Over & Over Ltd *v* Bonvests Holdings Ltd and another
[2010] SGCA 7

Case Number	: Civil Appeal No 141 of 2008
Decision Date	: 24 February 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Sundaresh Menon SC, Tammy Low Wan Jun and Paul Tan Beng Hwee (Rajah & Tann LLP) for the appellant; Alvin Yeo SC, Tan Whei Mien Joy, Chang Man Phing, Bryanne Liao and Kylee Kwek (WongPartnership LLP) for the respondent.
Parties	: Over & Over Ltd — Bonvests Holdings Ltd and another

Companies – Oppression – Minority shareholders

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2009] 2 SLR(R) 111.]

24 February 2010 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

1 This is an appeal against the decision of the High Court given in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2009] 2 SLR(R) 111 ("the GD"). The subject matter of the dispute involves the alleged oppression of a minority shareholder, Over & Over Ltd ("O&O"), by Bonvests Holdings Ltd ("Bonvests") in relation to their joint venture company, Richvein Pte Ltd ("Richvein").

Facts

2 Richvein was incorporated as a joint-venture company on 20 August 1980, with Unicurrent Finance Limited ("Unicurrent") as its majority shareholder and O&O as its minority shareholder. Unicurrent held 70% of the shares in Richvein, while O&O held the remaining 30%. After its incorporation, Richvein purchased land at Scotts Road and developed on it a hotel called the Sheraton Towers Singapore ("the Hotel"). The construction of the Hotel was completed in December 1985 and the Hotel continues to operate successfully at the same premises to date. It remains Richvein's sole business venture.

3 O&O, a company incorporated in Hong Kong, is controlled by the Lauw family. Lauw Siang Liong ("LSL") and John Loh ("JL") are O&O's shareholders and directors. Unicurrent and Bonvests are controlled by the Sianandar family, in particular by Henry Ngo ("HN"). When queried by this Court in the course of this appeal, counsel for the respondent, Mr Alvin Yeo SC ("Mr Yeo"), accepted that that about 60% of Bonvests is currently owned by HN and his family members, that is to say, the Sianandar family.

Overview

4 Sometime in 1979, the Sianandar family committed themselves to the purchase of a piece of land along Scotts Road to develop the Hotel. To spread the commercial risks, they sought a partner for the venture. A mutual friend introduced LSL to Ditju Sianandar ("DS"), the elder brother of HN.

Having ascertained LSL's interest in co-investing, DS left it to HN to continue the discussions. The two brothers were then Unicurrent's only shareholders, with 99% of the shares held by HN and the remaining 1% by DS. Unfortunately, both LSL and DS were unable to assist the trial court in reconstructing the basis of their original discussions. At [7] of the GD, the trial judge ("the Judge") found that LSL had a "failing memory" and DS's evidence was "shaky and unreliable". As they were the key individuals who had made the first contact between the two families on the nature and objectives of this joint venture their evidence was important. Ultimately, the Judge had little alternative but to deduce from the partisan evidence of HN and JL the history between the parties.

5 In the broadest of strokes, it can be said that the parties contemplated that Richvein was to be incorporated as the joint-venture vehicle between the Lauws' O&O and the Sianandars' Unicurrent, both of which were privately held family entities. It was only much later that the shareholding held by Unicurrent was transferred to Bonvests, a listed public company (see below at [15] to [16]).

6 The discussions between HN and the Lauw family leading to the incorporation of Richvein were informal and plainly based on mutual trust. No documentary records of the various discussions between the parties were maintained. Further, despite the substantial investment being made by both parties, their understanding was not embodied in any shareholders' agreement or in Richvein's memorandum and articles of association.

7 Although their discussions were not documented, it is now not disputed that there were nevertheless certain core understandings that governed the relationship between the Lauws and the Sianandars *vis-à-vis* Richvein. The parties had agreed, at the outset, that both families would always be represented on Richvein's board of directors, in a ratio of two Sianandar representatives to one Lauw representative. It was also agreed that the proposed building costs of the hotel would be funded by the two families in the proportion of 70%:30%, with the Sianandars responsible for the larger share. The families also agreed that the profits and losses of Richvein were to be shared between them in proportion to their respective shareholdings of 70% and 30% respectively.

8 The joint venture investment eventually required a huge financial commitment from both parties. Richvein presently has a paid-up share capital of more than $157m, all of which has been fully funded by the parties in proportion to their shareholdings. According to O&O, as at December 2002, it alone had loaned, interest-free, approximately $37.8m to Richvein. These shareholder loans had by then already been in existence for more than a decade.

9 Strict proportionate numerical accounting in corporate decision making aside, it had also been agreed from the outset that the Sianandar family would consult the Lauw family on any important decisions relating to the operations and management of Richvein ("the Important Decision Term"). This was notwithstanding the fact that the Lauw family was in the minority, both in terms of shareholding and representation on Richvein's board of directors.

10 The Hotel was duly constructed and operated by Richvein. Initially, the Hotel's operations proceeded smoothly and the working relationship between the parties was uneventful. Whenever any important issue affecting the operations or management of Richvein arose, HN would consult with the Lauw family before making any decision. This accorded with the Important Decision Term. In July 1991, however, HN unilaterally terminated an extant hotel management contract with ITT Sheraton Singapore Pte Ltd ("ITT Sheraton") without consulting the Lauw family. O&O alleged that he did this in order to divert the hotel management contract to another company in which he held a substantial interest; namely, Henrick International Hotels & Resorts Pte Ltd ("HIHR").

11 HN responded by explaining that HIHR had the necessary expertise to manage the hotel. He

stated that it was not feasible to have Richvein manage the Hotel itself by employing the necessary people because Richvein had already undertaken to provide compensation packages that specified stock participation for two key employees in HIHR. Under Richvein's original plan, 25% of the shares in HIHR would be held by the two employees, with Bonvests holding the remaining 75% of HIHR's shares.

12 Eventually, the impasse between the parties was resolved by having Richvein incorporate a subsidiary, Henrick Singapore ("HS"), to manage the Hotel. Richvein would hold 75% of the shares in HS, and the remaining 25% would be held by the two key employees. With this compromise in place, the changes in oversight of the Hotel's operations were implemented. However, it appears from the testimony of the parties that the previously warm relationship between the parties had distinctly cooled as a result of this run-in. Indeed, following the incorporation of HS, the friendship that had been enjoyed between the Sianandar and Lauw families gradually segued into what one might mildly term as neutrality. Communications between the parties over the next decade were brief and limited to formal business issues, usually tabled at board meetings.

13 In 2002, when the two key employees left HS, HN decided that it was no longer necessary to keep HS alive. HN suggested to JL that HS be liquidated and that Richvein contract directly with HIHR, in order to save on the compliance costs incurred in maintaining HS. JL objected to this suggestion, noting that O&O would be worse off as a result of this arrangement as it would have no direct or indirect interest in or control over HIHR, a wholly-owned subsidiary of Bonvests.

14 Notwithstanding O&O's objections, HN caused a hotel management contract between Richvein and HIHR to be entered into in December 2005. This was signed by HN on HIHR's behalf and by Long Sie Fong (a director of Richvein nominated by Bonvests) on Richvein's behalf [note: 1]. Even after it was finalised, the contract was not placed before Richvein's board of directors for ratification. Two subsequent contracts between Richvein and companies which HN had interests in, one for waste disposal services and another for cleaning services, were also not placed before or approved by Richvein's board of directors. Neither was O&O consulted about them before they were entered into. O&O alleges that as a result of these unratified contracts the Important Decision Term had once again been unheeded.

15 At around the same time in 2002, HN determined that it would be preferable that his public-listed company, Bonvests, acquire Unicurrent's 70% shareholding in Richvein. This arrangement would effectively unlock the value of the Sianandar's family interest in Richvein as the value of their disposable share interests in Bonvests would increase commensurately once the acquisition was completed. However, as an outright sale by Unicurrent of its shares in Richvein to a third party was prohibited by Richvein's Articles of Association, O&O's consent was required. HN, therefore, proceeded to enter into discussions with JL on the possibility of arranging such a sale, warning JL at the same time that if O&O did not consent to Unicurrent's sale of its shares in Richvein to Bonvests, this would make little difference as Bonvests could simply employ the "back-door approach" of buying over all of Unicurrent's shares.

16 Confronted by the harsh reality that HN could effectively do as he pleased on this issue without O&O's consent, JL reluctantly consented to the sale. However, he tried to salvage something from the situation by seeking the removal of Article 30 of Richvein's Articles of Association, which vests a right of pre-emption in either party ("Article 30"). The removal of Article 30 meant that, if they wanted to, the shareholders could transfer their shares to any third party notwithstanding that the transferee was not an existing member of Richvein.

17 Matters finally came to a head between the two families in 2006. In September 2006, HN received from the Development Bank of Singapore Limited ("DBS") an offer to refinance an

outstanding Richvein loan for $25m. The loan was due for repayment by November 2007. JL refused to agree to the proposed refinancing package, stating that he was unhappy about having to extend his personal guarantee whereas HN was not required to do so as the Sianandar's family interests in Richvein was now held through Bonvests.

18 On learning of JL's stance, HN immediately decided that a rights issue would be an appropriate mechanism to pay off the loan. Despite objections and repeated requests from JL for documents and for an analysis of the cash flow requirements of Richvein – in order to determine whether a rights issue could be *properly* justified – the rights issue was hastily completed by HN by the end of October 2006, at an issue price of $0.38 per rights share. An internal memorandum that surfaced in the course of the trial from Kwa Bing Seng ("KBS"), the financial controller of Richvein, to HN indicates that $0.3728 was the price that would "*result in the maximum dilution of [O&O]'s share if it does not take up the rights*" [emphasis added], see below at [47]. That same memorandum also indicated that the audited net asset per Richvein share adjusted for revaluation of land and building as of December 2005 was $1.0622.

19 Not long after this, O&O initiated this claim for relief against oppressive and/or unfairly prejudicial conduct under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") in 2007. Broadly speaking, O&O alleges that the respondent's conduct disclosed three obvious episodes of oppressive conduct. We shall now set out these alleged instances of oppression in greater detail, starting first with the contracts Richvein entered into with the various companies in which HN and/or Bonvests held an interest.

The Related Party Transactions

20 These contracts were (collectively, the "Related Party Transactions"):

(a) a contract dated 11 May 2006 with Colex Holdings Ltd ("Colex Holdings") for waste disposal services (the "Colex Contract");

(b) a contract dated 28 July 2006 with Integrated Property Management Pte Ltd ("IPM") for cleaning services (the "IPM Contract"); and

(c) a contract dated 12 December 2005 with HIHR for hotel management services (the "HIHR Contract").

21 It is common ground that Bonvests and/or HN had substantial shareholdings in Colex Holdings, IPM and HIHR. Between 1984 and 1992, HN gave notices to Richvein's directors stating his interest in these three related companies. Richvein's audited accounts also listed significant transactions with related parties, although no specific names were disclosed.

22 Both the Colex Contract and the IPM Contract were in fact renewals of contracts that had been entered into almost a decade ago. Richvein had entered into a contract with Colex (Singapore) Pte Ltd ("Colex (Singapore)", the precursor to Colex Holdings) from as early as 1997. Between 1997 and 2006, Richvein entered into several renewal contracts with Colex (Singapore) and Colex Holdings for waste disposal services. Colex (Singapore), now known as Colex Holdings, became a listed company in 1999.

23 Richvein entered into a contract with IPM for two years in 1998. This contract was primarily for the maintenance of common areas and car park and for carpet cleaning. In both 2000 and 2002, Richvein entered into two-year renewal contracts with IPM. In 2004, 2005 and 2006, Richvein again

contracted with IPM for daily and periodic cleaning services, but this time for a term of one year each.

24 The HIHR Contract, by contrast, has a longer and more involved history. Prior to July 1991, Richvein had a hotel management contract with ITT Sheraton. In July 1991, however, this contract was unilaterally terminated by HN, who then sought to enter into a management contract with another company in which he held a substantial interest, HIHR. The ostensible reason for this was that HIHR had the necessary expertise to manage the Hotel, and the fact that there would be cost savings in choosing HIHR over ITT Sheraton. On 19 July 1991, HN wrote to the Lauw family, asking them to sign, within seven days, a resolution permitting Richvein to enter into a management contract with HIHR. On 25 July 1991, JL wrote back asking for more time to consider the HIHR proposal. JL also raised a number of concerns.

25 Subsequently, a 5% interest in HIHR was promised to the Lauw family if they gave their consent to HN in relation to the proposed grant of the hotel management contract to HIHR. Nonetheless, in a second letter dated 1 August 1991, JL raised further queries. JL took issue with the fact that despite feasibility studies to form HIHR having allegedly been carried out some 19 months before, O&O was only informed of HN's intention to sign a new management contract with HIHR only recently.

26 The problem, as JL saw it, was that HIHR would be paid by Richvein, and that 30% of that payment would be in reality coming from O&O. If HIHR did not perform, HN would lose little because he would essentially be transferring his own funds from one company (Bonvests) to another (HIHR), while JL would be out of pocket. By engaging HIHR, HN would effectively obtain a cost-free premium of 30% from JL. JL therefore proposed that the management of the Hotel be taken over by Richvein, employing the same persons whose expertise HN claimed HIHR had. However, JL further added that if HN intended to proceed with the contract with HIHR, O&O would be "prepared in principle to sell all their shares in Richvein" [note: 2] .

27 A week later, on 8 August 1991, JL sent a *third* letter to HN, even before receiving any response from HN to his second letter. In this third letter, JL did not mince his words [note: 3] :

> *At the outset, I would like to say that it pains me that I have to write this letter especially since the Ngo family and the Lauw family have been good family friends for so many years*. It was a surprise to me that although studies into the feasibility to form [HIHR] began 19 months ago, [O&O] were only informed about the details of the Management Contract recently when I was asked to sign the Directors' Resolution approving the Management Contract. [emphasis added]

JL then reiterated his proposal that Richvein take over the management of the Hotel by employing the same people whose expertise HN had claimed to be justified in engaging HIHR.

28 On 2 September 1991, Richvein responded to JL, saying that it was not possible for Richvein to manage the Hotel itself by employing the necessary "key staff of proven expertise" [note: 4] because it would have to provide compensation packages that included stock participation for at least two of these key employees. Under Richvein's original plan, 25% of the shares in HIHR would be held by the two employees, Carl Kono and William Hau. Bonvests would hold the remaining 75% of HIHR's shares.

29 The impasse was finally resolved at a board meeting held on 23 September 1991 by having Richvein – and not HIHR – incorporate HS. HS was to be 75% held by Richvein and 25% held by Carl Kono and William Hau. Accordingly, Richvein would enter into a management contract with HS and HS would *subcontract* with HIHR to provide hotel management services (the "three-tier arrangement").

From O&O's point of view, this compromise was preferable to Richvein's earlier proposal that HIHR incorporate HS as a subsidiary and for O&O to subscribe for shares therein, since that course of action would leave the Sianandar family with the ability to maintain and exercise full control over HIHR and, indirectly, HS via its established 60% shareholding in Bonvests.

30 In 2002, the two key employees left HS. HN then decided that the reasons for setting up both HS and the three-tier arrangement were no longer applicable, and accordingly informed JL that Richvein intended to terminate the contract with HS. HN further informed JL that Bonvests (which was going to take over Unicurrent's shareholding in Richvein) would instead provide administrative support to Richvein, and that HIHR would take over the provision of the management services for the Hotel. However, O&O rejected this proposed arrangement in a letter dated 26 April 2002.

31 It bears mention that while JL was informed of the administrative service contract agreement with Bonvests on 26 March 2002, Richvein had in fact already executed the agreement *a week before* on 18 March 2002. HN and another director nominated by the majority also signed a Richvein board resolution dated 18 March 2002, which was then sent to JL on 26 March 2002, requesting that JL sign it as if the decision had already been made. The following exchange that took place when HN was cross-examined is illuminating: [note: 5]

> Q: So you agree with me, Mr Ngo, without board approval, 18 March 2002 the letter, and you accepted – well, it doesn't say when you accepted, but without board approval, this offer was really accepted by Richvein?
>
> A: Correct.
>
> Q: And … would you agree with me that *after the offer from Bonvests to provide administrative support was accepted by Richvein, then you went to seek approval by way of directors' resolutions in writing?*
>
> A: Yes.
>
> …
>
> Q: And if you look at the bottom, 18 March 2002, which is the date of the letter of offer from Bonvests, which was accepted, it already bears the signature of Mrs Tan and yourself; right?
>
> A: Yes.
>
> Q: And all this was done without checking with the plaintiff; right?
>
> A: Correct.
>
> Q: So you agree with me, Mr Ngo, that actually, being an interested-party transaction, you shouldn't be signing any board resolution? Right?
>
> A: Yes.
>
> [emphasis added]

32 JL did not sign the board resolution dated 18 March 2002 and the issue of the proposed management contract with HIHR (and the termination of HS) was postponed at Richvein's annual

general meeting ("AGM") on 29 May 2002. Specifically, HN agreed with LSL's request that any decision on the management contract with HIHR be deferred until Richvein's next AGM. In the following year, HN again proposed, in a letter dated 15 January 2003, that HS be liquidated and that the Richvein contract be concluded directly with HIHR. The purported reason for this was to save on compliance costs for Richvein in maintaining HS.

33 On 6 February 2003, JL's solicitors wrote to say that he was not agreeable to the proposed liquidation of HS. The stated reason for this objection was the same as that given earlier in 1991: that O&O would have no direct or indirect interest in or control of HIHR, which was wholly-owned by Bonvests. Notwithstanding JL's objections, however, HN and KBS signed a board resolution to terminate the management agreement with HS on 8 December 2005. Subsequently on 12 December 2005, HIHR entered into a contract for hotel management services with Richvein; namely, the HIHR Contract.

34 It is common ground that the HIHR Contract was not placed before Richvein's board of directors, and hence had not been approved by the board. This was also true for the Colex Contract and the IPM Contract. HN in cross-examination accepted the following: [note: 6]

> Q: You agree with me, Mr Ngo, that it was never brought to Mr John Loh's attention, or Mr Lauw's attention, that Richvein was contracting with [Colex (Singapore) and Colex Holdings]?
>
> A: Yes.
>
> …
>
> Q: And you agree with me that Richvein's decision to contract with [IPM] was never ever tabled for approval at Richvein's board level? Correct?
>
> A: Yes, your Honour.
>
> Q: And, Mr Ngo, these contracts, like the contracts with Colex and contracts between [IPM] and Richvein, were simply entered into by management on behalf of Richvein; right?
>
> A: Yes.

Accordingly, all three Related Party Contracts were entered into *prima facie* in breach of Article 92 of Richvein's Articles of Association, which expressly prohibits a director from voting in respect of any contract or arrangement in which he has an interest ("Article 92"). By participating in the decision-making process *vis-à-vis* the Related Party Contracts as an interested party, HN had effectively bypassed the terms of Article 92.

The Share Transfer

35 In 2003, HN wanted his public-listed company, Bonvests, to purchase Unicurrent's 70% shareholding in Richvein, ostensibly as part of an "internal group restructuring" exercise. However, as earlier discussed at [16] above, an outright sale by Unicurrent of its shares in Richvein was prohibited by Article 30.

36 The first reference on record of this proposed sale was made at a Richvein AGM on 29 May 2002 as part of the discussion of the item "ANY OTHER BUSINESS" [note: 7]. No prior notice had been

given of this proposed sale, even though the sale would be deemed to be "special business" under Article 63 of Richvein's Articles of Association. By virtue of Article 59 of the same Articles of Association, HN was obliged to give at least 14 days' notice of the proposed sale. HN accepted under cross-examination that he deliberately chose not to inform the Lauw family of the proposed sale, ostensibly to prevent the transaction from being "leaked out in the public". [note: 8]

37 At the AGM on 29 May 2002, HN attempted to pass a resolution to the effect that:

> with no objections from [O&O]'s representative [Mr Melvin Lee Tiong Choon], [Unicurrent] would at an opportune time, sell its entire shareholdings of 70,000,000 ordinary shares representing 70% of the issued capital of [Richvein] to [Bonvests].

This was despite the fact that Mr Melvin Lee, O&O's representative at the meeting, did not have an opportunity to discuss the sale of Unicurrent's shares in Richvein with his principals, JL and LSL.

38 Subsequently, implicitly recognising that the regularity of this board resolution was questionable, HN attempted to persuade the Lauw family to consent to the Share Transfer. However, even while doing so he maintained that informing the Lauw family of the intended sale of Unicurrent's shareholding was ultimately only a matter of "courtesy". In the same breath, HN informed JL bluntly that if the latter refused to permit the Share Transfer, he would arrange for Bonvests to buy up all the shares in Unicurrent, thus effectively achieving the same result by circumventing the spirit of the pre-emption rights that O&O had pursuant to Article 30 ("the back-door approach").

39 Bonvests also offered to purchase JL's shareholding, although the value that JL would have received – approximately $12.7m – was considered by O&O to be "derisory", and was far short of the investment that O&O had already made in Richvein (in the region of $37m). HN conceded during cross-examination that Bonvests' offer was "not a good deal". [note: 9]

40 In letters dated 17 September 2002 and 20 September 2002 to JL's solicitors, HN repeated his determination to proceed with the back-door approach, stating that "[t]he waiver of the transfer is merely a cordiality and there is no real need to await your clients to revert on it" [note: 10]. This interpretation of events has since been confirmed as HN, in the course of cross-examination, conceded that he was simply "determined to get Bonvests as a shareholder of Richvein, whether directly or through Unicurrent". [note: 11]

41 Eventually, JL reluctantly consented to the Share Transfer as he realised that HN would proceed with it in one form or another despite his objections. In an attempt to salvage something from this difficult situation, JL sought the removal of Article 30, so that thereafter any shareholder could transfer its shares to any party notwithstanding that the transferee might not be an existing member of Richvein. Accordingly, this amendment was passed at an EGM on 8 November 2002. The Share Transfer to Bonvests was subsequently completed on or around 23 September 2003. In return for 62.7m new shares, Unicurrent sold its 70% stake in Richvein to Bonvests. At $0.39 per Bonvests share, the deal valued Unicurrent's 70% stake in Richvein at merely $24.4m. Through this arrangement, the Sianandars' stake in Bonvests increased from 29.97% to 43.22% cent overnight. [note: 12] Indisputably, Bonvests (and the Sianandar family) benefited from this arrangement. In a circular to its shareholders, Bonvests claimed to have greater synergies with this new asset in its portfolio of investments. [note: 13]

42 The execution of the Share Transfer also meant that it would now be easier for the Sianandar family to realise or monetise its investment in Richvein (by selling or pledging its enlarged holding in

Bonvests). On the other hand, the Lauws' minority stake remained locked in Richvein.

The rights issue

43 On 25 November 2002, Richvein obtained a banking facility agreement for up to $63m from DBS ("the 2002 Loan"). O&O and JL executed corporate and personal guarantees respectively for 30% of the loan facilities granted by DBS. Unicurrent and HN also executed corporate and personal guarantees respectively in relation to 70% of Richvein's loan facilities. The loan tenure was five years from the drawdown date and in any case was to be fully repaid by 26 November 2007.

44 In 2003, after Bonvests acquired Unicurrent's 70% stake in Richvein, HN prevailed upon DBS to release him as a personal guarantor. This was done without informing JL. When JL later ascertained what had transpired and requested a similar release from his obligations as a personal guarantor, HN was neither helpful nor sympathetic. Under cross-examination, HN conceded that he was aware of JL's displeasure at having to remain as a personal guarantor but maintained that he was not obliged to assist JL on this issue. [note: 14]

45 On 16 September 2006, HN obtained a fresh bank proposal for a refinancing package for the 2002 Loan. The proposed refinancing package, with revised limits of $31m, required JL – but not HN – to provide his personal guarantee once again. On this occasion, JL refused to do so, on the basis that the collateral (the Hotel was worth some $191m in October 2006) was more than sufficient security for the 2002 Loan. The refinancing package was eventually not accepted.

46 In the course of the High Court proceedings it was revealed that KBS *did* speak with a DBS officer regarding the requirement for JL's personal guarantee. In a note to HN dated 26 September 2006, KBS reported that JL's personal guarantee *was not mandatory* but DBS would have to revert on whether the interest rate would be revised in the circumstances.

47 As it turned out, however, there was no follow-up with DBS or JL on this matter by HN. Instead, KBS and HN with unseemly alacrity immediately began evaluating the feasibility of a rights issue to raise funds to pay off the 2002 Loan. In a memorandum dated 2 October 2006 [note: 15], KBS recommended that the prospective new rights shares be priced at a level "*that will result in the maximum dilution of [O&O]'s share if it does not take up the rights*" [emphasis added]. He stated:

> There are at least three ways to price the rights issue: (a) **$1.00** per share which was the basis for the right [sic] issue (conversion of shareholders' loans) in 2002; (b) most recently audited (i.e. FY2005) net asset per share of **$0.3728**, or (c) audited net asset per share adjusted for revaluation of land and building in Dec 2005 ($191 million) of **$1.0622**.
>
> …
>
> In proposing a rights issue, management is entitled to believe that all shareholders will show continuous support and take up its rights. *In my view, a pricing using audited net asset value (without valuation adjustment) per share of $0.3728 (that will result in maximum dilution of [O&O]'s share if it does not take up the rights) is not difficult to justify*. We can check this position with our auditors and lawyers if we are pursuing this course of action.
>
> [emphasis in bold in original; emphasis in italics added]

48 On 4 October 2006, HN took steps to convene a Richvein board meeting that would authorise the holding of an EGM to pass a proposed rights issue (the "Rights Issue EGM"). JL sought an

adjournment of this board meeting on the basis that he needed more time to appraise the financial and operational performance of Richvein, and thus the appropriateness of any rights issue. JL also sought Richvein's latest management report which would disclose its year-to-date performance and the necessary information to conduct a cash flow analysis of Richvein. Both these requests were summarily rejected by HN.

49 The board meeting was held on 11 October 2006 and it was resolved (*with JL dissenting*) that the Rights Issue EGM would be convened on 26 October 2006. On 12 October 2006, O&O wrote to Richvein to ask for, *inter alia*, Richvein's profit and loss statements, but Richvein replied stating that the information could be gleaned from the audited accounts and monthly management reports that O&O had. O&O subsequently made two further requests for the profit and loss statements, but these too were not acceded to by Richvein. We note that HN acknowledged during cross-examination that the audited accounts and monthly management reports provided to O&O *did not contain* the relevant information that would assist in performing a cash flow analysis of Richvein. [note: 16] Pertinently, Bonvests also acknowledged in the course of arguments in this appeal that Richvein itself had not conducted any cash flow analysis or projections before the Rights Issue was decided on.

50 On 26 October 2006, the day of the Rights Issue EGM itself, O&O unsuccessfully requested yet again that the Rights Issue EGM be postponed. The proposed resolution for the rights issue was accordingly passed at the Rights Issue EGM at $0.38 per rights share (the "Rights Issue") even though JL dissented. It bears mention that no response was ever given to any of his requests or queries.

51 Pursuant to the Rights Issue, provisional allotment letters were issued. The final date of acceptance was 3 November 2006. O&O assumed that payment was to be made by a local cheque and requested instead to make payment by telegraphic transfer (on 27 October 2006 and 30 October 2006) as it did not have a Singapore bank account from which a cheque could be issued. Both these requests were denied without HN or KBS ever deigning to give any explanation.

52 JL later requested for more time to pay as some of the family's funds were kept in Indonesia and certain banks and businesses in Indonesia were closed for public holidays during that time. This request, too, was curtly rejected. Despite this, O&O somehow managed to accept its provisional allotment on 3 November 2006 with the requisite cheque payment drawn on a bank in Singapore.

The oral agreement

53 O&O commenced the action in the court below seeking relief under s 216 of the Companies Act. It alleged that the Related Party Transactions, the Share Transfer and the Rights Issue, whether taken alone or cumulatively, were oppressive and/or unfairly prejudicial.

54 O&O further argued that Richvein was a quasi-partnership by virtue of an alleged oral agreement (the "Oral Agreement") entered into by O&O and Unicurrent in or around 1979. The Oral Agreement was allegedly the culmination of various discussions between the two families, the primary (and disputed) terms of which were laid out by O&O as follows:

(a) the Lauw family was to be consulted on all important decisions and would be informed of the development and performance of Richvein's business (the "Important Decision Term");

(b) Richvein would eventually be listed on The Stock Exchange of Singapore through an initial public offering (the "Listing Term"); and

(c) if either party wished to sell its shares, it would have to offer the shares to the other party first. In order to realise their investment, both parties envisaged the possibility of a mutual exit strategy by selling their respective shares individually after the successful public listing of Richvein's shares or by selling their stakes together to interested buyers (the "Exit Term").

55 According to O&O, as Richvein was a quasi-partnership by reason of the Oral Agreement, it was entitled to expect from Bonvests a "high standard of corporate governance" (*Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR(R) 745 at [83] ("*Borden*")). O&O also contended that by being the majority party in a quasi-partnership arrangement, Bonvests should "take a broader and more generous view of their obligations" (*Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 ("*Evenstar*") at [45]) to O&O, the minority faction.

The decision below

56 The Judge was of the view that the common thread between the four alternative limbs of relief under s 216 of the Companies Act was some element of *unfairness* that would justify the invocation of the court's jurisdiction. Additionally, the Judge held that while prejudice was an important factor in the overall assessment of an action under s 216, it was not an essential requirement.

57 While O&O might have viewed the alternative of the back-door approach as a threat, the Judge thought that it had to take a stand nonetheless. It was not disputed that O&O had negotiated for the removal of the pre-emption rights which Bonvests agreed to and subsequently implemented. Having consented to the Share Transfer and obtained the removal of the pre-emption rights for its benefit, it was not open to O&O to later complain about the Share Transfer or how the Share Transfer made it less likely for Richvein to be listed.

58 HN and Bonvests had not, in the Judge's view, acted unfairly in respect of the Rights Issue. HN could not be faulted for looking into the question of refinancing the 2002 Loan one year before it was due for payment. The availability of other means of repayment did not make the Rights Issue unfair. The Rights Issue had been decided upon because of JL's own intransigence. There was no suggestion by O&O that the price of $0.38 per share was unjustifiable. O&O had Richvein's audited accounts and monthly management accounts and JL was unable to elaborate more specifically as to what kind of additional information he had been seeking. Further, the Judge held that the one month taken to conduct the Rights Issue (and the eight days given to subscribe for the rights shares) was not unduly short, since O&O had been given adequate notice of the Rights Issue EGM, JL's dissent notwithstanding.

59 The Judge acknowledged that HN *could* have given instructions to accept payment by telegraphic transfer or to extend the time for subscription but accepted that the background circumstances must have been frustrating for him. In any case, although O&O did not have a bank account in Singapore, it managed to subscribe for its portion of the rights shares on time. In so far as O&O said it did not have available funds in Singapore to subscribe and needed more time, it had already known for some time *before* the Rights Issue EGM that HN was pushing ahead with the Rights Issue. Accordingly, the Judge held that there had been no prejudice to O&O.

60 The Judge further determined that the three Related Party Transactions were not unfair. O&O did not give any evidence to show how HN was in breach of s 156(4) of the Companies Act by virtue of the fact that his interests in the related companies were different in nature or greater in extent from the date of the latest applicable disclosure notice to the time the transactions were entered into. Additionally, the Judge found that mere non-compliance with Article 92 would not necessarily warrant a finding of oppression. JL knew or ought to have known of HN's interests in the three

companies. At the very least, JL had known that Richvein had been contracting with businesses related to HN or Bonvests. Having earlier agreed to the three-tier arrangement, O&O could not subsequently complain that HIHR had no employees or that a large portion of the management fee paid by Richvein to HIHR would be subsequently redirected to Bonvests. Plainly, HS had become redundant on the resignation of its two key employees and its removal saved compliance costs. It did not result in HIHR receiving more from Richvein than what it had received from HS.

61 Even considering the Share Transfer, the Rights Issue and the Related Party Transactions cumulatively, the Judge found that there had been no unfairness visited upon O&O for the purposes of s 216 of the Companies Act.

62 With respect to the Oral Agreement, the Judge found that O&O had failed to establish the existence of the Listing Term and the Exit Term. He also held that whilst there might have been an understanding as between the parties with respect to important decisions concerning Richvein (the Important Decision Term), such an understanding was of an informal nature at best. Accordingly, the Judge held that it was unnecessary for him to find whether there existed a quasi-partnership between O&O and Bonvests with respect to Richvein.

This appeal

63 On appeal, O&O contends that the Judge had erred in studying the facts as three distinct and separate episodes. According to counsel for O&O, Mr Sundaresh Menon SC ("Mr Menon"), it was not seeking to reverse the individual transactions complained of. Rather, its central complaint was that the *manner* in which these transactions were carried out manifested a rapidly deteriorating relationship in which Bonvests' response to every request by O&O was driven by indifference at best, and malice at worst. From O&O's perspective, this decaying relationship was one that required relief from the court, given the propensity of the majority shareholder to abuse its power in oppressing the minority.

64 Mr Menon also argued that the Judge had made a mistake by failing to consider whether Richvein was a quasi-partnership. It was O&O's case on appeal that "the failure to make a finding on this issue led to several other errors" [note: 17], including the dismissal of the Important Decision Term and the fact that the Rights Issue was, *inter alia*, also a violation of legitimate expectations between the parties.

65 It was further submitted by Mr Menon that quite apart from the question of the mistrust that had taken root as a result of HN's dictatorial governance, characterised by the oppressive conduct of Richvein's affairs, s 216 relief was nonetheless appropriate given that Bonvests had chosen to issue new shares for an improper purpose, *viz*. the dilution of O&O's shareholding in Richvein.

66 In response, Mr Yeo's arguments centred on the contention that O&O's case on appeal had departed very starkly from its pleaded case. From Bonvests' point of view, O&O's pleaded case had been premised solely on the Oral Agreement and Bonvests' resulting breaches of the Exit Term, Listing Term and the Important Decision Term. By seeking to rely on a sweeping assertion that there was an agreement of co-participation between the parties, Mr Yeo contended that O&O was fielding arguments on appeal that were entirely different from those that had been canvassed before the Judge.

67 It is appropriate for us to note at this juncture that while the evidence before us on appeal remains as it was in the court below, all the *material* findings of fact by the Judge came by way of deduction or inference. As such, this court is not constrained from reviewing his findings.

The law on minority oppression

68 The Judge has helpfully summarised the law on this area (at [51]–[76] of the GD). We see no point in rehearsing his overview and shall therefore confine ourselves to a brief outline of the principles immediately relevant to this appeal.

"Single act" and "continuing conduct" oppression

69 Section 216(1) of the Companies Act provides the following:

> **Personal remedies in cases of oppression or injustice**
>
> 216. —(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister 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).

70 As pointed out by the Judge at [52] of the GD, s 216 appears to provide four alternative limbs under which relief may be granted – oppression, disregard of a member's interest, unfair discrimination or otherwise prejudicial conduct. These four limbs are not to be read disjunctively. The common thread underpinning the entire section is the element of unfairness. The instructive observations of Buckley LJ in the English Court of Appeal decision in *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 at 199 are apt for the purposes of this appeal:

> In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is *unfair* … to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs ...

71 In her book *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007), Margaret Chew rightly points out that (at pp 120–121):

> …….. any exercise in further defining or refining each of the expressions 'oppression', 'disregard of interests', 'unfair discrimination' or prejudice', in order to ascertain any differences in their meaning and application looks to be a frustrating one. It would be futile, if not impossible, to split pedantic hairs over the precise and exact meaning of the medley phraseology favoured by the legal draughtsman. The fruit of such labour could only add uncertainty and confusion.
>
> …

> The expressions in the Singapore, Malaysian, UK and Australian provisions — 'oppression,' 'disregard of interests' (or 'contrary to interests'), 'unfair discrimination' and 'prejudice' (or 'unfair prejudice') — all point toward behaviour on the part of the majority shareholders or the controllers of a company that departs from the standards of fair play amongst commercial parties. Traditionally, such behaviour would have attracted the dyslogistic labels of unfair, improper, unjust or inequitable. Other unflattering labels have included the lukewarm tag of 'reprehensible' to the fiery rebuke of 'tyrannical'. It is such opprobrious behaviour, it is submitted, that the legal draughtsmen of section 216 of the Companies Act and its foreign equivalents, sought to impugn. Therefore, *rather than distinguishing one ground from the other in section 216, the four grounds set out therein ought to be looked at as a compound one, the purpose of which is to identify conduct which offends the standards of commercial fairness and is deserving of intervention by the courts*. To this end, the combined language of section 216 is suggestive, descriptive and evocative.
>
> 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 discretionary power of the courts under section 216 is notoriously wide. Thus, in determining the scope of section 216, *rather than deciphering the precise nuance of each of the expressions 'oppression,' 'disregard of interests,' 'unfair discrimination' and 'prejudice,' a compendious interpretative approach, with an emphasis on the rationale and purpose of section 216, is hereby advocated*.
>
> [emphasis added]

72 Here, we must pause to say that we also agree with the Judge's conclusion at [76] of the GD that:

> the common thread under s 216 is some element of unfairness. *In my view, prejudice is a factor, and perhaps, a very important one in the overall assessment, but I do not think that it is an essential requirement*. [emphasis added]

73 Breaking down s 216(1) into its constituent parts, it is obvious that it provides for minority protection where:

(a) the company's affairs are conducted or the directors' powers are exercised

  (i) in an oppressive manner to the member; or

  (ii) in disregard of the member's interests;

(b) or an act is done or threatened or a members' resolution is passed or proposed which:

  (i) unfairly discriminates against one or more members; or

  (ii) is otherwise prejudicial to one or more members.

74 Based on a plain reading of s 216(1) itself, therefore, it appears that either a course of conduct or even a *single act* could theoretically amount to oppression. It has been noted, however, that the majority of the cases that have been decided by the courts pertain to minority complaints under limb (a) above, *viz*, oppression manifesting itself in the extended abuse in the conduct of the

company's affairs (see Victor Yeo and Joyce Lee, *Commercial Applications of Company Law in Singapore* (CCH Asia Pte Ltd, 3rd Ed, 2008) at p 282. Nonetheless, the following passage from *Minority Shareholders' Rights and Remedies* correctly encapsulates the position on what might be said to single distinct acts of unfair behaviour (at pp 228–229):

> It is recognised, however, that a past oppressive act, although remedied, may belie a risk of future oppressive acts and may have continuing oppressive effects. Therefore, the fact that an excluded director has been reinstated or that a diversion of monies has been repaid may not mean oppression of the minority has necessarily ceased. In *Re Kong Thai Sawmill (Miri) Sdn Bhd*, though improper loans made by the controllers of the company to themselves had been repaid, Lord Wilberforce acknowledged that the transactions could have remained material as evidence of oppressive conduct and made the following observation:
>
> > A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section.
>
> In the same vein, *an isolated act may amount to oppression and a course of conduct need not be shown*. For example, *a singular dilution of the minority's shares by the majority contrary to an informal understanding*, or a clear and egregious misappropriation of monies contrary to an implied understanding, would suffice as oppressive conduct. However, a singular assertion of excessive remuneration or inadequate dividend payment perhaps may not. As illustrated by cases like *Low Peng Boon v Low Janie*, *Kumagai Gumi Co Ltd v Zenecon Pte Ltd*, *Re Elgindata Ltd* and *Re Cumana Ltd*, to name a few, allegations of oppression appear to be best sustained where oppression manifests itself in a course of conduct over a period of time, straddling several grounds or categories of oppressive conduct, and considered cumulatively. Nonetheless, this is not to say that a past and singular act may not amount to oppression under section 216 of the Companies Act. In the words of Derrington J in *Re Norvabron Pty Ltd (No 2)*:
>
> > Obviously, in order to invoke the exercise of the court's discretion, the single past act would need to be so serious as to equate a continuing present state of affairs, but a series of past acts may be cumulative and may be considered in respect of their present and future effect. *A single act in the past may not be so serious as to support the remedy or having been corrected may not support it … but of course everything depends upon the circumstances of the particular case*.
>
> [emphasis added]

75 In the case of *Re Cumana Ltd* [1986] BCLC 430, the majority shareholder, Bolton, prevailed upon the company to undertake a rights issue. Bolton knew that Lewis, the minority shareholder, was unlikely to take up his proportion of new shares since he was unemployed and financially challenged. The effect of the proposed rights issue, should Lewis have been unable to take up the shares, would have been to reduce Lewis' minority holding from one-third to less than 1%. Lewis brought an action under the precursor to s 459 of the UK Companies Act 1985 asserting, *inter alia*, that the rights issue was unfairly prejudicial to him. The judge at first instance inferred that the proposed rights issue was part of a scheme to reduce Lewis's shareholding in the company and held that it was unfairly prejudicial to Lewis's interests. This was affirmed by the English Court of Appeal.

76 This is not to say that every issue of shares with knowledge that a minority shareholder may not take up the issue due to impecuniosity may amount to a case of oppression or unfair prejudice (*a*

fortiori the case here for O&O, which was perfectly capable of subscribing to the rights issue). In *Re a Company (No 007623 of 1984*) [1986] BCLC 362, Hoffmann J dismissed, *inter alia*, the minority shareholder's assertion that a rights issue he was not able to take up was unfairly prejudicial conduct on the part of the majority shareholders. With his customary acuity, he pointed out the following (at 366–367):

> The other matter relied on as unfair conduct is the proposed rights issue. It was said that the company had no need of additional capital and the purpose of the issue was merely to bring about a drastic dilution of the petitioner's interest in the company. I find that the board genuinely believed that the company required additional capital. …
>
> Nevertheless, I do not think that the bona fides of the decision or the fact that the petitioner was offered shares on the same terms as other shareholders necessarily means that the rights issue could not have been unfairly prejudicial to his interests. If the majority know that the petitioner does not have the money to take up his rights and the offer is made at par when the shares are plainly worth a great deal more than par as part of a majority holding (but very little as a minority holding), it seems to me arguable that carrying through the transaction in that form could, viewed objectively, constitute unfairly prejudicial conduct. In this case, however, it seems to me that the petitioner, if he lacks the resources or inclination to contribute *pari passu* to the company, could protect his interests by offering to sell his existing holding to the majority. Indeed, if the company needs funds and he does not want to pay his share, it seems to me only fair that he should offer to sell out.

In *Minority Shareholders' Rights and Remedies*, Margaret Chew suggests at p 199 that:

> ... on the whole, the fact that the majority shareholders have procured an issue of shares by the company with the intention of diluting a minority shareholder's proportional shareholding will not amount to oppressive conduct. Generally, a shareholder participates in a company without the expectation that the shareholding ratios amongst shareholders would remain static and unchangeable.

In *Re Cumana Ltd*, however, the facts had a distinctive feature: there had been an informal understanding amounting to a legitimate expectation that the proportion of shareholdings would remain immutable, to reflect the distribution of the company's commercial profit. As we shall see shortly in the next sub-section, it was O&O's case below that there had been a similar informal understanding between O&O and Bonvests.

77 With respect to the four limbs of injustice to minorities countenanced in s 216 – (a) oppression, (b) disregard of a member's interest constituting "continuing conduct" injustice, (c) unfair discrimination and (d) prejudice falling under the purview of "single act" injustice – the Judge's conclusion (at [68] of the GD) that "there is no meaningful distinction between all four limbs" is broadly correct. Accepting that "the common thread [under s 216] is some element of unfairness which would justify the invocation of the court's jurisdiction under s 216" means that the appropriate "test" to apply in cases of "single-act" injustice would accordingly be the same as the test already applied in cases of "continuing conduct" injustice, *viz*, "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect": *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 ("*Re Kong Thai Sawmill*"), cited with approval in *Low Peng Boon v Low Janie and others and other appeals* [1999] 1 SLR(R) 337 ("*Low Peng Boon*") at [43].

Quasi-partnerships

78 Distinctly, another principle that should be remembered (given our present facts) is that courts, in deciding whether to grant relief under s 216 of the Companies Act, must take into account both the legal rights and the legitimate expectations of members. While these legal rights and expectations are usually enshrined in the company's constitution in the majority of cases, a special class of quasi-partnership companies form an exception to this rule.

79 In *Ebrahimi v Westbourne Galleries Ltd and Others* [1973] AC 360 ("*Ebrahimi*"), a case dealing with the court's jurisdiction to wind up companies on "just and equitable grounds", the House of Lords recognised that shareholders may have enforceable expectations which do not emanate from any articles of association and which are not necessarily submerged in the company's structure. Lord Wilberforce said, at 379:

> [A] limited company is more than a mere legal entity, with a personality in law of its own: … *there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure*. … The "just and equitable" provisions … enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. [emphasis added]

80 Although *Ebrahimi* was decided in the context of the "just and equitable" jurisdiction of the court under the winding up provisions of the UK Companies Act, there is little doubt that under both English and Singapore law, the doctrine of quasi-partnerships is equally applicable to cases involving minority oppression. Chan Sek Keong CJ in *Borden* emphatically pointed out at [80] and [83] that:

> 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] 1 SLR(R) 441]) on the ground that a minority shareholder participates in a corporate entity knowing that decisions are subject to majority rule, s 216 of [the Companies Act] 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.
>
> …
>
> 8 3 *It bears repeating that in a case such as the present where a company has the characteristics of a quasi-partnership and its shareholders have agreed to associate on the basis of mutual trust and confidence, the courts will insist upon a high standard of corporate governance that must be observed by the majority shareholders* vis-à-vis *the minority shareholders*.
>
> [emphasis added]

81 "Commercial fairness", therefore, is the touchstone by which the court determines whether to grant relief under s 216 of the Companies Act. This standard must be the same as that laid out in *Re Kong Thai Sawmill* at [77] above. However, whether the majority's conduct may be characterised as unfair is, to be sure, a multifaceted inquiry. Chan CJ additionally observed in *Evenstar*, at [31]:

> [U]nfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence

where the "just and equitable" jurisdiction under s 254(1)(i) has been successfully invoked can be re-characterised as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder. Unfairness can also arise in the loss of substratum cases.

82 While the language of the above excerpt refers to s 254(1)(*i*) specifically, Chan CJ took pains to clarify the applicability of the fairness concept to s 216, at [37]:

> Hence, it is our view that the "just and equitable" and "oppression" regimes under our [Companies Act] each have their own respective spheres of application. However, at the same time, we also recognise that these two jurisdictions, though distinct, do in fact overlap in many situations since they are both predicated on the court's jurisdiction to remedy any form of unfair conduct against a minority shareholder. ***In this regard, although s 216 does not expressly adopt the "just and equitable" principle, the concept of unfairness is common to both sections*** . *In such overlapping situations*, we agree with Parker J's *dictum* in *Guidezone* … that ***in order to reconcile the concurrent jurisdictions under the two provisions in a principled manner, the degree of unfairness required to invoke the "just and equitable" jurisdiction should be as onerous as that required to invoke the "oppression" jurisdiction*** . [emphasis in italics in original; emphasis added in bold italics]

83 In the context of quasi-partnerships, therefore, the courts have consistently applied a stricter yardstick of scrutiny because of the peculiar vulnerability of minority shareholders in such companies. First, those who enter into a corporate structure often do not always spell out their rights and obligations in their entirety, in part because they are unable to anticipate all the eventualities that may arise, but also because it would be disproportionately expensive and time-consuming to do so even if they could. Naturally, this problem is particularly acute in respect of those who set up business with others essentially on the basis of mutual trust and confidence – they would have operated on the belief that the majority would take their interests into account and that any such problems would be readily and civilly ironed out. Ironically, often these understandings are not documented, let alone spelt out in legal terms, as it might be perceived that the very documentation of the understanding might betray a lack of trust. This might seem naïve but unfortunately this behaviour is not infrequent, even today, in commercial dealings; relationships thin in words but thick in trust underpinned by the implicit belief that each will do right by the other without the need to spell out in embarrassing detail what is expected or needed. Second, the reality of the nature of a closed company makes it susceptible to exploitative conduct by the majority simply because the minority has no obvious legal remedies spelt out in the memorandum and articles of association. At the risk of stating the obvious, it bears mention that minority shares in private companies are often difficult to dispose of, and even if there was a market for them they would often have to be sold at a substantial discount.

84 Consistent with the above concerns, it is well-established that informal understandings and assumptions may be taken into account in determining whether the minority has been unfairly treated. Hoffman LJ insightfully summed up the position in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 ("*Harrison*") when he stated, at 19–20:

> Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term 'legitimate expectation' to describe the correlative 'right' in the shareholder to which such a relationship may give rise. *It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form* … [emphasis added]

85 The inquiry as to the equities of the situation ultimately calls for a textured approach, rather than a technical one that is concerned only with the strict rights of parties. *Thus, a majority shareholder may be within his strict legal rights but the manner in which he exploits his legal rights may call for the court's intervention. In particular, it is trite law that conduct can be unfair without even being unlawful*. On the other hand, there appears to be something to be said against the post-hoc judicial imposition of a quasi-partnership where the parties concerned are savvy, experienced investors – like JL and HN here – who have chosen the vehicle of a joint-venture company for a specific and capital-intensive purpose, see *eg*, the recent Malaysian case of *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor* [2007] 7 MLJ 618 ("*Ting Check Sii*") at [15]. In cases of this nature, the facts must clearly point towards an understanding that the parties would have to jointly make important decisions and that the substratum of trust had broken down because of the defendant's unfair conduct.

Analysis

Was Richvein conceived as a quasi-partnership?

86 First, we ought to dispose of a side issue. We readily agree with the Judge's finding at [85] of the GD that O&O had failed to establish the existence of the Listing Term and the Exit Term. There was nothing on the evidence which pointed to any concrete basis for these two alleged terms in the Oral Agreement. O&O were obviously tilting at windmills in order to prop up their legal position. We need say no more.

87 On the other hand, we entertain serious reservations about the Judge's consideration of the relevance and significance of the Important Decision Term. At [85] of the GD the Judge states:

> I accepted that there might have been some understanding as between the parties with respect to important decisions, but such an understanding was of an informal nature.

This was, with respect, a curious finding. What more could be required of the Important Decision Term, as alleged by O&O, than *precisely* an understanding of an "informal nature" with respect to important decisions? An understanding of a "formal nature", necessarily, would mean that there would be precise contractual terms; and had that been the case, this would have been a straightforward matter making it quite unnecessary for any inquiry into the existence and characteristics of "quasi-partnerships". If the Judge, on the other hand, meant that because the understanding was of an informal nature it did not merit legal protection, we must respectfully disagree. The real issue he ought to have addressed was whether there was any understanding and if so, its precise purport. It is not necessary that the understanding be legally enforceable. What is crucial, we reiterate, is the kernel of the understanding. In this regard, Bonvests' argument at [66] appears to be misguided; by virtue of having pleaded the existence of the Important Decision Term, the "agreement of co-participation between the parties" *had* effectively already been pleaded by O&O. The Judge had, in our view, erred in adopting Bonvests' position, and in focusing on the legal formalities of the understanding rather than on its *substance* and *objectives*. We now turn to examine the substance of the understanding.

88 It appears quite plain to us that the circumstances under which Richvein was incorporated suggest that it was founded upon a relationship of mutual trust and confidence between the Lauw and Sianandar families. For instance, in a letter from JL to HN dated 7 October 2006 addressing JL's reluctance to provide a personal guarantee for the refinancing package, JL stated the following: [note: 18]

> I am much displeased that you have questioned my decision not to provide the personal bank guarantee for the refinancing of the Loan. It is also especially so when you made the statement that "we should separate corporate and personal issues and not let this affect the smooth running of the business".
>
> *May I take you back to the 1970's and 1980 when you and I started this venture. As far as I distinctly recall, we were partners, ready and willing to put in our own efforts and cash to start the hotel business*. You had your own company to front your investment. I had mine. You agreed to be majority and I minority. *There was no issue not being able to work or co-operate with one another. There was no necessity even for me to insist on minority right as against the majority. It was simply "you and I" on this business venture*.
>
> When you wish to transfer your 70% to Bonvest[s] Holdings Ltd, a public company, I didn't object. *It was within our personal understanding that I should not pose problems to your personal intentions*.
>
> However when, you decide to take out your personal guarantee to the bank, you left me the personal sole guarantor potentially exposed. Your acts benefited yourself personally and you failed to think of me. *Therefore when I recalled the time when we were as friends and on good faith started this business, it pains me greatly that you did not even take me into consideration*.
>
> … I do not agree that we can entirely separate the corporate from the personal issues.
>
> [emphasis added]

Such an "understanding" would be consistent with a finding of Richvein being a quasi-partnership company, at least during the formative years of its inception. In this respect the relationship between the Lauws and the Sianandars bears more than a passing semblance to that which existed in the Australian case of *Wallington v Kokotovich Constructions Pty Ltd* [1993] 11 ACLC 1207 ("*Kokotovich*") where the court found a "moral partnership" between Mrs Wallington and Mr Kokotovich. Prior to the breakdown of friendly relations in *Kokotovich*, Mrs Wallington and Mr Kokotovich had enjoyed an "intimate … relationship" that led to "both an emotional and a business association" *vis-à-vis* their jointly held company. The nature of the joint shareholding between the two parties was, however, unclear. While Mr Kokotovich thought that Mrs Wallington only held shares "so as to satisfy legal requirements", Mrs Wallington herself laboured under no such impression. In the event, when Mr Kokotovich issued additional shares to himself and members of his family, Young J held that the objective of the share issue was to reduce Mrs Wallington's ownership interest in the company and that this was oppressive. On appeal, the Supreme Court of New South Wales affirmed Young J's decision, stating the following (*Kokotovich Constructions Pty Ltd & Ors v Wallington* (1995) 13 ACLC 1113 at p 1126):

> It was submitted by the appellants that it would be "illogical and absurd" for the governing director [Mr Kokotovich] to have the wide array of powers that he has, but not to have the power to vote on a resolution at an ordinary meeting. I do not agree. These provisions, in fact, reflect the view of the nature of the company for which the respondent argued, and which Young J accepted. *Mr Kokotovich was to have the control of the day-to-day operations of the company. He was to manage the company. This was never disputed by the respondent. However, when it came to specific issues about the constitution of the company, issues that the general meeting of shareholders would address, Mrs Wallington and Mr Kokotovich were to have equal voices. This reflects the significant role which both incorporators intended Mrs Wallington to have in the company. It also reflects, and confirms, the "moral partnership" which Young J*

found to exist. [emphasis added]

89 As in the case in *Kokotovich*, it is striking how much trust the Lauws and Sianandars reposed, in the course of the negotiations over the joint venture, on mutual good faith. HN himself acknowledged that although there were a number of meetings between members of the two families to discuss the terms of the proposed joint venture, *none* of the terms agreed upon during the discussions were reduced to writing. He testified as follows: [note: 19]

> We had a few meetings and discussions but I cannot now recall the exact number or the dates on which they took place. As far as I can recall, the discussions were fairly brief and *the main focus was how to accommodate the parties' respective interests*. [emphasis added]

90 The brevity and informality of the parties' negotiations is highly significant, given the large financial commitment involved in the joint venture. LSL, DS and HN owned several other companies at the time and could properly be considered experienced investors and businessmen. This failure to record essential terms of their agreement in writing can only be rationalised and explained on the basis that the Lauw and Sianandar families had consciously chosen to enter into a relationship implicitly based on mutual trust and good faith with respect to the conduct of the affairs of Richvein in the future. Indeed, apart from a bare statement by HN that "LSL, JL, DS and I were not close friends … [t]he investment was for business purposes and our relationship was purely commercial" [note: 20], it should be noted that the *basis* of JL's letter excerpted at [88] above was never expressly denied or refuted by HN. This was despite it being *HN* who had "demand[ed] that [JL] let [him] know in writing what Bonvests and/or [HN] had done to cause [JL] to be so unhappy with [them]". [note: 21] In this connection, the observations of Lady Justice Arden in the recent English case of *Strahan v Wilcock* [2006] BCC 320 ("*Strahan*") at [19] and [23] are pertinent:

> 19 The question whether the relationship between shareholders constitutes a "quasi-partnership" is relatively easy to answer if the company's business was previously run by a partnership in which the shareholders were the partners. It is indeed common for partnerships to be converted into companies for tax or other reasons. *It is also relatively easy to establish whether a relationship between shareholders constitutes a "quasi-partnership" when a company was formed by a group of persons who are well known to each other and the incorporation of the company was with a view to them all working together in the company to exploit some business concept which they have. …*
>
> …
>
> 23 … [Additionally,] the terms of the option agreement were *informally* agreed between them. *The terms were never committed to writing, and this reinforces the conclusion that there was a personal relationship involving mutual trust and confidence between the parties*.
>
> [emphasis added].

91 It was unsurprising, therefore, that HN had no alternative but to accept during cross-examination that a number of *oral* agreements on highly significant issues were reached during these preliminary discussions. These issues included the representation of the Lauw and Sianandar families on Richvein's board of directors, the funding of the building project, the apportionment of profits and losses as well as the management and operations of Richvein. Taken together, these agreements exhibited a *fundamental understanding* between the two families as to the manner in which the business of Richvein would be conducted, an understanding not unlike that which prevailed in *Harrison*

at [84] above.

92 HN further acknowledged in the course of cross-examination that there had been an obligation to consult the Lauw family on important financial and operational matters. Indeed, the following excerpt was probably the basis upon which the Judge concluded at [85] of the GD that there was indeed "some understanding as between the parties with respect to important decisions". It will be helpful if we make reference to HN's responses when cross-examined on this issue: [note: 22]

> Q: Mr Ngo … [t]he point is, when you wanted to cause Richvein to terminate the hotel management agreement [in 1991], you took steps to consult the Lauw family; agree?
>
> A: As usual, it is the company –
>
> Q: Would you agree or disagree? Then give your explanation.
>
> A: I agree on that.
>
> Q: And you wanted to explain?
>
> A: Because this is the hotel business, it involved the future of the company, obviously I have to tell this situation as the other shareholder.
>
> Q: Right. So because it was an important issue that affected the company, that's why you felt that you have to consult the Lauw family; correct?
>
> A: Yes.
>
> Q: *So you would agree with me, Mr Ngo, that if there is an important issue affecting the operations or the management of Richvein, you had to consult with the Lauw family before making a decision; agree?*
>
> A:*Yes*.
>
> [emphasis added]

In *Strahan*, the English Court of Appeal similarly regarded Mr Strahan's "participat[ion] in management decisions of the company" as indicative that his relationship with the only other shareholder, Mr Wilcock, "was more a 'quasi-partnership' relationship than a [mere] relationship between a majority shareholder and a company executive" holding a minority share in the company (at [23]).

93 We are, however, unimpressed by Mr Menon's submissions that the existence of "restricted exit options" indicates a greater likelihood of Richvein being *ab initio* a quasi-partnership [note: 23]. Pre-emption rights with respect to share transfers, like those enshrined in Article 30 of Richvein's Articles of Association, are a common feature of many modern company articles and/or shareholder agreements, and on their own do not carry much weight in establishing the existence of any quasi-partnership. Article 30 provides [note: 24]:

> Shares may be freely transferred by a member or other person entitled to transfer to any existing member selected by the transferor, but save as aforesaid, and save as provided by Article 35 hereof, *no share shall be transferred to a person who is not a member so long as any member or any person selected by the Directors as one whom it is desirable in the interest of the*

> *Company to admit to membership is willing to purchase the same at fair value*. [emphasis added]

94 The relative ubiquity and uniformity of pre-emption clauses in present day company articles militate against any argument that special consideration must be given to such "transformational" provisions. Indeed, *pace* O&O's position that "a restriction on the free transfer of the company's shares" is indicative of a quasi-partnership, Tan Cheng Han SC (gen ed), *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005) states at para 11.111 that,

> *[i]n the case of a private company, the transfer of shares must be restricted in some way*. This is commonly done by giving a discretion to directors to refuse to register a transfer, or by stipulating to whom shares may be transferred, or *by giving to the existing members a right to have any shares offered to them first before they can be transferred ('pre-emptive rights')*. emphasis added]

To say, therefore, as O&O does that "a restriction on the free transfer of the company's shares" is indicative of a quasi-partnership is surely to wag the dog with its tail.

95 In any case, as has already been mentioned, on 23 September 2002 O&O's solicitors wrote to HN, seeking the amendment of Article 30 such that all pre-emption rights would be removed. It was therefore O&O that had wanted and effectively procured the removal of Article 30. Given this, it is difficult to see how O&O also then goes on to say that "[t]he fact that Article 30 was subsequently amended as a result of certain actions pursued by [HN] in relation to the Share Transfer … does not detract from the original founding intention behind the joint venture." [note: 25] It appears to us that the existence and subsequent removal of Article 30 is no more than a legal red herring that adds little in any effort to characterise the true relationship of the parties. Article 30 was not intentionally inserted to signify the special relationship between the parties. Likewise, its removal must also be understood contextually. It was prompted by a move from HN to include a new entity, a publicly listed entity, into the original relationship which was strictly between two families. JL had asked for its removal to achieve theoretical parity with HN, who had made it clear that one way or another the shares would be transferred to Bonvests. We use the term "theoretical parity" because the Lauw family's minority interest could not in reality be transferred to a third party without a very substantial discount. HN was clearly cognisant of this: when asked if he would purchase O&O's shares in Richvein, he made a paltry offer of $12.7m (see above at [39]).

96 The originally warm relations between the Lauw and Sianandar families became at best "neutral" – to borrow the term employed by counsel during the course of the appeal – between 1991 (the year in which the difficulty with respect to HIHR arose) and 2002 (the year in which HN transferred Unicurrent's shares in Richvein to Bonvests and attempted to liquidate HS to pave the way for a direct contract with HIHR). Indeed, we can trace the pathology of the breakdown from the increasingly terse and confrontational correspondence exchanged by the parties over the years. From the tenor of the personal letters JL wrote in August 1991 just as the first strains in the relationship appeared (see above at [27]), to O&O's solicitors' letters stating its dissatisfaction with the proposed liquidation of HS in February 2003, it is obvious that the relationship had gradually eroded then corroded and eventually unravelled irretrievably.

97 Given the above and in particular the existence of the Important Decision Term, we accept that Richvein *must* have started life as a quasi-partnership in 1980, an "association founded and intended to be continued on the basis of a personal relationship of mutual trust and confidence" (*Phoenix Office Supplies Ltd v Larvin* [2003] BCC 11 ("*Larvin*") at [39]). In *Larvin*, the English Court of Appeal held that the existence of a common understanding between the only three shareholders of a company

indicated the presence of a *de facto* quasi-partnership. In the course of its judgment, the Court of Appeal stated as follows at [40]:

> This relationship [between the three shareholders] was reflected in the fact that, *although … no legally binding agreement was entered into at (or subsequent to) the meeting held on March 27, 1995* with regard to what should happen to his shareholding if one of the shareholders should leave the company or retire or die, *the matters which were discussed and apparently agreed on that occasion were intended to give form to and put flesh on their relationship of mutual trust and confidence in the conduct of the company's business*. [emphasis added]

The situation in *Larvin*, therefore, was not very different in substance from the one established on the evidence here. The fact that the relationship between the Lauw and Sianandar families began to deteriorate sometime after 1991 *did not change the character of the original relationship*. Accordingly, as a result of events engendered mainly by HN's actions, there was almost certainly a rapidly decaying relationship between the parties from September 2003 onwards. This relationship was to be characterised by curt and eventually confrontational communications about a going concern that had effectively become a listed subsidiary of Bonvests, which in fact owned 70% of Richvein. This was in stark contrast to what the parties must have originally envisaged and how the venture had initially started off: a closely knit relationship underpinned by the private ownership of the shares in Richvein. This fundamental change in the character of the relationship was solely precipitated by HN when he sought to maximise the benefit that the Sianandar family could realise from its investment in Richvein by transferring the Unicurrent shareholdings in Richvein to Bonvests, a publicly held entity.

Did the Related Party Transactions constitute oppression?

98 Quasi-partnership or no quasi-partnership, HN's conduct *vis-à-vis* the Related Party Transactions had, without question, constituted a conscious bypassing of Article 92. In 2005, HN caused Richvein to enter into a management contract with a company he had an interest in without reference to the Board. Again in 2006, he caused Richvein to enter into contracts with companies he had an interest in without Board approval: see [33]–[34] above. However, on the evidence, there had been no harm to the shareholders; indeed, there might even have been some benefit in the form of compliance cost savings in not having to maintain the shell company HS. We also note that there had been the requisite disclosures of HN's interests in Colex (Singapore), IPM and HIHR from as early as 1984.

99 In any case, the decision to contract directly with HIHR appeared ultimately to have been a business decision taken with the strategic interests of Richvein in mind though of course it also appears that Bonvests had benefited from this exercise. In this respect, we are minded to agree with the findings of the Judge summarised at [60] above. However, in assessing this issue in isolation, the Judge did not go on to also consider whether HN's conduct on this issue manifested a proclivity by HN to abuse his majority rights at the expense of O&O whenever there was a collision of interests.

100 Accordingly, while we do not find that a case of oppression made out on this aspect of O&O's claim, this does not mean that the lack of prejudice precludes further consideration of HN's earlier conduct when it comes to assessing holistically the entire manner in which the affairs of Richvein have been conducted apropos O&O to date of which the Related Party Transactions would form a part (see below from [128] onwards).

Did the Share Transfer constitute oppression?

101 At [87]–[89] of the GD, the Judge found that the Share Transfer to be insufficient to

constitute oppression:

> 87 It is undisputed that HN had told [O&O] that he could circumvent the pre-emption rights in Richvein's Articles by injecting Unicurrent into Bonvests sometime before 20 September 2002. *[O&O] might well have viewed this as a threat but it had to take a position*. It could have asserted that this was a breach of the spirit or substance of the Exit Term but it did not do so. Instead, [O&O] used this opportunity to negotiate for the removal of the pre-emption rights in Richvein's Articles which Bonvests agreed to and implemented. *As [O&O] consented to the Share Transfer and obtained the removal of the pre-emption rights, I was of the view that it was not open to [O&O] to complain about the Share Transfer later*.
>
> 88 [O&O] also argued that the Share Transfer rendered it less likely for Richvein to be listed as envisaged under the joint venture, since the Sianandar family could realize its investment in Richvein by selling its shares in Bonvests. In [O&O]'s view, this would result in [O&O], as a minority shareholder, having to deal with people whom it had not intended to work together with. *It seemed to me that since [O&O] had consented to the Share Transfer and obtained the removal of the pre-emption rights for its benefit, it was also not open to [O&O] to raise this complaint*.
>
> 89 In the circumstances, it was not open to [O&O] to try and raise reasons to complain several years later about the Share Transfer.
>
> [emphasis added]

102 With respect, we again have some difficulty with the Judge's views on this issue. One has to first appreciate how O&O found itself embroiled in an impossible situation where it "had to take a position" and why this was done. HN had forced JL into this invidious position. It was plain to us that O&O was stuck between a rock and a hard place. JL was only too painfully aware that HN could have forced the Share Transfer either through a direct sale of Unicurrent's shares in Richvein to Bonvests, or via the back-door approach, with Bonvests acquiring Unicurrent. It is therefore puzzling why the Judge reasoned that O&O "could have asserted that [the back-door approach] was a breach of the spirit or substance of the Exit Term but it did not do so" (at [87] of the GD). The Exit Term, as the Judge had earlier rightly found, was an after thought contrived for the purposes of these proceedings so it should come as no surprise that this was not raised. It is not disputed that O&O was unhappy about the Hobson's choice it had to make. Asserting that the back-door approach was a breach of the spirit or substance of any other understanding was certainly one way in which it could have made its unhappiness known. This would have meant litigation, at an earlier juncture, as it was also clear that HN was going to be unyielding in his desire to transfer the shareholding. Another option was simply for O&O to let HN know that it *was* unhappy. This O&O did in ample measure, as evidenced by HN's frustrated correspondences to LSL and O&O's solicitors in June and September 2002.

103 The point is simply that even though O&O eventually *did* settle for one of the two unhappy alternatives, this did not mean that it could not keep its powder keg dry. Merely because a shareholder does not immediately initiate legal proceedings complaining about treatment unfairly dished out to him does not mean that he is always precluded from doing so subsequently, see *eg*, *Low Peng Boon* at [30]–[31]. Obviously, if Unicurrent's shares in Richvein were going to be transferred whether directly or indirectly, thus *already* defeating the spirit if not the letter of Article 30, it would have made no sense for JL not to similarly excuse himself from that restraint so as to minimise the prejudice that he would have suffered as a result of the Share Transfer. This, however, did not mean that the Lauw family was a willing participant; nor does it preclude the Lauw family from now asserting that it has suffered prejudice in being locked in a new business relationship with a listed

public company that bears no resemblance to the implicit understanding the families had when Richvein was incorporated in 1980.

104 While it is true that the Sianandar family also effectively controlled Bonvests, it cannot be gainsaid that the change in shareholdings precipitated a radical alteration of the parties' existing relationship. Besides the obvious breakdown in trust, Bonvests – as a publicly listed company with distinct legal obligations to not just the Sianandar family but to its own distinct minority shareholders – was a radically different entity and legal proposition from the privately held Unicurrent. The joint venture, we reiterate, was conceived as a closed, two-family partnership, and this was the relationship that underpinned all dealings between the parties until then. In many ways, this resembles the "loss of substratum" that Margaret Chew refers to in *Minority Shareholders' Rights and Remedies* at p 205:

> Where it can be shown that the new or proposed business venture is not one that had been contemplated or agreed upon by the parties upon incorporation, this conduct on the part of the majority may amount to oppressive conduct under section 216 of the Companies Act, since it effectively forces the minority to participate in a corporate venture that he had not expected. His monies are locked into a company with commercial objectives he never considered investing in. …
>
> In particular, in situations of loss of substratum, there may be oppressive conduct even where the majority has offered to buy the minority's shares at a valuation in accordance with the company's articles of association. This is so where the valuation in accordance with the procedure stipulated in the company's articles would result in a return to the minority shareholder that would be less than what he would have received were the company to have been wound up.

105 All things considered, we are of the view that HN's conduct with respect to the Share Transfer (and when seen as a whole) did amount to oppression pursuant to s 216. The change in character of Richvein as a company, from a private one to a semi-public one, was a profound one that manifestly and irretrievably altered the easy and informal relationship the parties had until HN drove a coach and fours through it. We do not agree with the Judge that O&O, which had merely attempted to salvage some theoretical benefit from the high handed behaviour of HN, cannot now complain about it; see above at [103].

Did the Rights Issue constitute oppression?

106 The Judge also found that the Rights Issue had not resulted in any prejudice to O&O, and that in the circumstances both HN and Bonvests had not acted unfairly. An issue that took centre-stage among the Judge's considerations was the fact that JL had himself "torpedoed" the refinancing package (at [103]–[104] of the GD):

> HN had managed to get a re-financing package on better terms, ie, interest being charged at a rate lower than the 2002 Loan. Yet, O&O and JL did not agree to provide their guarantees for 30% of the loan. In evidence from JL, it was clear that the real issue was his being required to provide his personal guarantee when HN did not have to provide a personal guarantee for 70% of the loan. Indeed, after the Share Transfer some years earlier, HN had managed to get himself released as a personal guarantor but JL did not succeed then… This state of affairs irked JL to the extent that he was not prepared to give his personal guarantee for the re-financing package.
>
> Ironically, I found that it was JL who was behaving unreasonably. DBS Bank had released HN and Unicurrent from their respective guarantees because Bonvests, a public listed company, had

given its guarantee (for 70% of the 2002 Loan). JL was therefore not in a similar position as HN since [O&O] was a HK$2 company with its shares in Richvein being its only asset. Yet, JL was adamant about not continuing to provide his personal guarantee. It appeared not to matter to him what disadvantages this would entail. The evidence at trial was that DBS Bank might still have extended a loan but on less favourable terms to Richvein.

107 We again cannot agree with the Judge's conclusion on this point. If Richvein had even mildly exerted itself it seems to us that the requirement for JL's personal guarantee would have been readily dispensed with – indeed, as has already been noted at [45] above, this was almost a certainty given the enormous size of the collateral for the 2002 Loan. This was simply a matter of commercial parity, and HN as a seasoned businessperson must have known that it was unlikely that DBS would stand in the way if it had been pressed in any way. After all, the Hotel would have been more than ample security for the outstanding loan facility. It is again striking that HN did not even begin to try and persuade DBS to offer the same package (without JL's guarantee) or seek alternative funding before rushing headlong into the rights issue without so much as even considering the need for a proper cash flow study, see above from [44] to [50].

108 The Judge then went on to examine the proportionality of the Rights Issue as a response to O&O's intransigence with respect to the refinancing package (at [107]–[108] of the GD):

> *In any event, the crux of the matter was not whether there were other means of raising some or all the money to pay the 2002 Loan but whether the Rights Issue in the circumstances was unfair*. The availability of other means of repayment in itself did not make the Rights Issue unfair.
>
> As mentioned, *HN did not come up with the idea of the Rights Issue at the outset*. The Rights Issue was called because of JL's intransigence. I could well understand HN's frustration. That is why HN's responses in cross-examination, which [O&O] relied on, must be considered in context. It also seemed to me that such responses were also given out of pique.
>
> [emphasis added]

109 We do not think that the question of "whether the Rights Issue in the circumstances was unfair" was the only one the Judge ought to have posed. If there had been other means to pay back the 2002 Loan, or *no* loan was even required in the first place, then plainly the Rights Issue was entirely unnecessary and simply a device to hit back at O&O and dilute the Lauws' stake in Richvein. The Judge ought to have considered whether HN had acted reasonably *contextually* instead of readily exonerating him for acting out of "frustration". In the context of the Important Decision Term, HN had, at the very least, an obligation to seek an appropriate solution to this "difficulty", even if JL was unreasonable, instead of acting precipitously. What makes HN's conduct even more difficult to rationalise or excuse is that there was absolutely no time pressure to resolve this issue urgently: see below at [117]–[122]. It is trite that a director, especially one representing the majority's interests, cannot in law exercise a fiduciary duty *qua* director simply to settle personal scores.

110 As for the issue of the Rights Issue being precipitated by JL's refusal to give his personal guarantee, we see that an entirely different view of the matter could also fairly have been taken on the facts: JL's refusal to give his personal guarantee was borne of HN's *own* intransigence in refusing to assist in extricating JL from the guarantee burden. The following admissions made in the course of cross examination by HN are revealing: [note: 26]

> Q: Mr Ngo … you could have, in November of 2003, you could have gone to DBS Bank to ask for the release of John Loh's personal guarantee and negotiated that, if you wanted to, but you

chose not to do it; agreed?

A: Yes.

Q: And is it your evidence that if John Loh wrote to you directly, instead of to DBS Bank, and told you directly, "I am not happy about having to give a personal guarantee because you don't have to give a personal guarantee", if this had happened in November 2003, is it your evidence that you then would have said, "Okay, I will talk to DBS Bank on your behalf"? Is that what you are telling us?

A: Yes, my honour.

111 We are puzzled and unconvinced by HN's stance. He had been copied on each of JL's letters to DBS and was certainly more than aware that JL was unhappy about having to give a personal guarantee. If he had been sincere in his wish to talk to DBS on JL's behalf, he could have done so easily. Furthermore, JL *had* indeed written to HN expressing his unhappiness over having to give a personal guarantee in October 2006. HN, however, did not respond to this. The further clarification HN gave when the appellant's then counsel pursued this point also merits a reference: [note: 27]

Q: Right. But you agree that in October 2006, when Mr Loh was writing to you telling you he was unhappy about giving a personal guarantee, you didn't do anything of that sort; you didn't go to the bank and try to negotiate? Correct?

A: Correct.

…

Q: Mr Ngo, you see, you have told us that in 2003, if Mr John had written to you, you would have gone to talk to the bank?

A: Correct.

Q: In 2006, when he wrote to you directly, you did not go to the bank. I'm asking you for an explanation as to why. And is your explanation that it would have failed anyway, because "If I had gone to the bank, the bank wouldn't agree"?

A: No it's not say that I fail; I just find – found that if I negotiate with the bank without personal guarantee or corporate guarantee, the bank will charge higher interest rate to Richvein.

112 HN's responses appear to be disingenuous. There was no attempt whatsoever by him to press the bank to offer the same interest rate on the basis that the security was well in excess of the loan and the healthy historical cash flow enjoyed by the business all but eliminated any default risk to DBS. It appears to us, therefore, that HN had been acting not simply out of frustration as the Judge had found, but cynically for a collateral objective. We explain our reasons for taking this view below at [124]–[127].

113 The memorandum written by KBS to HN proposing the different pricings of the Rights Issue (see [47] above) is in our view a highly pertinent, and implicatory item of evidence staining HN's already questionable conduct with indelible dubiousness. The Judge, surprisingly, dismissed this piece of evidence as follows (at [111] of the GD):

> As for KBS' memorandum [dated 2 October 2006], it suggested that HN did consider the possibility that [O&O] might refuse to subscribe for its portion of a rights issue. KBS' memorandum addressed the maximum dilution depending on the pricing but that is different from saying that HN was aiming for a dilution. While the price of $0.38 per rights share might result in maximum dilution, there was no suggestion by [O&O] that the price itself was unjustifiable. *Presumably, Bonvests itself would also want to pay the minimum price justifiable*. [emphasis added]

114 The Judge's reasoning here is mistaken .The pricing of the Rights Issue was quite clearly *premised on a failure by O&O to subscribe at all*. It is obvious that the total amount raised from the Rights Issue would have been the *same* regardless of per-share pricing. Bonvests and the Lauw family would have paid the same amount regardless of the final price decided upon. So why was there an attempt to price the shares at the lowest amount permissible? Patently, the deliberate low pricing of $0.38 (as opposed to the adjusted net asset per share of $1.06) was an attempt to strengthen Bonvests' hand in Richvein in the event that the Lauw family failed to partake in the Rights Issue. This is so as a lower rights price would necessarily entail the issuance of more shares, which pursuant to Article 5 of Richvein's Articles of Association, Bonvests could acquire in full by way of subscribing for excess rights shares in the event O&O fails to subscribe for its portion. The memorandum by KBS on 2 October 2006 could not have been a clearer manifestation of Bonvests' bad faith towards O&O in relation to its shareholding in Richvein. *It is noteworthy that KBS was not called by Bonvests to testify and explain if his memorandum had any other meaning or objective*.

115 In response to O&O's allegation that it had insufficient funds in Singapore at that point of time to pay for the Rights Issue, the Judge observed (at [116]–[117] of the GD):

> In so far as [O&O] was saying that it did not have available funds in Singapore to subscribe, it had known for some time before the EGM that HN was pushing ahead with the Rights Issue.
>
> Besides, *Bonvests also did not have ready cash to subscribe for its portion of the Rights Issue. That was why it was considering taking a loan to do so. It seemed to me that the fact that it was prepared to borrow money at a higher rate of interest than the 2002 Loan* was not so much an indication of its intention to dilute [O&O]'s stake but of HN's frustration with JL. In any event, the subsequent repayments of part of shareholders' loans would have alleviated any temporary need to borrow.
>
> [emphasis added]

116 Two matters are pertinent here: first, that Bonvests too did not have ready cash to subscribe for its portion of the shares potentially to be issued, but yet nevertheless was in a rush to carry through the Rights Issue even though there was no urgency to repay the 2002 Loan; and second, that Bonvests was prepared to borrow money at a higher rate of interest than the 2002 Loan to *repay that same loan*.

117 We first address the timing issue. Richvein was not facing any pressure from DBS to repay the 2002 Loan, which was only due for repayment slightly more than a year later in 2007. HN conceded during cross-examination: [note: 28]

> Q: You could have adjourned the meeting and provided Mr Loh with whatever information he needed for the purposes of coming to a decision as to the rights issue; right?
>
> A: Yes.

Q: But you chose not to do so?

A: Yes.

Q: And it wouldn't have made a jot of difference, because the bank was not chasing for repayment; if you had adjourned it for one month, two months, three months, it would not have made a jot of difference. You agree?

A: Yes, I agree.

118 The inexplicable haste with which the Rights Issue was pushed through meant that no proper cash flow analysis or projections were carried out to assess the need or desirability for the issuance of the new shares. The rejection of JL's repeated requests for the relevant management accounts to perform such a cash flow analysis calls into question the very propriety of the Rights Issue.

119 It should further be noted that there was never any danger of DBS calling an event of default. The 2002 Loan (which at October 2006 had a balance of about $25m) was more than adequately secured by a mortgage of the Hotel, which had been valued at no less than $180m in November 2002.

120 The haste with which the Rights Issue was *implemented* is also highly significant. HN permitted only eight days for JL to raise over $7m to subscribe for the new shares after the vote was taken at the Rights Issue EGM. Two requests by O&O on 1 and 2 November for just *one week's* extension of the deadline were ignored (see above at [51]–[52]) despite the utter lack of urgency for the funds.

121 During cross-examination, HN admitted that the requests for an extension of time to make payment were deliberately ignored so as to make it difficult for O&O to subscribe for the rights shares: [note: 29]

Q: … And you see that this is a letter dated 1st November by the plaintiff to Richvein, and it's attention to you and Mr Kwa. They asked for an extension of one week, right, from the 3rd to the 9th of November 2006, slightly less than a week.

A: That's correct.

Q: And it would not have made a difference if payment was made slightly late, one week late; right? It would not have made a difference to Richvein. Correct?

A: Yes.

Q: But you didn't agree to this; correct?

A: Correct.

Q: And in fact, you didn't even bother to reply to this request for extension; right?

A: That's correct.

Q: And this is because you were frustrated and unhappy with John Loh; right?

A: That's correct.

Q: And you wanted to make things difficult for him to comply with the deadline of 3rd November; correct?

A: That's correct.

This pattern of cynical conduct is entirely consistent with the reference in KBS' memorandum, dated 2 October 2006, (above at [47]), to the fact that if JL was unable to subscribe to the Rights Issue the new share issue at the proposed price would dilute the proportion of Lauw family's stake in Richvein to the maximum extent possible.

122 Admittedly, there was nothing inherently wrong in trying to repay the 2002 Loan, even if it was a year in advance of the deadline. But, as held in *Howard Smith Ltd v Ampol Petroleum and others* [1973] AC 821, the issue of shares for any reason other than to raise capital – for instance, to dilute the voting power of others – amounts to a breach of fiduciary duties by the directors of the company and may be set aside by the court. Further, if directors representing majority shareholders abuse voting powers by voting in bad faith or for a collateral purpose, oppression can be said to have been established: see *Polybuilding (S) Pte Ltd v Lim Heng Lee and Ors* [2001] 2 SLR(R) 12 ("*Polybuilding*"). In this regard, we are in agreement with Mr Menon's contention that the lack of urgency for new funds – especially when contrasted with the speed at which the issue of new shares is carried out – is often a good indication of what the true objective of the rights issue is. The raising of capital for a company is always a serious matter that merits careful consideration. This is particularly so if it could have consequences that might affect the proportion of shareholdings in a quasi-partnership type company.

123 The fact that Bonvests was willing to borrow at a higher rate of interest than the 2002 Loan (4.5% compared to 3.83%) to pay back that same loan through subscribing to its share of the Rights Issue is even more damning. The following exchange when HN was cross examined says it all [note: 30] :

Q: So Bonvests was prepared to borrow money at a higher rate to pay off part of a loan which had a lower interest rate; right?

A: Yes.

124 In any case, in the final analysis, it can be confidently said that there had been really no valid commercial justification for the Rights Issue. HN conceded during cross-examination that *without* the Rights Issue, Richvein would have been able to repay $19m of the total outstanding loan of $25m by August 2007, thus leaving a balance of only $6m to refinance when the 2002 Loan fell due in November 2007. There would have been no difficulty refinancing the balance of the loan in November 2007, given the availability of the Hotel as security for any new loan facility. We also find the rapid sequence of shareholder loan repayments made not long after the Rights Issue rather remarkable, to say the least. About a month after the Rights Issue (which raised the total sum of $25,080,000, of which $7,524,000 came from O&O alone), Richvein repaid shareholder loans amounting to $3m. In a letter dated 15 December 2006 responding to JL's queries about the sudden repayment of shareholders' loans, Richvein stated that it could do so because it had "surplus funds in excess of [its] operational requirements". [note: 31] Altogether $14,441,736 was repaid to the shareholders between 5 December 2006 and 30 August 2007. *Why then had the Rights Issue even been undertaken without a proper study of the cash flow requirements of the company?* To our minds, this is unassailable evidence that the Rights Issue was ill-conceived and hastily executed for a dubious objective.

125 It is also telling that Richvein's first-ever dividends in thirty years were declared in the second half of 2007, *less than a year after the Rights Issue in November 2006*. On 11 May 2007, HN wrote to JL in response to the latter's queries about Richvein's dividend policy: [note: 32]

> Currently, priority should be to reduce shareholders' loan. Company will consider declaring dividends to shareholders after the shareholders' loan are fully repaid, *subject to cashflow requirements, investment needs and adequacy of reserves*. [emphasis added]

It is certainly paradoxical that HN suddenly became concerned about Richvein's cash flow only *after* the Rights Issue had been muscled through! Indeed, given that Richvein had been profitable since 2002, [note: 33] it was odd that a proper cash flow analysis had not been carried out – if not in 2002, then in any of the intervening profitable years – prior to the major decision concerning the Rights Issue. This was an issue that JL, as a director representing a significant interest in Richvein, ought to have been fully briefed on prior to the Rights Issue to enable him to properly discharge his duties *qua* director.

126 Further, it has also not been denied that alternative avenues of funding – banks other than DBS, financial institutions and Richvein's own cash flow – were not seriously explored. Indeed, there had not even been any attempt to negotiate with DBS as to the best interest rate possible should there be no personal guarantee from JL. At this juncture, it is worthwhile to note that there is more than a hint of hypocrisy in HN's alleged motivation in securing the best interest rate for the refinancing package (see [111] above); for he was ready to arrange for Bonvests (a listed public company) to take up a new loan to subscribe for the Rights Issue at an interest rate that was approximately 0.7% higher than that for the 2002 Loan!

127 This entirely unnecessary haste in deciding on and muscling through the Rights Issue, coupled with the complete absence of any commercial justification for the exercise is a testament to just how capricious the whole process was. It smacked of an abuse of rights. In this connection we note that the Lauw family had plainly suffered prejudice from the Rights Issue: they had been put to considerable inconvenience to put up extra capital (and incurred not insubstantial interest payments and the loss of the use of a large sum of money) for no valid commercial reason because they had no real alternative but to fend off a barely-concealed and ill-conceived attempt to dilute O&O's shareholding in Richvein.

Summary

128 The court, where oppression is alleged, has to have regard to all the circumstances and take into consideration the cumulative effect of the impugned conduct. In the light of all of the events rehearsed above, we are of the opinion that the Rights Issue and the Share Transfer, viewed in conjunction with the overarching background of the Related Party Transactions, comprised clear evidence of unfairness that amounted to oppressive conduct against O&O. This was not a case of just a single isolated act or episode of minority oppression, but rather a deliberate *course of conduct* that steadily grew in brazenness with the passage of time. The Lauws have in all invested some $47.1m into Richvein. To date they have earned no returns whatsoever from their investment; they received no remuneration and, further, earned no dividends, until after it was plain to all that the Rights Issue had raised entirely unnecessary capital. On the other hand, the Sianandar family had, by the transfer of their shareholdings to Bonvests, effectively unlocked the value of their shareholdings in Richvein.

129 While HN's actions in the Related Party Transactions were insufficient on their own to justify

any finding of oppression, they reinforce the perception that HN had been in the habit of riding roughshod over the Lauw family's interests in Richvein when it mattered. In the final analysis, there is no gainsaying that the Rights Issue – even if it was not engineered to dilute the Lauw family's shareholding in Richvein – was a disturbingly disproportionate response to an allegedly "difficult" minority shareholder which was insisting on the strict observance of its legal rights. The absence of any reasonable commercial justification for this precipitative and imprudent course of action taken by HN is strongly redolent of commercial unfairness and the abuse of majority rights in a corporate setting. In the result, the Rights Issue proved to be one step too far and became the proverbial straw that broke the camel's back, culminating in the present proceedings.

130 The touchstone in any oppression action is fairness. By any yardstick, HN, and the shareholders he represented, had repeatedly conducted (in the instances referred to above) the affairs of Richvein in a commercially unfair manner that has also occasioned grave prejudice to O&O. We also find that as a quasi-partnership between Bonvests and O&O existed, the Rights Issue alone – as an instance of "single act" injustice – would have been sufficient basis for a finding of oppression pursuant to s 216.

Conclusion

131 In the circumstances, the appeal is allowed. There is obviously no residual goodwill or trust left between the parties and therefore we do not think it would be right for O&O's shareholding to remain tied up with the company in a broken and bitter relationship. Nor do we think it would be appropriate for us to attempt to regulate future conduct of the company's affairs. The appropriate relief in this case is to permit O&O to realise the value of its shares at a fair value pursuant to s 216(2)(*d*) of the Companies Act.

132 As the breakdown in the relationship between the parties was entirely precipitated by HN's inappropriate conduct we do not think that it would be fair for O&O to sell its shares in Richvein to Bonvests at a discount on the basis of its minority stake. It is to us a crucial consideration that there are also no other minority interests involved and were Bonvests to purchase O&O'shareholding in Richvein it would become the sole shareholder of a valuable asset. In the light of this, we are of the view that the appropriate order is to have the fair market value of Richvein ascertained by an independent valuer. The parties are to agree on the appointment of an independent valuer and if they are unable to do so within 14 days from the date hereof they are to write to this court to appoint same. The independent valuer is to assess the value of Richvein on the basis of the fair market value of its assets *as of the date of this decision*. Within 14 days of receipt of this independent valuer's valuation, Bonvests is to decide whether it will purchase the entire shareholding of O&O on the basis of this valuation. Such a purchase should be completed within three months of Bonvests' decision. In the event Bonvests elects not to purchase O&O's shares in Richvein, then O&O may proceed to wind up Richvein and appoint an independent liquidator to realise and distribute its assets. The costs of the liquidation, if this happens, are to be paid from the assets of Richvein.

133 O&O is to have the costs of the proceedings here and below with the usual consequential orders to apply. Parties are at liberty to apply in relation to the modalities involved in implementing our directions.

[note: 1] Appellant's Core Bundle vol 2 ("ACB2") at p 107.

[note: 2] ACB2 at p 68

[note: 3] ACB2 at p 69

[note: 4] Record of Appeal Vol 5 (Part 3) at 6260.

[note: 5] Transcript dated 30 July 2008 at pp 46-48.

[note: 6] Lines 4-23, Transcript dated 30 July 2008 at p 8.

[note: 7] ACB2 at p 111.

[note: 8] Lines 10-11, Transcript dated 28 July 2008 at p 42.

[note: 9] Line 4, Transcript dated 28 July 2008 at p 82.

[note: 10] ACB2 at pp 114–115.

[note: 11] Lines 20-23, Transcript dated 28 July 2008 at p 61.

[note: 12] Audrey Tan, "Chairman sells Sheraton Towers stake to Bonvests" (Business Times 18 March 2003) in Agreed Bundle of Documents, Volume 9 at pp 3681-3682 (Record of Appeal Vol 5 (Part 10)) at pp 8788-8789).

[note: 13] Bonvests Holdings Limited Circular to Shareholders dated 27 June 2003, Record of Appeal Vol 3 Part 6 at p 1794.

[note: 14] Transcript dated 28 July 2008 at pp 96–97; Record of Appeal Vol 3 Part 11 at pp 3210–3211..

[note: 15] ACB2 at pp 138–139.

[note: 16] Transcript dated 29 July 2008, at pp 37–38.

[note: 17] Appellant's Case at para 76.

[note: 18] Record of Appeal Vol 5 (Part 14) at p 10010.

[note: 19] Affidavit of Evidence-in-Chief of Henry Ngo filed on 25 June 2006 at para 5; Record of Appeal Vol 3 (Part 4) at p 1060.

[note: 20] 1st Respondent's Supplemental Core Bundle at p 90.

[note: 21] Record of Appeal Vol 5 (Part 14) at p 9990.

[note: 22] Transcript dated 28 July 2008 at pp 19-20.

[note: 23] Appellant's Case at paras 108–109.

[note: 24] ACB2 at p 165

[note: 25] Appellant's Case at para 109.

[note: 26] Transcript dated 28 July 2008 at pp 97-98.

[note: 27] Transcript dated 28 July 2008 at pp 115-116.

[note: 28] Transcript dated 29 July 2008 at pp 40-41.

[note: 29] Transcript dated 29 July 2008 at pp 76–77.

[note: 30] Lines 11-14, Transcript dated 29 July 2008 at p 92.

[note: 31] Record of Appeal Vol 5 (Part 15) at p 10266.

[note: 32] Record of Appeal Vol 5 (Part 16) at p 10513.

[note: 33] Record of Appeal Vol 3 (Part 4) at p 1101 and Record of Appeal Vol 3 (Part 1) at p 195.

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