Thio Keng Poon v Thio Syn Pyn and Others and Another Suit
[2009] SGHC 135

Case Number : Suit 734/2008, 10/2008

Decision Date : 04 June 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Vinodh Coomaraswamy SC and Arvind Daas Naaidu (Shook Lin & Bok LLP) for the plaintiff; Davinder Singh SC and Adrian Tan (Drew & Napier LLC) for the defendants

Parties : Thio Keng Poon — Thio Syn Pyn; Thio Syn Wee; Thio Syn Kym Wendy; Thio Syn Ghee; Thio Syn San Serene; Vicki Thio Syn Luan; Kwik Poh Leng; Thio Holdings (Private) Limited; Malaysia Dairy Industries Private Limited; Modern Dairy International Pte Ltd; United Realty (Singapore) Private Limited

Companies

4 June 2009

Lai Siu Chiu J:

Introduction

1 This was a case where one Thio Keng Poon ("the Plaintiff") sued his entire family comprising of his six children and his wife Kwik Poh Leng ("Madam Kwik") as well as four family companies over his removal from the offices of Director, Chairman and Managing-Director of those companies between 20 November 2007 and 25 November 2008.

2 In Suit 734 of 2008, the Plaintiff's case was that he was removed as Director, Managing Director and Chairman from Malaysia Dairy Industries Pte Ltd ("MDI") and Modern Dairy International Pte Ltd ("Modern Dairy") in a manner not in accordance with the Articles of Association of the abovementioned companies.

3 In Suit 10 of 2008, the Plaintiff's case was for oppression, breach of contract and breach of an understanding and assurance.

4 After the Plaintiff had closed his case, the court was informed that the defendants elected not to give any evidence on the basis that they had no case to answer. Submissions were then presented by the parties on that premise at the conclusion of which, I accepted the defendants' argument and dismissed the Plaintiff's claims in both suits. The Plaintiff has now appealed (in Civil Appeal No 64 of 2009 and Civil Appeal 71 of 2009) against my decision.

The facts

5 The Plaintiff as well as Madam Kwik were both 77 years old. The names and ages of their three sons and three daughters were as follows:

	Name	Age	Relationship with tl Plaintiff

1st Defendant	Thio Syn Pyn ("Syn Pyn")	51	Second child
2nd Defendant	Thio Syn Wee ("Patrick")	44	Sixth child
3rd Defendant	Thio Syn Kym Wendy ("Wendy")	49	Third child
4th Defendant	Thio Syn Ghee ("Michael")	47	Fourth child
5th Defendant	Thio Syn San Serene ("Serene")	46	Fifth child
6th Defendant	Vicki Thio Syn Luan ("Vicki")	52	First child

6 In Suit 10 of 2008, the 1st to 6th Defendants were the above children of the Plaintiff, the 7th Defendant was Madam Kwik, while Thio Holdings (Private) Limited, MDI, Modern Dairy and United Realty (Singapore) Private Limited were the 8th to 11th Defendants respectively.

7 The Plaintiff's family owned and managed a group of companies (the "Thio Group"). The Thio Group comprised the following companies:

In Singapore

a. Thio Holdings (Private) Limited ("Thio Holdings");

b. MDI;

c. Modern Dairy;

d. United Realty (Singapore) Private Limited ("United Realty"); and

e. Cotra Enterprises Pte Ltd.

In Malaysia

a. Malaysia Milk Sdn Bhd ("MMSB"); and

b. Cotra Enterprises Sdn Bhd ("Cotra").

In Hong Kong

a. Premier Enterprise Limited; and

b. Pertama Investment Limited.

In Myanmar

a. Myanmar Dairy International Pte Ltd.

In Brunei

a. Modern Dairy Industries (B) Sdn Bhd.

8 The Plaintiff incorporated and ran companies in the Thio Group beginning from the early 1960s. Thereafter, over the years, the Plaintiff transferred his shares in and procured the issuance of bonus shares of various companies in the Thio Group to his family members for no consideration. According to the Plaintiff, he started giving Syn Pyn (who is also known as Ernest) and Patrick shares when they were aged 12 and 5 respectively, in or around 1970. From 1983, Syn Pyn helped the Plaintiff in the running of the Thio Group and the Plaintiff eventually handed over the management of the day-to-day business of the Thio Group to Syn Pyn when the latter was appointed Deputy Managing-Director of MDI in December 1995.

9 Even after giving his shares in the Thio Group to his family members, the Plaintiff undertook numerous restructuring exercises in relation to the shares. In 1991, when Michael encountered problems in his personal business affairs, Madam Kwik with the approval of the Plaintiff asked Michael to transfer all his shares in the Thio Group to Syn Pyn and Patrick. In 2002, the Plaintiff adjusted the shareholdings of Thio Holdings, MDI and United Realty by way of bonus issues in order to provide for the 3rd, 4th, 5th, 6th and 7th Defendants. In May 2005, upon the birth of Michael's twin sons (who were the Plaintiff's only grandsons), the Plaintiff again wanted to restructure the respective

shareholdings of his children to provide for his grandsons. This resulted in the execution of a Deed of Settlement dated 23 December 2005 ("Deed of Settlement") which bound the Plaintiff (who was legally represented) and the 1st to 9th Defendants.

10 Clause 10 of the Deed of Settlement provided:

> Each of the Parties to this Deed hereby confirms and accepts that upon Completion, each of the Parties' full legal, registered and beneficial shareholdings in the Companies shall be as set out in Columns 5 and 6 of the Schedules, and: -
>
> (a) none of them shall have any further right or claim to any other shareholding or equity interest in the Companies, save for interests in shares arising from subscriptions or investments or rights arising after the date of this Deed; and
>
> (b) their respective shareholdings stated in Column 5 and 6 of the Schedules represent their respective full legal and beneficial interests and none of them: -
>
> (i) is holding any shares in the Companies on trust or on behalf of any other person; or
>
> (ii) has any claim to or beneficial interest in any shares in the Companies that are registered in the name of any other person.

11 Clause 13 of the Deed of Settlement stated:

> The Parties agree that the Companies will be managed and operated for profit and in accordance with best corporate practices to return to shareholders maximum returns.

12 Clause 15 of the Deed of Settlement provided:

> This Deed sets forth the entire agreement and understanding of the Parties with respect to the subject matter contained herein and supersedes all prior discussions and agreement, whether written or oral, relating to the subject matter herein.

13 Amongst other provisions, the Deed of Settlement settled the distribution of shares in the Thio Group. As a result of the Deed of Settlement, the Plaintiff received shares from Syn Pyn, Patrick and Thio Holdings which had a total net tangible asset value in excess of S$24m as at 31 December 2005. Syn Pyn and Patrick jointly retained majority control over Thio Holdings and MDI. The shareholdings of the various parties at the time of the trial were as follows:

Name of Shareholder	Thio Holdings (%)	MDI (%)	United Realty (%)
Syn Pyn	25.50	10.50	8.75
Patrick	25.50	10.50	8.75
Madam Kwik	21.75	12.50	10.00
Michael	9.00	10.00	8.75

Vicki	4.50	5.00	2.50
Wendy	4.50	5.00	2.50
Serene	4.50	5.00	2.50
Thio Holdings	-	30.00	26.25
MDI	-	-	20.00
Plaintiff	4.75	11.50	10.00

14 After the Deed of Settlement was signed, friction between the Plaintiff, on the one hand, and Syn Pyn and Patrick, on the other, arose whenever they did not follow his instructions. One example was when the Plaintiff wanted a birthday present of S$10m in May 2006, Syn Pyn and Patrick objected to the Plaintiff's proposal to obtain this sum by having MDI declare dividends and for the 1st to 6th Defendants to renounce their rights to the dividends. Instead, the 1st to 6th Defendants received their dividends and gave the Plaintiff a birthday gift of S$10m free of tax in June 2006 by making a contribution of S$1.67m each. After receiving his birthday gift, the Plaintiff wanted to restructure the shareholding in the Thio Group again. The proposed restructuring would have deprived Syn Pyn and Patrick of majority control of the Thio Group. Syn Pyn and Patrick did not agree to the Plaintiff's restructuring proposal.

15 The removal of the Plaintiff from his offices in Thio Holdings, United Realty, MDI and Modern Dairy came about as a result of the discovery around October 2007 that the Plaintiff had been making improper double claims on his travel expenses from MDI and Cotra. MDI engaged Ernst & Young ("EY") to conduct an independent review of the travel expenses incurred by the Plaintiff as recorded in the accounting books and records of MDI, MMSB and Cotra. The EY report dated 16 November 2007 (see AB843-870) revealed that on nine occasions between 1 January 2005 and 30 September 2007, the Plaintiff claimed reimbursement for the cost of 17 different airline tickets from both MDI and Cotra. This amounted to a double claim of about S$45,000 from MDI and Cotra. According to the Plaintiff, the reason for the double claim was that on each of those occasions, the Plaintiff travelled with a female companion.

16 Having reviewed the EY Report, Syn Pyn called for an emergency meeting of the board of directors of MDI to be held on 20 November 2007. Notice of the emergency board meeting was sent on 19 November 2007 to all directors (except the Plaintiff) together with a copy of the EY Report. The Plaintiff was then in Canada for the purpose of receiving eye treatment. Having reviewed the EY report, the board of directors of MDI unanimously approved the removal of the Plaintiff as a Director, Managing-Director and Chairman of MDI, pursuant to Article 88(c) of MDI's Articles of Association ("MDI Articles"), and as an authorised signatory of MDI's bank accounts on 20 November 2007. A members' resolution at the 44th Annual General Meeting ("AGM") of MDI held on 21 November 2007 approved and ratified MDI board's removal of the Plaintiff from his positions in MDI.

17 The Plaintiff's privileges which attached to his three offices were removed on 30 December 2008 and he was barred from the premises of MDI with effect from 16 February 2009 (after being involved in an altercation at the company's premises on 4 February 2009 with Syn Pyn, Patrick and Lim Choo

Peng, a director and general manager of MDI. The Plaintiff had insulted Lim Choo Peng calling him *inter alia* a dirty dog and had threatened Syn Pyn with a golf stick).

18 The Plaintiff was removed as an authorised bank signatory, a Director, Managing Director and Chairman of Modern Dairy with immediate effect from 21 November 2007 after MDI, the holding company beneficially entitled to all of the issued shares of Modern Dairy, resolved at an AGM *inter alia*, that the Plaintiff be requested to vacate and by reason thereof was deemed to have vacated his offices.

19 The Plaintiff was further removed from his offices as Director of Thio Holdings and United Realty after resolutions to that effect were passed at the Extraordinary General Meetings of the two companies on 25 November 2008.

20 In response to his removal, the Plaintiff sought interim injunctions to restrain his removal from the offices he held in the Thio Group. On 7 January 2008, the Plaintiff filed Summons No 53 of 2008/Q for an interim injunction to restrain his removal from the various companies in the Thio Group but Choo J declined to grant the order. In a further attempt, the Plaintiff filed Summons No 4898 of 2008/R on 6 November 2008 to restrain his removal from his various positions in the Thio Group but Lee J dismissed his application. The Plaintiff appealed to the Court of Appeal against Lee J's dismissal. When the Court of Appeal refused his application for an *Erinford* injunction in Summons No 5090 of 2008/M on 21 November 2008, the Plaintiff withdrew his appeal. This brings me to the present suits.

The proceedings

21 Suit 734 of 2008 started life as an originating summons. On 22 September 2008, it was converted into a writ action and consolidated with Suit 10 of 2008. The trial started on 30 March 2009. The Plaintiff, Teo Beng Koon ("TBK") who held various positions in the Thio Group including the post of Company Secretary, Director and Manager, and Serene (the 5th Defendant) (PW3) gave evidence on behalf of the Plaintiff. At the close of the Plaintiff's case, the defence submitted that there was "no case to answer".

22 As a preliminary observation, I note that in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745 Chan Sek Keong CJ held at [5]:

> It is also an accepted principle that he who asserts must prove and therefore a defendant is entitled to put the plaintiff to strict proof of everything he is alleging, without having to respond in any way to the allegations. However, it is also accepted that where a defendant calls no evidence to rebut the evidence of the plaintiff, a submission of no case in those circumstances is a very high-risk strategy. This is particularly so as the appellants are alleging a series of oppressive and prejudicial acts and omissions of the respondents. Absent *mala fides* on their part, the appellants would indeed have to have obtained very poor or even negligent advice if they could not make out a case of oppression on the evidence they had adduced in court.

23 Judith Prakash J in *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR 657 set out the test of no case to answer at [20] in the following manner:

> In considering the evidence and the arguments, I bear in mind that the test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes a case in law or whether the evidence led by the plaintiff was so unsatisfactory or unreliable that its burden of proof had not been discharged. See *Bansal Hermant Govindprasad v Central Bank of India* [2003] 2 SLR 33 ("*Bansal*") and *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745. In this

respect, the plaintiff has only to establish a *prima facie* case. A *prima facie* case is determined by assuming that the evidence led by the plaintiff is true, unless it is inherently incredible or out of all common sense or reason. Further, if circumstantial evidence is relied on, it does not have to give rise to an irresistible inference as long as the desired inference is one of the possible inferences. See *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2006 Reissue) at para 120.025. As *Halsbury's* also says in the same paragraph:

> Put another way, the evidence is subjected to a minimal evaluation as opposed to a maximal evaluation …
>
> If, however, there is no evidence in support of any fact in issue, or any evidence is manifestly unreliable and should be excluded from that score, a submission of no case to answer will succeed.

24 I shall now examine the case the Plaintiff attempted to establish and explain why the Plaintiff failed to discharge his burden of proof.

The Plaintiff's claims in Suit 734 of 2008

25 In Suit 734 of 2008, the Plaintiff averred that MDI's attempt, acting by its directors, to invoke Article 88(c) of the MDI Articles on 20 November 2007, was wholly invalid because no request was made to the Plaintiff to vacate his office on 20 November 2007.

26 The Plaintiff averred that the members' resolution passed on 20 November 2007, was wholly invalid and ineffective by reason of the failure to fulfil the requirements of Article 105 of the MDI articles, to comply with s 184(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") and satisfy the implied obligation that a notice convening a meeting of the members of MDI must contain sufficient information to enable a prudent member to decide whether or not he would attend the meeting and to give each member fair warning of what was to be resolved at the meeting (see paras 13, 32 and 33 of the Statement of Claim).

27 The Plaintiff averred that the resolution on 21 November 2007 did not affect the Plaintiff's position as the Founder, Chairman and Managing Director of Modern Dairy on the ground that contrary to Article 82(g) of the Modern Dairy Articles of Association ("Modern Dairy Articles"), no request to vacate his office had been made of the Plaintiff on or prior to 21 November 2007. Therefore Article 82(g) of the Modern Dairy Articles could not have been invoked at the deemed AGM on 21 November 2007. Further and/or in the alternative, Article 82(g) could only be invoked by Modern Dairy's directors and not by Modern Dairy's members in an AGM (see paras 42-45 of the Statement of Claim).

28 The Plaintiff *inter alia* claimed:

(1) a declaration that the resolution of the directors of MDI passed on 20 November 2007 purporting to invoke Article 88(c) of the MDI Articles deeming him to have vacated his office as Director, Managing Director and Chairman of MDI with effect from 20 November 2007 was null and void and not binding on the Plaintiff;

(2) a declaration that the resolution of the members of MDI passed at the 44th AGM of MDI on 21 November 2007 purporting to confirm and ratify his removal as a director of MDI was null and void and not binding on the Plaintiff;

(3) a declaration that nothing which occurred at the AGM of Modern Dairy deemed to have taken place on 21 November 2007 affected the Plaintiff's position as a Director, the Managing Director and Chairman of Modern Dairy; and

(4) a declaration that the Plaintiff was still a Director, the Managing Director and Chairman of MDI.

The Plaintiff's claim in Suit 10 of 2008

29 In Suit 10 of 2008, the Plaintiff averred that the affairs of Thio Holdings and MDI were being conducted, and the powers of the directors of MDI were being exercised by the 1st to 5th and 7th Defendants in a manner oppressive to the Plaintiff; in disregard of his interests as a member and shareholder of Thio Holdings and MDI and in a manner which unfairly discriminated or was otherwise prejudicial to him.

30 The Plaintiff contended that he was entitled to the benefit of an agreement between the 1st, 2nd, 3rd, 5th and 6th Defendants made in or around December 2005 that the 1st and 2nd Defendants (ie Syn Pyn and Patrick) would not seek to remove the Plaintiff from his positions as Director, Managing-Director and Chairman of Thio Holdings and MDI and their subsidiaries ("the Assurance").

31 The Plaintiff's pleaded case in relation to the Assurance as set out in his Statement of Claim (Amendment No.2) was that:

1.5.2 Prior to the execution of the Deed of Settlement, and pursuant to and consistent with the Understanding, the 1st and 2nd Defendants assured the 3rd, 5th and 6th Defendants that they would not seek to remove the Plaintiff from his positions in the various companies in the Thio Group ("the Assurance").

1.5.3 The 6th Defendants communicated the Assurance to the Plaintiff, through the company secretary of the 8th Defendant, before the Plaintiff signed the Deed of Settlement.

1.5.4 The Plaintiff, as well as the 3rd, 5th and 6th Defendants, signed the Deed of Settlement in reliance on the Assurance.

1.5.5 In the circumstances, the Assurance gave rise to a contract between the 1st and 2nd Defendants on the one part and the 3rd, 5th and 6th Defendants on the other part under which the 1st and 2nd Defendants conferred a benefit on the Plaintiff on the terms of the Assurance, in consideration for which the 3rd, 5th and 6th Defendants signed the Deed of Settlement.

1.5.6 Consequently, the Assurance is enforceable by the Plaintiff pursuant to section 2 of the Contracts (Rights of Third Parties) Act (Cap 53B).

32 The Plaintiff averred that in breach of the Assurance and contrary to an understanding ("the Understanding") between the Plaintiff and the 1st to 7th Defendants, the 1st to 5th and 7th Defendants purported or attempted to remove the Plaintiff from his positions as Director, Managing Director and Chairman of MDI and its subsidiaries including Modern Dairy.

33 The Plaintiff expanded on the Understanding in his Statement of Claim (Amendment No.2) at para 1.4.1 in the following manner:

> The Plaintiff avers that the transfer of his shares in the various companies in the Thio Group to the 1st to 7th Defendants was done on an understanding, based on the Plaintiff's trust and confidence in his children, that the 1st to 7th Defendants recognised and would continue to recognise the Plaintiff's responsibility for creating and building the business of the Thio Group ("the Understanding").

34 The terms of the Understanding were set out at para 1.4.2 of the Statement of Claim (Amendment No.2) in the following manner:

> a. The Plaintiff would be entitled to participate in the management of the Thio Group to the extent that the Plaintiff desired until the Plaintiff decided to relinquish his right to participate;
>
> b. The Plaintiff would retain his position as Director, Managing Director and Chairman of the companies in the Thio Group and would continue to lead the companies until he decided to relinquish these positions; and
>
> c. The Plaintiff would have the final decision in respect of any salaries and fees payable to, or other benefits accruing to, the directors, including himself, of the companies in the Thio Group.

35 At para 1.4.4 of the Statement of Claim (Amendment No.2), the Plaintiff averred:

> In 1995, on the basis of and in reliance on the Understanding, the Plaintiff handed over the day-to day management of the Thio Group to [Syn Pyn] whilst retaining overall supervision and strategic oversight over the affairs of the Thio Group.

36 Under cross-examination, the Plaintiff explained that the Understanding was based on the Confucian tenet of filial piety and that it would last forever.

37 The Plaintiff averred that MDI had, in breach of the Plaintiff's contract of employment with MDI, failed to pay his salary of S$70,000 a month with effect from 21 November 2007. He averred that there was a contract between the Plaintiff and MDI, implied from the conduct of MDI, that the Plaintiff was entitled to a monthly salary of S$70,000 for the year 2007, with the bonus for 2007 and the increment for 2008 to be determined by the Plaintiff. The conduct he referred to in order to give rise to this implied contract was the fact that MDI had since 1968 paid a salary (including an annual bonus) to the Plaintiff in an amount determined by the Plaintiff from year to year. In 2007, the Plaintiff was (until on or about 27 November 2007) paid a monthly salary of S$70,000 by MDI (para 4.1.2 of the Statement of Claim (Amendment No. 2)). Additionally, the Plaintiff submitted that it was because of the Understanding that he was paid the salary of S$70,000 from MDI (para 4.3.2 of the Plaintiff's submissions).

38 The Plaintiff *inter alia* sought the following reliefs:

> a. a declaration that the Understanding bound the defendants;
>
> b. further or in the alternative, an order that he be reinstated as Director, Managing-Director and Chairman of MDI and Modern Dairy;

c. an injunction to restrain the defendants, whether by themselves or their servants and agents howsoever, from removing him from his offices and positions as Director, Chairman and Managing-Director of Thio Holdings, MDI and their subsidiaries; and

d. further or in the alternative, that MDI pay his arrears of salary to be assessed.

Counterclaim in Suit 10 of 2008

39 Besides denying the Plaintiff's allegations in the defence, MDI counterclaimed that the Plaintiff owed MDI fiduciary duties including the duty to act honestly, in good faith, in the best interests of MDI, not to place himself in a position in which his personal interests conflicted with the interests of MDI and a duty to act for the proper purposes of MDI in relation to its affairs.

40 MDI pleaded that the Plaintiff acted in breach of his fiduciary duties to MDI as a result of double claiming his travel expenses from MDI and Cotra and as a consequence, MDI had suffered loss and damage.

41 MDI claimed *inter alia* against the Plaintiff for:

(1) a declaration that the Plaintiff was in breach of his fiduciary duties to MDI;

(2) a declaration that the Plaintiff was liable to account to MDI for the sum of S$45,529.64 and/or all sums claimed by him from MDI in breach of his fiduciary duties; and

(3) an order that the Plaintiff pay to MDI the sum of S$45,529.64, and/or such sums that were found due, upon the taking of an account.

The Plaintiff's defence to the counterclaim in Suit 10 of 2008

42 The Plaintiff denied that he owed MDI the abovementioned fiduciary duties on the ground that any fiduciary duty he owed to MDI was modified by the terms of the Understanding.

Analysis of the Plaintiff's complaints

The Understanding

43 In order to prove the existence of the Understanding, the Plaintiff pointed to three factors. First, Syn Pyn, Michael and Patrick tacitly accepted and affirmed the Understanding when the Plaintiff transferred shares in the Thio Group companies to them. Second, the fact that Michael, with the approval of the Plaintiff, transferred his shares to his two brothers without consideration meant that the sons accepted the Understanding. Third, that the Plaintiff procured the issuance of bonus shares in the various companies of the Thio Group to the 3rd, 4th, 5th and 6th Defendants (para 4.4.3- 4.4.5 of his submissions).

44 However, the Plaintiff's evidence under cross examination was that he never discussed the Understanding with any of his children when he transferred the shares to them, although he alleged that he had discussed it with his wife (at N/E 42:22 and 48:9). His evidence was that the Understanding was unspoken (at N/E 48:18). He admitted that in the same way that he was filial to

his father, he assumed that his children would correspondingly adopt the same attitude towards him (at N/E 50:1). As the Understanding was unspoken and assumed by the Plaintiff, such a transfer of shares did not sufficiently prove the existence of and the terms of the Understanding.

45 The Plaintiff agreed that right up to 17 July 2007, his family could not have known about the Understanding or its terms (at N/E 66:24). He further conceded to counsel for the defendants that his family members could not have done anything to give him the expectation that they would abide by the Understanding or its terms given that they did not know about the Understanding or its terms at all (at N/E 67:7). He also agreed that none of his family members had said anything to give rise to his expectation to remain in the management of the affairs of MDI and Modern Dairy (at N/E 90:22).

46 The Plaintiff was unable to specify the terms of the Understanding. He said the terms could be anything and "everything is in it" (at N/E 74:15). Pressed further during cross-examination, he stated that he could not think of any other terms other than those set out in his pleadings "at the moment".

47 The Plaintiff failed to mention the Understanding to the defendants. Most notably, when the Plaintiff learnt that the directors had convened an EGM of each of the Malaysian companies to remove him, his evidence was that it was a very serious breach of the Understanding (at N/E 63:4) and he agreed that it was very important for him to have reminded his family members that there was an Understanding (at N/E 63:18). Yet, the letter written by his lawyers in relation to his removal from the Malaysian companies did not mention the Understanding at all. Further, the Plaintiff agreed that he failed to tell Syn Pyn and Patrick of the Understanding in May 2006, when they were against his proposal to dilute their control over the Thio Group, even though it occurred to him that they were breaching the Understanding (at N/E 150:7).

48 Moreover, cl 15 of the Deed of Settlement which provided that the Deed of Settlement superseded all prior discussions and agreements relating to the shares in forming the subject matter of the Deed of Settlement had the effect of superseding any alleged Understanding prior to the Deed of Settlement.

49 The Plaintiff confirmed three times during cross-examination that his case was not about an Understanding or that there was an Assurance, but that because he had built up the Thio Group and because it was his family to whom he had given shares, they should not remove him and he complained that his children were not filial (at N/E 97:18, 98:2 and 99:1). On his final confirmation, he agreed with counsel for the defendants that all the references to the Understanding and Assurance were contrived as there was no mutual understanding, no discussion of the Understanding and his family members did nothing to give him any expectation that they would comply with the Understanding and Assurance.

50 In light of the Plaintiff's own evidence that the Understanding was unspoken, his family could not have known about the Understanding or its terms right up to 17 July 2007, his inability to give specific details of the contents of the Understanding and his failure to mention the Understanding in the legal proceedings in Malaysia to prevent his removal from MMSB and Cotra, I was of the view that the existence and terms of the Understanding were the Plaintiff's invention. This conclusion was further supported by the Plaintiff's own admission that his case was not about any Understanding or Assurance, but that because he had built up the Thio Group and because it was his family to whom he had given shares, they should not remove him.

51 In any event, the existence of any Understanding must have been superseded by cl 15 of the Deed of Settlement when it was signed on 23 December 2005 (see [48] above).

The Assurance

52 In order for the Plaintiff's claim to succeed on the Assurance, he had to show that there was a contract between Syn Pyn and Patrick, on one side, and the 3rd, 5th and 6th Defendants, on the other, that Syn Pyn and Patrick would not seek to remove the Plaintiff from his positions in the various companies in the Thio Group.

53 The evidence in relation to the existence of the Assurance was troubling. First, Serene, who was one of the parties to the alleged Assurance gave evidence that there was no Assurance. Second, TBK (PW2) testified that Vicki had whispered to him on 23 December 2005 at the law firm where the signing of the Deed of Settlement took place, that Syn Pyn and Patrick had promised the 3rd, 5th and 6th Defendants that Syn Pyn and Patrick would not seek to remove the Plaintiff from his positions in the various companies in the Thio Group. However TBK's evidence did not satisfy s 62 of the Evidence Act (Cap 97, 1997 Rev Ed) as it amounted to hearsay. Moreover, why would Vicki not give the Assurance to the Plaintiff directly but instead give it through TBK? The Plaintiff and Vicki were seated at the same table before the signing of the Deed of Settlement and the Plaintiff was after all Vicki's father.

54 The Plaintiff could have called Vicki as a witness to ask her whether she was party to the Assurance and whether she had indeed given TBK the Assurance. The Plaintiff had served a subpoena on Vicki on 4 April 2009 (after the first week of trial) but decided not to call her.

55 Third, the existence of the Assurance was inherently unbelievable since it contradicted the Deed of Settlement which by virtue of cl 15, was intended to set forth the entire agreement and understanding of the Parties with respect to the shares in the Thio Group. Furthermore, such an Assurance would also be contrary to cl 13 of the Deed of Settlement, a clause which was added at the Plaintiff's behest.

56 Fourth, the Plaintiff was unable to explain why there would be a need for the Assurance if according to his own case, the Understanding was unaffected by the signing of the Deed of Settlement (N/E 132: 4). He replied that he wanted to "make sure" that his children would not remove him, yet he admitted that he had not asked for the Assurance, and instead he was informed of it by TBK.

57 On balance, I found that the Plaintiff had failed to discharge his burden of proof by adducing *prima facie* evidence of the existence of the Assurance.

Oppression

58 Section 216(1) of the Act on personal remedies in cases of oppression or injustice provides:

> **216**. —(1) Any member or holder of a debenture of a company …may apply to the Court for an order under this section on the ground —
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed

which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

59 In granting relief under s 216 of the Act, the Court must ask itself whether the proper standard of commercial fairness and fair dealing had been departed from. In Lim Swee Khiang v Borden Co (Pte) Ltd *(*supra [22]*)*, Chan Sek Keong CJ explained at [80] to [82]:

> 80 The law on acts that are considered oppressive to a minority shareholder or in disregard of his interests is settled. Although the courts have been slow to intervene in the management of the affairs of companies (see for example Re Tri-Circle Investment Pte Ltd [1993] 2 SLR 523) on the ground that a minority shareholder participates in a corporate entity knowing that decisions are subject to majority rule, s 216 of the CA enjoins them to examine the conduct of majority shareholders to determine whether they have departed from the proper standard of commercial fairness and the standards of fair dealing and conditions of fair play: Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 at 229.
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> 81 In Re Kong Thai Sawmill (Miri) Sdn Bhd, Lord Wilberforce described the disregarding of minority interests as something more than a failure to take account of the minority interests, such as an awareness of the minority interest and an evident decision to override it or brush it aside. In In re Five Minute Car Wash Service Ltd [1966] 1 WLR 745 at 752, Buckley J made it clear that the director in that case had to have 'acted unscrupulously, unfairly or with any lack of probity'. Margaret Chew, author of Minority Shareholders' Rights and Remedies (Butterworths Asia, 2000) pertinently states at pp 107 and 108 that:
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> > Section 216 of the Companies Act was conceived and passed with the objective of protecting minority shareholders from majority abuse. In order to offer effective and comprehensive protection, section 216 confers on the courts a flexible jurisdiction to do justice and to address unfairness and inequity in corporate affairs.
> >
> > The courts may be said to be empowered under section 216 of the Companies Act to re-lay the boundaries of what is or is not fair as between corporate participants.

60 Under s 216 of the Act, the acts complained of must affect the member in his capacity as a member: per Jenkins LJ in *Re HR Harmer Ltd* [1958] 3 All ER 689 at 698. In *Re A Co (No 000477 of 1986)* [1986] BCLC 376, Hoffmann J held that a member's interest as a member who invested his capital in the company's business may include a legitimate expectation that he would continue to be employed as a director and his dismissal from that office may therefore be unfairly prejudicial to his interests as a member.

61 The Plaintiff's claim for oppression, disregard of his interests as a member and shareholder of Thio Holdings and MDI and allegations of unfair discrimination were premised on the 1st to 5th and 7th Defendants' wilful disregard of the Understanding and Assurance in the conduct of the affairs of Thio Holdings and MDI in the exercise of their powers as directors of MDI. However, the Plaintiff had no standing to invoke s 216 of the Act to object to his removal as a Director, Managing Director and Chairman of MDI and Modern Dairy because the acts complained of in this case affected the Plaintiff in his capacity as a member of the board, not as a member of the company. Further, there was no evidence that his interests as a member had been oppressed given that there was no *prima facie* evidence of the existence of the Understanding and Assurance that he would continue to hold executive positions in MDI and Modern Dairy.

62 As I had found that the Understanding, if it existed at all, had been superseded by the Deed of

Settlement and there was no such Assurance, the Plaintiff had no standing to invoke s 216 of the Act to object to his removal as a Director, Managing Director and Chairman of MDI and Modern Dairy.

63 Even if the Understanding and Assurance were found to exist, the Plaintiff admitted that he expected his children to act in accordance with best corporate practices if he had committed a breach of fiduciary duties as can be seen from the following extract from his cross-examination (at N/E 189:2):

> Q: You have already said, "I expect them to run the companies using best corporate practices." So you would expect them to do the right thing, even if the person who did wrong was the father; correct?
>
> A: Correct.

64 In the light of his admission of wrongdoing, the Plaintiff's expectation and agreement that his children would act in accordance with best corporate practices (as reflected in cl 13 of the Deed of Settlement) negated the operation of the Understanding or Assurance.

65 In addition, a breach of the Understanding or Assurance was but one factor in determining whether unfairness had been made out. On the facts of *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297 the Court of Appeal found at [38] that technically, there was a breach of the pre-emptive provisions of the company's articles of association but the Court held that such a breach in the circumstances did not amount to oppressive conduct.

66 Given that the Plaintiff had accepted that he had made a claim in the amount of his airline ticket from both MDI and Cotra on the occasions referred to in the EY report (see para 7.8.6 of his Statement of Claim) and as a matter of law, this amounted to a clear breach of fiduciary duties, his removal from the board of MDI and Modern Dairy was not unfair. The alleged failure to comply with the procedural requirements under MDI and Modern Dairy's Articles did not suffice to establish the presence of oppressive conduct.

67 In relation to the MDI board meeting on 20 November 2007, there was no requirement to notify the Plaintiff who was then in the United States because Article 112 of the MDI Articles provided that "[i]t shall not be necessary to give notice of a meeting of the Board to any Director for the time being absent from Singapore and West Malaysia.".

68 As for MDI's AGM held on 21 November 2007, the Plaintiff was represented by his proxy Wendy Lee, a lawyer. When the members were informed of the decision by the board to remove the Plaintiff following the findings in the EY report on the Plaintiff's improper claims from MDI and after the EY report was presented to the members, the Chairman of the AGM inquired as to whether there were any questions with respect to the EY report. The Plaintiff's proxy remained silent. Thereafter, the shareholders ratified the board's removal of the Plaintiff. Subsequently, MDI's lawyer told Wendy Lee that "there is nothing to stop [the Plaintiff] from writing to the Company's Board of Directors to consider his reinstatement by stating the merits of his case.". Given that the Plaintiff was represented at the AGM of MDI and his proxy was given ample opportunity to make representations but failed to do so, there was no evidence that the Plaintiff was oppressed.

69 In relation to the AGM of Modern Dairy held on 21 November 2007, the Plaintiff did not have any standing to sue under s 216 of the Act because he was not a member of Modern Dairy.

Unpaid salary

70 As for the Plaintiff's claim that there was an implied contract based on the conduct of MDI that he was entitled to a monthly salary of S$70,000 for the year 2007, with bonus for 2007 and the increment for 2008 to be determined by the Plaintiff, I was of the view that there can be no implied contract as to matters covered by an express contract. *Rabiah Bee Bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR 655 at [123] followed Scrutton LJ in *Steven v Bromley & Son* [1919] 2 KB 722 who held at 727:

> It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced. A well-known example of this is where an agent works on the terms that he shall receive a commission if successful. That excludes a claim on a quantum meruit for work which does not result in success. But where work is done outside the contract, and the benefit of the work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration, and the terms of the express contract may remain binding in so far as they are not inconsistent with the implied contract.

71 The MDI Articles was a contract between MDI and each of the members of MDI. Article 107 of the MDI Articles provided that "The Board may from time to time appoint [the Plaintiff] to the office of Managing Director for such period and on such terms as they think fit…".

72 Given that Article 107 of the MDI Articles gave power to the board to determine the Plaintiff's remuneration, and the Plaintiff did not adduce any evidence to displace the MDI Articles, I was of the view that there was no room for the implication of a contract which would run contrary to Article 107 of the MDI Articles. I further rejected the Plaintiff's claim to unpaid salary, which was premised on the existence of the Understanding, for the reason that there was lack of prima facie evidence of its existence.

Claim for reinstatement

73 A claim for reinstatement should not be granted where it would be futile. In *Bentley –Stevens v Jones* [1974] 1 DPP 638, Plowman J held (at 640H-641A):

> In my judgment, even assuming that the Plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same. In *Browne v. La Trinidad* (1887) 37 Ch.D. 1, 17, Lindley L.J. said:
>
> > "I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment."

74 I rejected the Plaintiff's claim for reinstatement under Suit 10 of 2008 on the ground that such an order would be futile as there was nothing to stop Syn Pyn and Patrick from removing the Plaintiff after reinstatement, in accordance with the procedural requirements under the MDI and Modern Dairy's Articles.

Procedural irregularities

75 The Plaintiff's pleadings only referred to the alleged non-compliance with MDI and Modern Dairy's Articles without pleading that this amounted to oppression under s 216 of the Act.

76 In relation to procedural irregularities, s 392(2) of the Act provides:

> A proceeding under this Act is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

77 A meeting of the board of directors was a proceeding under s 392(2) of the Act: (see *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR 940). In *Re Caysand No 64 Pty Ltd* [1994] 2 Qd R 467 Thomas J dealt with s 1322 of the Australian Corporations Law which was not materially different from s 1322 of the 2001 Australian Corporations Act, which, in turn, is *in pari materia* with s 392 of the Act. He held that the onus lay upon the party attacking the validity of a proceeding to satisfy the court of substantial injustice that cannot be remedied by the court.

78 The Court of Appeal in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR 121, expanding on the notion of "substantial injustice" held at [107] in relation to s 392(6)(c) of the Act that:

> A question that then arises is whether the test of "no substantial injustice" in s 392(6)(*c*) of the Companies Act entails a consideration of the same factors as those relating to prejudice which the court takes into account in determining whether an extension of time should be granted under the Rules of Court. We agree with Bowen CJ's observation in *Re Compaction Systems Pty Ltd* (see the passage quoted at [105] above) that "injustice" in s 392(6)(*c*) refers to the same thing as (real) prejudice. As for the word "substantial", it is defined in A S Hornby, *Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press, 5th Ed, 1995) at p 1192 as "large in amount or value; considerable". In our opinion, the court can grant an extension of time under s 392(4)(*d*) of the Companies Act so long as it is satisfied that no *considerable* prejudice would be caused to any of the interested parties if the order is made. It thus appears to us that "substantial injustice" in s 392(6)(*c*) amounts to something greater than just ordinary prejudice.

79 In the same vein, the same interpretation of "substantial injustice" should apply under s 392(2) of the Act.

80 I was of the view that no substantial injustice had been caused to the Plaintiff as a result of the MDI board meeting held on 20 November 2007. First, the Plaintiff had actual notice of the MDI board meeting. The Plaintiff admitted that he had been informed on 19 November 2007 of the MDI board meeting and his lawyers had sent an email to the defendants' lawyers on 19 November 2007 pertaining to the board meeting on 20 November 2007. Second, there was no requirement to give the Plaintiff notice of the 20 November 2007 meeting by virtue of Article 112 of the MDI Articles. Third, the Plaintiff did not plead that he suffered substantial injustice and he failed to adduce any evidence to prove such injustice.

81 Granted, the Plaintiff was not requested to vacate office by all the other directors pursuant to Article 88(c) of the MDI Articles and the notice in relation to MDI's 44th AGM did not contain sufficient information to enable a prudent member to decide whether or not to attend the meeting. However, a defect in the notice would not invalidate a meeting unless, as provided by s 392(2) of the Act, substantial injustice was caused to the Plaintiff which cannot be remedied by any order of the Court.

82 I therefore concluded that there was no substantial injustice to the Plaintiff since there was nothing to stop the defendants from removing the Plaintiff from his positions in MDI and Modern Dairy

by complying with the requisite procedural requirements even if he was reinstated.

The Plaintiff's defence to the Counterclaim

The double claim

83 In relation to Suit 10 of 2008, it was clear from para 3.2.1 of the Statement of Claim (Amendment No.2) that the Plaintiff was claiming that it was the 1st to 5th and 7th Defendants' wilful disregard of the Understanding and the Assurance in the conduct of the affairs of Thio Holdings and MDI and their exercise of their powers as directors of MDI which led to oppression of the Plaintiff, disregard of the Plaintiff's interest as a member of Thio Holdings and MDI and which unfairly discriminated or was otherwise prejudicial to the Plaintiff.

84 The defendants pleaded that the Plaintiff's removal was not oppressive because it was made after consideration of the EY report which concluded that the Plaintiff had double claimed on his air travel expenses.

85 I shall first address the evidence on the double claim. The Plaintiff in his Affidavit of Evidence in Chief ("AEIC") affirmed on the 20 February 2009 (at para 7.8.6) deposed:

> It is correct that I made a claim in the amount of my airline ticket from both [MDI] and [Cotra] on the occasions referred to in the E & Y Report. There was, however, no double claiming involved. I am entitled to be reimbursed for all my travel expenses including airfare and hotel expenses. On each of those occasions, I claimed the cost of my accommodation from [Cotra]. However, as I travelled on each of those occasions with a female companion, and as that fact was reflected in the hotel invoices which were issued, I claimed the cost of the airline ticket from [Cotra] as a reasonable approximation of my hotel expenses. In fact, it was an under approximation because the cost of the airline ticket was always less than the actual cost of the hotel accommodation. However, in order not to strain my relations with my family, I decided to bear the difference out of my own pocket rather than to submit the hotel invoices which showed that I had been accompanied during my stay. Now produced and shown to me marked "TKP-65" are examples of some hotel invoices which indicate on the invoice that I had been accompanied during my stay at that hotel.

86 In the light of the Plaintiff's AEIC, the hotel invoices relating to the double claims ("Double Claim Hotel Invoices") were relevant for two reasons. First, they were relevant to determine whether the cost of the hotel accommodation exceeded the cost of the air ticket and second, whether the Double Claim Hotel Invoices would reflect that the Plaintiff had been travelling with a female companion.

87 However, the Plaintiff failed to produce the Double Claim Hotel Invoices at all stages of the proceedings. The defendants' solicitors had written to the Plaintiff's solicitors on 25 March 2009 to obtain copies of the Double Claim Hotel Invoices and requested the Plaintiff's solicitors to make the originals available for inspection by 5 pm on 26 March 2009. The Plaintiff's solicitors did not respond by 26 March 2009. Accordingly, the defendants filed Summons 1401 of 2008/P on 27 March 2009 for an order that the Plaintiff produce the Double Claim Hotel Invoices.

88 On 27 March 2009, 11 hotel invoices were given to the defendants by the Plaintiff's solicitors in a letter dated 27 March 2009. However, it was found that none of the 11 invoices were the Double Claim Hotel Invoices. On the first day of trial on 30 March 2009, at the hearing of Summons 1401 of 2008/P, the Plaintiff's counsel suggested that the Plaintiff needed to look for the Double Claim Hotel Invoices in his office in MDI's premises. The defendants' counsel agreed to allow the Plaintiff access

to MDI's office and the court ordered that the Plaintiff produce to the defendants by noon 31 March 2009 the documents requested by the defendants which included all the hotel invoices for the period of 1 January 2005 to 30 September 2007 referred to in the Plaintiff's AEIC. If the Plaintiff did not or was unable to produce any of the documents requested, he was to file an affidavit to explain his omission by the same deadline.

89 On the following day, the Plaintiff filed an affidavit in which he stated that he could not find the Double Claim Hotel Invoices.

90 The Plaintiff's failure to produce the Double Claim Hotel Invoices meant that he could not substantiate his assertion that (i) the cost of the hotel accommodation was more than the cost of the air ticket and that (ii) the Double Claim Hotel Invoices would reveal that he was travelling with a female companion. Serious doubt was cast on the Plaintiff's evidence because he accepted in cross examination that he could simply have used his credit card receipts to claim for his hotel accommodation expenses and those receipts would not have revealed that he was travelling with a female companion.

91 Moreover, his evidence during cross-examination regarding the Double Claim Hotel Invoices undermined his credibility. The Plaintiff's evidence was that the first time he realised that the defendants were looking for the Double Claim Hotel Invoices was on the first day of trial on 30 March 2009. When the defence counsel told him that his solicitors would have informed him that the defendants were looking for those invoices the week before, the Plaintiff's counsel informed the court that it was through TBK that the invoices were obtained. Not only was it difficult to believe that TBK would have acted without informing the Plaintiff, TBK's own evidence was that he did not help the Plaintiff find any invoices in the previous week.

92 Further, the Plaintiff's failure to adduce the Double Claim Hotel Invoices was inexplicable. The Plaintiff admitted that he had the Double Claim Hotel Invoices when he filed his AEIC on 20 February 2009. He gave evidence that he kept hotel invoices in his study room at his home (N/E 247:23) and he was the only person who had access to the invoices (N/E 248:10). He gave evidence that he destroyed hotel invoices over the weekend when he had the time (N/E 248:22). However, he could not explain why he had destroyed later hotel invoices dated in 2007 but not earlier hotel invoices dated in 2005 and 2006 which he produced to the court (N/E 250:17).

93 Counsel for the defendants urged the Court to dismiss the Plaintiff's claims as the evidence led on behalf of the Plaintiff was unsatisfactory and/or unreliable or, to strike out the Plaintiff's case in the light of his non-compliance with the Court's order to produce the Double Claim Hotel Invoices by 31 March 2009.

94 Under Order 24 Rule 16(1) of the Rules of Court (2006 Rev Ed), I had the discretion to order that the defence be struck out if there was a failure to comply with an order of court to make discovery of documents or to produce any documents for the purposes of inspection. In *SMS Pte Ltd v Power & Energy Pte Ltd* [1996] 1 SLR 767 at [17], C R Rajah JC held that:

> Where the order breached is not an 'unless' order then the court will only strike out a defence if in all the circumstances there is a serious risk that a fair trial would not be possible by reason of the defendants' breach.

Furthermore, Otton LJ in *Star News Shops v Stafford Refrigeration Ltd* [1998] 4 All ER 408 at 542, held that it was a misuse of the court's powers under the equivalent provision in the English Rules of Court to strike out the defence for non-compliance with a non-peremptory order of the court because

it had the effect of debarring the party from advancing an arguable defence. Furthermore, Otton LJ was of the view that even though the discovery was not complete and there was no evidence justifying the default, the circumstances were not so exceptional to justify a striking out order.

95 The Plaintiff failed to produce the Double Claim Hotel Invoices despite my order dated 30 March 2009. His explanation that he could not find the Double Claim Hotel Invoices was inherently incredible given that he admitted that he had the documents on 20 February 2009. His evidence that he routinely destroyed hotel invoices did not stand up to scrutiny as he was able to produce older hotel invoices but not the more recent Double Claim Hotel Invoices which were sought by the defendants.

96 Although his refusal to disclose the Double Claim Hotel Invoices was deliberate and without adequate explanation, I was of the view that a draconian striking out of the Plaintiff's claim was not appropriate on the present facts because the Plaintiff had advanced other claims such as the existence of the Understanding and Assurance which merited examination. Rather, I drew an adverse inference against the Plaintiff under s 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed) for his omission to produce the Double Claim Hotel Invoices. Hence, I rejected the Plaintiff's justification for his double claims as set out in his AEIC on the ground that he had not adduced one iota of evidence to support his two contentions in [90] *supra*.

Plaintiff's appeal against the terms of my judgment

97 There was a dispute between the parties on the terms of my judgment. Counsel for the Plaintiff had amended the defendants' draft judgment by adding the following italicised words to the defendants' solicitors' draft:

> IT IS FURTHER ADJUDGED that in respect of the 9th Defendant's Counterclaim in Suit No. 10 of 2008/T there be interlocutory judgment for the 9th Defendant against the Plaintiff for an inquiry to be taken *for the sum of S$45,529.64 and/or* all sums claimed by the 9th Defendant from the Plaintiff in breach of the Plaintiff's fiduciary duties with the costs of the inquiry to be reserved to the Registrar having conduct of the inquiry.

98 Counsel for the defendants requested for clarification from this court. On 7 May 2008, I heard the parties' arguments. Counsel for the Plaintiff submitted that the inquiry should be confined to the sum of S$45,529.64) claimed in MDI's counterclaim and limited to the period 1 January 2005 to 30 September 2007 on the basis that the sum was pleaded as the loss suffered by MDI and was part of the reliefs it counterclaimed from the Plaintiff. He argued that the court had in effect cut down MDI's claim in my findings.

99 Counsel for the defendants objected to the proposed limitation placed on the inquiry to be conducted to ascertain MDI's loss (which objection I upheld). He pointed out that by not awarding MDI final judgment on its counterclaim, this court had in effect dealt with the issue of whether the inquiry should be limited to any sum or to $45,529.64 as identified in the EY report.

100 I rejected the Plaintiff's argument that the inquiry should be limited, prompting the Plaintiff to file his second appeal (Civil Appeal No 71 of 2009) against my decision. There was no reason to limit the inquiry to be conducted by MDI in terms of quantum and time because in the reliefs it counterclaimed from the Plaintiff, MDI had pleaded (see [41] above) that the Plaintiff was liable to account to MDI for the sum of S$45,529.64 and/or all sums claimed by him from MDI in breach of his fiduciary duties and it had prayed for an order that the Plaintiff pay to MDI the sum of S$45,529.64 and/or such sums that were found due, upon the taking of an account. Limiting the inquiry as

proposed by counsel for the Plaintiff would render the inquiry nugatory. I suspected that the Plaintiff's motive to so limit the inquiry was prompted by his fear that his other and similar defalcations would be uncovered – he had in fact made more double claims than the sum identified in the EY report.

Conclusion

101 In the light of my findings that the evidence led by the Plaintiff was unsatisfactory on his various heads of claim and he had failed to establish a *prima facie* case, I dismissed both his actions in Suit 10 of 2008 and Suit 734 of 2008 with costs to the defendants. I further granted interlocutory judgment to MDI on its counterclaim against the Plaintiff in Suit of 10 of 2008 coupled with an inquiry with the costs of such inquiry to be reserved to the Registrar having conduct of the same.

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