC shall forthwith allocate to each purchasing member the shares applied for and shall issue to each purchasing member the requisite share transfer form for their due execution. 2. Within Seven (7) days of the expiration of such sixty day period or upon full acceptance of the offer by all the remaining shareholders, whichever is the earlier, IHC shall notify ORIX and all purchasing members of the allocations which have been made pursuant [to] Clause 1(c) above and shall submit to ORIX for further action the duly executed share transfer forms from the purchasing members. … 6. Within Seven (7) days of ORIX ceasing to be a member of IHC, IHC shall cause to be convened a general meeting of its members whereby resolutions authorising the increase in the authorise[sic] and

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> paid up capital of IHC to Singapore Dollars ..... and Singapore Dollars Forty One Million Six Hundred and Eighty Four Thousand Five Hundred and Fifty (S$41,684,550) shall be considered for approval by the member[sic] of IHC (hereinafter called "the Resolution"). 7. IHC shall then pursuant to the said Resolution allot by means of renounceable letters of allotment to each of the members of IHC named in the first column of the schedule hereto the number of ordinary shares set against his name in the second column of the said schedule such shares to be credited as fully paid up the consideration for the same to be obtained as follows:- (a) ARJ [Ameer] shall transfer 1,264,000 of his shares in Scotts Holdings Limited to IHC; (b) YRJ [Yusuf] shall transfer 1,806,000 of his shares in Scotts Holdings Limited to IHC; (c) MRJ [Plaintiff] shall transfer 2,167,000 of his shares in Scotts Holdings Limited to IHC and (d) SIS shall transfer 12,820,000 of its shares in Scotts Holdings Limited to IHC. The number of shares to be transferred as provided for above is based on the trading price of 0.72 cents/share. In the event that the trading price of the Scotts Holdings Limited's shares as at the close of the seven day period after the transfer of the ORIX's shares in IHC is higher or lower than 0.72 cents/share, the number of Scotts Holdings Limited shares to be transferred by ARJ, YRJ, MRJ and SIS to IHC shall be adjusted accordingly PROVIDED ALWAYS that there shall be no transfer of shares of Scotts Holdings Limited during the periods prohibited by the Stock Exchange of Singapore in which event the day for transfer of the shares shall be the next trading day after the lifting of the prohibition and the price shall be the trading price of Scotts Holdings Limited as at the close of that trading day.

26 16 The draft capitalisation agreement was forwarded to Rafiq and Iqbal by Elizabeth Chelliah on 30 January 1993 with her comments.

27 17 On 12 February 1993, notices of meetings of the boards of SIS and the Defendant were given. The first item of the agenda for the board meeting of the Defendant was the submission for approval of the draft capitalisation agreement.

28 18 It must then have been realised that such an agreement required the approval of the Defendant's shareholders. So, on 17 February 1993, notice was

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given of the annual general meeting of the Defendant to be held on 20 February 1993 in place of the board meeting.

29 19 The agenda of the annual general meeting omitted reference to the draft capitalisation agreement. Instead, items 2 and 3 provided:

> "2. To consider and if thought fit to approve of the proposed capitalisation of the Company as follows:-
>
> … (b) to approve of the creation of Ten Million (10,000,000) new ordinary shares of S$1.00 each in the company. (c) to authorise the Directors to issue such of the Company's unissued capital to such persons at such times and for such considerations as the Directors in their discretion shall determine to be in the best interest of the Company.
>
> 3. To authorise the Directors of the Company to enter into an agreement with the shareholders of the Company pertaining to the above."

30 20 It is to be noted that the allotment proposed in the draft capitalisation agreement was for 13,000,000 additional shares. The resolution sought at the annual general meeting was for only 10,000,000 additional shares.

31 21 The agenda in the notice of the board meeting of SIS to be held on 20 February 1993 sought approval of the board for SIS to enter into agreements pertaining to the capitalisation of the Defendant. Two of the SIS board resolutions read:

> "1) THAT the Company do consent to take up the offer of shares in I.H.C Private Limited as offered by Croissant Investment Pte Ltd at a price to be determined after valuation of I.H.C Private Limited.
>
> 2) THAT the Company do agree to the transfer of Twelve Million Eight Hundred and Twenty Thousand (12,820,000) ordinary shares of S$1.00 each in Scotts Holdings Limited to I.H.C. Private Limited as consideration for the allotment of additional shares in I.H.C. Private Limited."

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32 22 The minutes also recorded a paragraph preceding the resolutions reading as follows:

> "RJ [Rafiq] went on to explain that actually ARJ, YRJ and MRJ's shareholdings percentage hide the actual shareholding which is still *f* , *f* , *f* because SIS has a higher proportion of ARJ's family trust. At $0.72 per share, SIS will sell 12,800,000 ordinary shares. YRJ sells 1,806,000 ordinary shares, MRJ sells 2,167,000 ordinary shares and ARJ sells 1,264,000 ordinary shares."

33 23 It is this part of the minutes that is relied on by the Defendant for its case that the Plaintiff had agreed to contribute 2,167,000 SHL shares toward its capitalisation. But in item 10 of the minutes, it was also recorded as follows:

> "MR [referring to Plaintiff] advised the shareholders that he too wanted to sell his shares in the Company to the other shareholders..."

34 24 The SIS board meeting was followed by the annual general meeting of the Defendant held at 11.30 am on 20 February 1993. At this meeting the following resolutions were passed:

> (i) The sale by Croissant of its shares in the company to the remaining shareholders was approved. The auditors, Ernst & Young, were to do a valuation of the company and determine the price.
>
> (ii) The authorised capital of the company was to be increased to $40,000,000 by the creation of 10,000,000 additional ordinary shares of $1.00 each.
>
> (iii) The directors were authorised to allot and issue such additional shares to such persons or corporations, in such proportion and for such consideration as they determined to be fit and proper.
>
> (iv) The directors were authorised to enter into an agreement with the shareholders setting out the pre-emption of the shares of Croissant and the offer to and acceptance by the remaining shareholders of the additional shares.

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35 25 The resolutions at the annual general meeting of the Defendant thus envisaged that the Company enter into an agreement with the remaining shareholders for the allotment of the 10,000,000 additional shares and the purchase by them of Croissant's shares.

36 26 Following the board meeting of SIS and the annual general meeting of the Defendant of 20 February 1993, the Plaintiff signed and handed over a blank transfer of SHL shares. The transferee's name and the number of shares to be transferred were not filled in.

37 27 One of the reasons subsequently given by the Plaintiff for signing the blank transfer on 20 February 1993 was that he had been told by Iqbal that he had signed guarantees for the Defendant's banking facilities and therefore he had no choice but to agree to the capitalisation of the Defendant and sign the blank transfer pending the finalisation of the capitalisation agreement.

38 28 On 3 March 1993, Elizabeth Chelliah forwarded a copy of the company's audited accounts to the Plaintiff.

39 29 On 15 March 1993, the Plaintiff wrote to Elizabeth Chelliah in the latter's capacity as Company Secretary of SIS and the Defendant asking for copies of guarantees and letters of undertaking signed by him for the facilities accorded to the two companies.

40 30 On 24 March 1993, by letter to Susie Tan as Company Secretary of SIS, the Plaintiff questioned the accuracy of the minutes of the SIS board meeting:

> "Again the para preceding the Resolution presumes acceptance of the capitalisation program by various individuals named which to my view is not correct."

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41 31 On 12 May 1993, the Plaintiff wrote to Elizabeth Chelliah as the Company Secretary of the Defendant as follows:

> " …
>
> There were no accounts of IHC Pte Ltd tabled at the said meeting in order that the shareholders of the Company could consider the viability of the proposed further recapitalisation of IHC. No accounts of IHC were given prior to or at the meeting. Under such circumstances I was unable to make any informed decision on the proposed further capitalisation of IHC and my reticence at the meeting should not be construed as acceptance of any proposals."

42 32 In his letter of the same date to Susie Tan as General Manager, Legal Services, SIS, he wrote:

> "…
>
> As far as IHC Pvt Ltd is concerned, I have replied on 12 May to the Company Secretary."

43 33 On or about 14 June 1993, the Plaintiff received a notice of meeting of the board of SIS to be held on 26 June 1993. The agenda related to the formation of a company to be the holding company of the Jumabhoy family's retail companies. On 24 June 1993, the Plaintiff wrote to Susie Tan as the Company Secretary stating:

> "I object to the calling of the proposed [board] meeting of SIS on 26 June because
>
> 1. as per my separate letter to you dated 22 June 93 the minutes of previous meeting held on 20 Feb have yet to be finalised. As such the meeting to be held on 26 June 93 cannot take place unless you declare the previous meeting held on 20 Feb 93 null and void and I have asked for a fresh meeting with the same Agenda because relevant overdue Accounts of IHC were not disclosed and issues pertaining to the minutes incomplete.
>
> 2. no information, accounts and papers are being made available in advance for study so that the interests of shareholders can be protected by the non-executive Directors

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> who are kept in the dark and are only requested to sign letters of support and guarantee."
>
> Following his objection, he did not attend the board meeting.

44 34 By a memo on the letterhead of SHL dated 21 September 1993, Susie Tan invited the Plaintiff, Ameer and Yusuf to submit their application to the Central Depository Pte Ltd ('CDP') to convert their SHL shares to scripless share system. She also offered to do it on their behalf. Along with the memo, she enclosed a completed transfer in favour of CDP for the Plaintiff's entire holding of 16,857,419 SHL shares. The Plaintiff was advised to sign the transfer and return it to her at SHL with the share certificates.

45 35 On 28 September 1993, Susie Tan on the letterhead of SHL sent a reminder to the Plaintiff, Ameer and Yusuf. Again a completed transfer form was enclosed.

46 36 Ameer and Yusuf must have responded to the second memo from Susie Tan because the transfers of their shareholdings in SHL were lodged with CDP on 4 and 6 October 1993 respectively.

47 37 On 8 October 1993, the Plaintiff wrote to Susie Tan as Company Secretary of SHL. The letter reads:

> " 08th October 1993 REGISTERED Ms. Susie Tan Scotts Holdings Ltd Thongsia Bldg #05-00 30 Bideford Road Singapore 0922 Conversion of Scotts Holdings Ltd to Scriples[s] Trading I refer to your Memo of 28 Sept and enclose herein : a) Transfer form to Central Depository (Pte) Ltd b) Share Certificate Nos. 000003 for 1,000 share[s] 000011 6,856,419 000012 10,000,000 My CDP A/c No. 1681-0379-9474 Yours faithfully [Signed] Dato M. R. Jumabhoy Encl : "

48 38 It is pertinent to note that it was at the request of Susie Tan that the Plaintiff sent in the signed transfer in favour of CDP with the share certificates

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for the total of 16,857,419 SHL shares. This was for the specific purpose of conversion to scripless share system.

49 39 After receipt of the Plaintiff's letter of 8 October 1993 with the enclosures, Susie Tan, acting on the instructions of Rafiq and Iqbal, went about making plans to effect transfer to the Defendant of 2,167,000 of the Plaintiff's 16,857,419 SHL shares by using the blank transfer signed by him on 20 February 1993.

50 40 A draft letter to be sent to the Plaintiff was prepared by Susie Tan as General Manager, Legal Services, of Scotts Group of Companies on 14 October 1993 for Iqbal's approval. It was to advise the Plaintiff before effecting the transfer that they would be transferring 2,167,000 of his SHL shares to the Defendant. The draft reads:

> "
>
> 'To MR,
>
> Thank you for your letter of 8 October 1993 together with your share certificates nos. 3, 11 and 12 for a total of 16,857,419 shares in Scotts Holdings Limited (SHL).
>
> We have in our possession a transfer form executed by you to have 2,167,000 SHL shares transferred to I.H.C Private Limited (I.H.C) as consideration for the allotment of new I.H.C's shares to you ("Capitalisation").
>
> We are in the process of finalising the Capitalisation and it is our intention to effect this transfer and then deposit the balance of 14,690,419 shares into your CDP Account.
>
> Before we finalise the Capitalisation, I.H.C will hold your shares on trust on your behalf. A Trust Deed has been prepared and a copy enclosed for your record. When the finalisation of the Capitalisation is effected, I.H.C will issue new I.H.C shares to you, and any excess SHL shares will be returned to you by depositing into your CDP Account.
>
> Please be informed that we shall proceed to effect the transfer on _____.

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Rgds.' "

51 41 According to Iqbal, he referred to Susie Tan to Rafiq and sent her draft to him for approval. What happened thereafter was disclosed by Iqbal in his supplemental affidavit of evidence in chief:

> "15 After she had discussed the matter with Mr. Rafiq Jumabhoy, Ms Susie Tan informed me that Mr Rafiq Jumabhoy, was of the view that the Plaintiff may prove uncooperative and object to the transfer. Mr. Rafiq Jumabhoy made the point to Ms. Susie Tan that the Plaintiff had earlier tried to renege from the agreement made in February 1993. Mr Rafiq Jumabhoy suggested that we first transfer the 2.167 million SHL shares to the Defendant and notify the Plaintiff of the same only after the transfer had been completed. Ms Tan showed me Mr. Rafiq Jumabhoy's comments in manuscript on the draft that she had prepared. However, Mr. Rafiq Jumabhoy also took the view that legal advice should be sought before we proceed to effect the transfer.
>
> 17.[sic] On 22 October 1993, Mr. Rafiq Jumabhoy, Ms Susie Tan and I contacted SHL's legal advisor on corporate matters, Mr. Sunny Wong of Wong Tan & Molly Lim through telephone. Mr. Wong's advice was sought on whether the transfer of the 2.167 million SHL shares belonging to the Plaintiff to the Defendant without his prior express consent would be proper and lawful. Mr. Wong was informed that the Plaintiff had agreed to the transfer of the said 2.167 million shares in February 1993 and had furnished the Defendant company with a duly executed blank transfer form for these shares. Mr. Wong was also informed that the Plaintiff had sought to renege from his earlier agreement and may well be uncooperative. Mr. Wong advised and confirmed that the transfer of the 2.167 million SHL shares to the Defendant could be effected without first informing the Plaintiff and the transaction would be lawful. A copy of Ms Susie Tan's file-note which fairly accurately records the events at this telephone conference with Mr Wong on 22 October 1993 is annexed hereto and marked "**IJ-42**".

52 42 Having received the instructions of Rafiq and Iqbal and the advice of Sunny Wong given on the basis that the 'Plaintiff had agreed to the transfer of the said 2.167 million shares in February 1993 and had furnished the Defendant with a duly executed blank transfer form for these shares', Susie Tan in her

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memo of 22 October 1993 to Rafiq and Iqbal put on record the instructions given to her and her own thoughts on the matter. Her note reads:

"

53 **MEMO**

54 Date : 22 October 1993

To : RJ/IJ From : Susie Tan

Re : CAPITALISATION OF IHC AND

TRANSFER FORMS EXECUTED BY MRJ

55 _____

Further to the meeting with both of you and the telephone conference with Sunny Wong, as instructed, I shall proceed to transfer MRJ's 2,167,000 shares to IHC as consideration for the allotment of new shares to MR as per the SIS BOD's resolution passed on 20.2.93 and MR's executed transfer form. Pending finalization of IHC's capitalisation (ie. before allotting new shares) for AR, YR & MR, IHC will hold the shares on trust for them.

I have prepared the following:

56 (a) 3 draft Trust Deeds for IHC's execution for AR, YR and MR and

(b) a draft letter to MR, informing him of the transfer (Please approve). Before doing these, please note the following: (a) We have to get AR & YR to sign CDP's Form 4 to transfer their shares in CDP to IHC.

IJ, as discussed, please decide on the 'purpose' of transfer. (Sook May will liaise with you). After AR and YR sign the forms, we shall write to MR that all parties have effected the transfer. (b) SIS [sic] shares are in scrip. We should have them converted to scripless before transferring to IHC to avoid stamp fees (about $17,000,000[sic] as the shares are worth more than $12 million). Then we will do the transfer by Form 4 with CDP at $10.00. (c) MRJ's transfer form:- (i) as suggested by RJ, IJ is to execute as witness to MR's transfer form. (ii) please let me know what is the date for the transfer. We should try not to back-date for more than two weeks because of stamp duty penalties. (iii)

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> what is the consideration for the transfer ie. we have to state the allotted new shares of IHC in monetary value. As per SIS's BOD meeting on 20 February 1993, it was stated that: "An auditor's valuation of IHC will be carried out to certify the fair value of a share of IHC and the shares will be offered to the remaining shareholders of IHC in their proportion of the number of shares held by them respectively." Further, it was also stated that: "The number of shares to be transferred as provided for above is based on the trading price of $0.72 per share." Even though the share price is currently $0.85 as per the SIS BOD meeting, the consideration will be around 1.5 million ($0.72 X 2,167,000). d Stamp duties payable will be based either on the net tangible asset (NTA) of SHL's shares or the consideration (1.5 million), whichever is higher, and the stamp fee will be $0.20 per every $100.00. Based on 1.5 million, the stamp duty is approximately $3,120.00.
>
> Please discuss and instruct. You may contact Sook May who has been briefed to handle this. "

57 43 Sunny Wong in his affidavit of evidence in chief confirmed:

> "I was instructed the 2.167 million SHL shares belonging to the Plaintiff which they proposed to transfer to the Defendant were part of 16,857,419 SHL shares delivered by the Plaintiff for purposes of converting them to the scripless system. More specifically, my advice was sought on whether the transfer of the 2.167 million SHL shares belonging to the Plaintiff could be effected without first informing him of the transfer. I was informed that the Plaintiff had agreed to the transfer of the said 2.167 million shares in February 1993 and had furnished the Defendant with a duly executed blank transfer form for these shares. I was also informed that the Plaintiff had sought to renege from his earlier agreement and would be uncooperative. Based on these instructions, I confirmed that the transfer of the 2.167 million SHL shares to the Defendant could be effected without first informing the Plaintiff."

58 44 It is to be noted that Sunny Wong was not instructed that the Defendant was not party to the agreement (if there was one) by the Plaintiff to the transfer of his SHL shares.

59 45 On 8 November 1993, Susie Tan as General Manager, Legal Services, of the Scotts' Group of Companies, sent to Lim Associates (Pte) Ltd,

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the corporate secretaries of SHL, the Plaintiff's SHL share certificate no. 11 for 6,856,419 shares with instruction to 'split' it into two certificates, one for 4,689,419 shares in the name of the Plaintiff and the other for 2,167,000 shares in the name of the Defendant. Susie Tan's instructions were complied with on 3 December 1993.

60 46 On 30 December 1993, Susie Tan by a memo to the Plaintiff informed him as follows:

> " FACSIMILE TRANSMISSION Date : 30 December 1993 Via Fax and Mail To : M R Jumabhoy From : Susie Tan No of Pages : 12 (including this page) _____ Thank you for your letter of 8 October 1993 together with your share certificates nos. 3, 11 and 12 for a total of 16,857,419 shares in Scotts Holdings Limited (SHL). You have also handed over to us a transfer form executed by you to have 2,167,000 SHL shares transferred to I.H.C Private Limited (IHC) as consideration for the allotment of new IHC's shares to you ("Capitalisation"). As per the minutes of the Board of Directors' meetings of Scotts Investments (Singapore) Pte Ltd held on 20 February 1993 and 26 June 1993 and the shareholders' meeting of IHC, we are finalising the Capitalisation and in the process have effected the transfer of ARJ, YRJ and your shares to IHC. We effected the transfer of your 2,167,000 SHL shares ("A") to IHC on 3 December 1993. We will deposit the balance of 14,690,419 shares ("B") into your CDP Account. Thus a new transfer deed reflecting your new shares is enclosed for your execution. Please sign and return it to us as soon as possible. In the meantime, we will be holding the "B" share certificates on your behalf. Until the Capitalisation is effected, IHC will hold your "A" shares in trust. A Trust Deed has been prepared and a copy is attached for your record. When the Capitalisation is concluded, IHC will issue new IHC shares to you. At that time, if there is any surplus of SHL shares not required for this Capitalisation exercise, these will be returned to you by depositing into your CDP Account. Copies of the said Minutes are enclosed for your easy reference. Thank you. Regards, [Signed] Susie Tan "

61 47 It should be noted that the minutes of the meetings referred to in Susie Tan's memo to the Plaintiff do not show an agreement by the Plaintiff to transfer

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2,167,000 SHL shares to the Defendant. The Plaintiff was not even present at the SIS board meeting of 26 June 1993. Further the SHL shares belonging to Ameer and Yusuf were not transferred to the Defendant until after 7 April 1994.

62 48 The Plaintiff did not see Susie Tan's memo when it arrived as he was away in Pakistan. On his return, when he did not see his 16,857,419 SHL shares in his CDP account statement, he wrote to Susie Tan at SHL:

> " 16th February 1994 REGISTERED

63 Ms. Susie Tan

> Scotts Holding[s] Ltd., Thongsia Bldg #05-00 30 Bideford Road, Singapore 0922. Conversion of Scotts Holdings Ltd to Scriples[s] Trading I refer to my letter to you of 8th October 1993. I am alarmed to find that the transfer to CDP has not been effected. Your memo of 28th September 1993 states that you are arranging for the same and this I would take to mean pre-paying the nominal stamping and administration fees. Please therefore either affect[sic] the transfer of my shares to CDP or return the same via registered mail to me within 14 working days of receipt of this letter. Yours faithfully, [Signed] Dato' M.R. Jumabhoy "

64 49 On 22 February 1994, Susie Tan replied under the letterhead of Scotts Group of Companies:

> " FACSIMILE TRANSMISSION Date : 22 February 1994 Via Fax and Mail (fax no 04-628816) To : M R Jumabhoy From : Susie Tan No of Pages : 13 (including this page) _____ Conversion of Scotts Holdings Ltd to scripless Trading We refer to your letter of 16 February 1994 in regards to the above matter and would like to refer to our fax of 30 December 1993 which we have refaxed to you on 19 January 1994. A copy of the fax is attached for your reference. In order to transfer your shares to CDP, we would appreciate if you could sign and return the attached transfer deed to us as soon as possible. Thank you. Regards, [Signed] Susie Tan "

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65 50 On 1 March 1994, the Plaintiff wrote to the Executive Director of the Defendant stating:

> " 01st March 1994 The Executive Director IHC Private Limited Thongsia Building 30, Bideford Road #05-00 Singapore 0922 Dear Sir, I refer to a trust deed dated 26 October 1993 which was faxed to me by the Company Secretary of Scotts Holdings Limited, Ms. Susie Tan on 30 December 1993 while I was outstation. I have received on 26 Feb '94 the originals under cover letter dated on 22 Feb '94 franked postage 23 Feb '94. I have not authorized Ms. Susie Tan to provide you with any of my 16,857,419 shares of Scotts Holdings Limited sent to her on 08 Oct '93 as Secretary of Scotts Holdings Ltd. vide her request of 28 Sept for lodging with the C.D.P and this may amount to a breach of her trust as Company Secretary. I request your[sic] therefore to return any and all Scotts Holdings Ltd. shares to me within 7 working days for registering with the C.D.P. With regard to the position I.H.C and S.I.S these are seperate[sic] matters and as such please refer to my separate correspondence. Yours truly, [Signed] Dato' Mustafa R. Jumabhoy "

66 51 On 9 March 1994, Thang Poh Suan, a legal officer with SHL, sought the assistance of Sunny Wong in drafting 'an appropriate and suitable reply' to Plaintiff's letter of 1 March 1994.

67 52 On 15 March 1994, Sunny Wong replied enclosing his draft. It is necessary to set out his draft and some of the comments thereon by Thang Poh Suan to Iqbal and Susie Tan. Sunny Wong's draft reads:

> " [From Executive Director, IHC Private Limited/Scotts Holdings Limited] To: Dato Mustafa R Jumabhoy SCOTTS HOLDINGS LIMITED I refer to your letter of 1 March 1994. There appears to be some confusion on the matter raised in your letter. In February 1993, the shareholders of IHC Private Limited ("IHC"), other than Croissant Investment Pte Ltd ("Croissant"), agreed, amongst other things, to subscribe for new shares in IHC. It was agreed that the consideration for these new shares in IHC would be shares in Scotts Holdings Limited ("SHL") owned by the shareholders of IHC, other than Croissant. The number of SHL shares to be transferred by you to IHC for the new shares in IHC to be allotted to you pursuant to the agreement to subscribe for new shares in IHC is

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> 2,167,000 SHL shares. Pursuant to such agreement, you furnished to us a signed blank transfer form in respect of SHL shares. In accordance with the agreement mentioned above (which is clearly reflected in the minutes of the board meeting of Scotts Investments (Singapore) Pte Ltd held on 20 February 1993), the transfer form you furnished was sent to the company secretary of SHL for the transfer to be effected. [I would add that the other shareholders of IHC, except for Croissant, had all taken steps to effect the transfer of their respective percentage of shares in SHL to IHC in accordance with the agreement mentioned above.] With regard to your remaining 14,690,419 shares in SHL, the share certificates are being held for the purpose of conversion of SHL shares to the scripless share system. Please let the company secretary of SHL have the transfer form earlier sent to you, duly signed, so that such shares can be transferred into your CDP Account Number. Finally, please note that the company secretary of SHL acts in accordance with instructions of the board of directors of SHL and there is no question of any breach by her of her duties or of any trust as alleged by you. Your allegation is totally unfounded and objected to. Please refrain from any further unfounded allegations or aspersions against her or any other officer of SHL. Yours faithfully "

68 53 Thang Poh Suan herself put up a draft and forwarded it to Rafiq and Iqbal with the following general comments on Sunny Wong's draft:

69 " (1) …

> (a) I feel the draft is over "reliant" on the "agt" [agreement] arrived at during IHC's AGM and SIS's BOD's meeting. If I am not mistaken MRJ did write in to say he is not agreeable to the minutes as minuted!! (b) I feel the safest route for us to take is; we have a duly executed transfer form + share cert [certificate], the only thing to be done by us is "effect the transfer". … "

70 Thang Poh Suan also made the following specific comments:

71 (i) On paragraph 3 of Sunny Wong's draft, she noted:

> "The AGM minutes merely states (i) there will be new shares issued (ii) the new shares will be allotted to such persons or corporations pursuant to s. 161 of the Co's [Companies] Act."

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72 (ii) On para 4 of Sunny Wong's draft:

> "I don't like this. If the type and no. [number] of shares is agreed, why is it a blank transfer – creates suspicion."

73 (iii) On para 5 of Sunny Wong's draft:

> "Why is shareholders [agreement] not stated in the IHC AGM minutes but SIS BOD's minutes? It might raise "doubts/queries"? "

74 These comments suggest that Thang Poh Suan was of the view that there was no capitalisation agreement whereby the Plaintiff could be compelled by the Defendant to transfer 2,167,000 SHL shares to it:

75 (iv) On para 7 of Sunny Wong's draft:

> "I don't think we should put this in, in case, he turns around and harps on the issue that the share certs [certificates] were sent for the purpose of conversion to scripless and not to facilitate transfer."

76 Thang Poh Suan clearly was aware that the certificates with the transfer for 16,857.419 SHL shares were sent by the Plaintiff to SHL for conversion to scripless share system and for no other purpose.

77 54 The reply that was eventually sent out on 22 march 1994 was signed by Iqbal as a director of the Defendant. It was according to Sunny Wong's draft with two minor alterations; the word 'blank' in paragraph 4 was deleted, and the word 'sent' in paragraph 5 was changed to 'delivered'.

78 55 Meanwhile, pressure was being put by SHL now a public listed company on SIS to clear the debts owing to it by the Jumabhoy family companies. Accordingly, Ameer's and Yusuf's contribution of 3,070,000 SHL shares along with 3,700,000 SHL shares contributed by SIS were placed out.

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The proceeds were used to discharge the debts of A&W and two other family companies, Connoisiers Pte Ltd and Lion City Holdings Pte Ltd to SHL and Citibank. These family companies were managed and controlled by the family members of Ameer. The proceeds of sale of the SHL shares were not used to pay off the debts due to the banks in the event the Defendant sold A&W and there was a shortfall as envisaged at the family meeting of 21 September 1992, the draft capitalisation agreement and SIS board meeting of 20 February 1993. This was the intention behind the capitalisation scheme. The 2,167,000 SHL shares transferred to and treated by the Defendant as the Plaintiff's capital injection have not been sold and are still with the Defendant. The Plaintiff's demand for their return was not complied with. Accordingly, the Plaintiff on 15 April 1997 commenced these proceedings.

79 The claim

80 56 The basis of the Plaintiff's claim is that the certificates of his 16,857,419 SHL shares were elicited by Susie Tan on SHL's behalf and sent by the Plaintiff to SHL for a specific purpose, that is, their transfer to CDP for his account for conversion to the scripless share system. SHL was therefore the trustee for the Plaintiff in respect of the said shares sent to it on its undertaking to effect the conversion for the Plaintiff. In breach of trust, SHL transferred 2,167,000 of the 16,857,419 shares to the Defendant by using the Plaintiff's signed blank transfer handed over by the Plaintiff to the Defendant on 20 February 1993 pending finalisation of the capitalisation agreement.

81 The defence

82 57 Notwithstanding the doubts entertained by officers of the Scotts Group of Companies, the Defendant contended that there was an agreement

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arrived at the SIS Board Meeting of 20 February 1993 whereby the Plaintiff agreed to inject 2,167,000 SHL shares for the capitalisation of the Defendant and that this agreement was approved at the annual general meeting of the Defendant that followed on the same day.

83 My decision

84 58 The relevant portion of the SIS board minutes read:

> "There was tabled and produced to the meeting the workings of the percentages of each shareholder's holding (Appendix A) as follows:-
>
> Shareholding in IHC - SIS - 57%
>
> Croissant - 20%
>
> ARJ - 6%
>
> YRJ - 8%
>
> MRJ - 9%
>
> When shares are re-allocated, the workings will work out in accordance to the fact that Croissant will no longer be a shareholder as follows:-
>
> SIS - 71%
>
> Croissant - 0%
>
> ARJ - 7%
>
> YRJ - 10%
>
> MRJ - 12%
>
> RJ went on to explain that actually ARJ, YRJ and MRJ's shareholding percentage hide the actual shareholding which is still , , because SIS has a higher proportion of ARJ's family trust. At $0.72 per share, SIS will sell 12,820,000 ordinary shares, YRJ sells 1,806,000 ordinary shares, MRJ sells 2,167,000 ordinary shares and ARJ sells 1,264,000 ordinary shares."

85 59 These minutes do not reflect an agreement by the Plaintiff to inject 2,167,000 SHL shares into the capital of the Defendant. It was Rafiq's

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exposition of the formula for the capitalisation scheme predicated on Croissant divesting its shareholding to the remaining shareholders. This is confirmed by clauses 1, 2, 6 and 7 of the draft capitalisation agreement.

86 60 Resolution No. 3 of the annual general meeting of the Defendant is also relevant. It reads:

87 "IT WAS RESOLVED : -

> THAT the Directors of the Company be and are hereby authorized to enter into an agreement with the shareholders of the Company setting out the pre-emption of the shares of Croissant Investments Pte Ltd and the offer and acceptance of additional shares in the Company to the remaining shareholders."

88 61 This resolution only authorised the directors to enter into a capitalisation agreement based on Croissant divesting its shares in the company and the offer to and acceptance by the remaining shareholders of additional shares. It does not constitute or evidence an agreement on the part of the Plaintiff to inject 2,167,000 SHL shares into the company.

89 62 If there was an enforceable agreement giving rise to an obligation on the part of Plaintiff to inject additional capital into the Defendant by way of transfer of SHL shares, the conditions precedent have not taken place, that is, no valuation of the company has been carried out to determine the value of Croissant’s shares. Croissant has not divested its shares. Accordingly, the 7-day period envisaged in cl 7 of the draft capitalisation agreement for determining the trading price of SHL shares has not come to pass. Without the price of SHL shares being determined, the number of such shares to be injected by each shareholder cannot be arrived at.

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90 63 Alternatively, if there was an enforceable agreement, it is one among the shareholders of the Defendant. The Defendant is not a party and cannot enforce the same.

91 64 In any event, the Plaintiff's SHL shares were sent to SHL for conversion to scripless share system. SHL on receipt became a trustee thereof for the Plaintiff to effect the conversion. Underhill and Hayton on Laws Relating to Trusts and Trustees, 15th Ed, page 42 states:

> "A constructive trust of property is a trust imposed by equity in respect of property on proof of a variety of special circumstances… where equity considers it unconscionable for the owner of particular property to hold it purely for his own benefit. It confers a *proprietary* right on the plaintiff and so must be distinguished from the *personal* right afforded by Equity to a plaintiff against a defendant who no longer has, or who never had, any trust property in his hands, but whose conscience is affected by his knowing involvement in a dishonest breach of trust (or other fiduciary duty), so that Equity historically made him personally liable to account as if he had been an express trustee acting in breach of trust, so he is said to be accountable as a constructive trustee."

92 65 The Defendant knew the purpose for which the Plaintiff's share certificates were sent to SHL. This is because they had common directors and office bearers, that is Rafiq, Iqbal, Susie Tan and Thang Poh Suan. The Defendant therefore knew that the handing over of the Plaintiff's SHL share certificate no. 11 to effect the transfer of the 2,167,000 shares using the Plaintiff's blank transfer was a breach of trust on the part of SHL. The Defendant itself is in knowing receipt of trust property which is still in its possession. The Defendant is liable to account for the same as a constructive trustee.

93 66 Underhill and Hayton pages 295-6 state:

> "

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> Constructive trusts of property arise:
>
> (a) when the traceable product of trust or other fiduciary property is found in the hands of the trustee or fiduciary; (b) when trust or other fiduciary property or its traceable product has wrongfully been transferred by the fiduciary to a stranger not protected by statutory overreaching provisions or exceptions to the rule *nemo dat quod non habet* or the defence of change of position or bona fide purchaser of a legal interest for value without notice;"

94 67 On accountability of a constructive trustee, Underhill and Hayton, page 297 states:

> " An express trustee is liable to a real and a personal action. A real action lies against him in respect of the trust property and its fruits so that he is liable to a proprietary remedy; while a personal action lies against him to account for the losses and profits arising out of his stewardship of the trust property. Similarly a person who receives property subject to a trust or other fiduciary relationship (without being protected, eg as a purchaser) is liable to a proprietary remedy, to the extent he has the property or its traceable product, and to a personal liability to account in Equity. Liability to account was Equity's remedy superior to common law damages and, of course was the only personal liability where the defendant could not be sued at common law because involved with an equitable or fiduciary relationship exclusively within the province of the Courts of Equity.
>
> Indeed, even if the defendant had not received trust or other fiduciary property but had knowingly assisted the trustee or other fiduciary in a dishonest breach of duty, Equity, as a fictitious formula for equitable personal liability, was prepared constructively to treat him as if he had been an express trustee of the relevant property so as to make him liable as a constructive trustee."

95 68 As the Defendant is liable as a constructive trustee in respect of the 2,167,000 SHL shares in its possession, I entered judgment for the Plaintiff with costs.

96 GOH JOON SENG

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97 JUDGE

Goh Joon Seng J

Harish Kumar (Chor Pee & Partners) for the plaintiff
Chong Boon Leong / Low Suk Ling (Rajah & Tann) for the defendant

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