Swiss Butchery Pte Ltd *v* Huber Ernst and others and another suit [2010] SGHC 129

Case Number : Suit No 245 of 2008/V consolidated with Suit No 222 of 2008/W

Decision Date : 27 April 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Hee Theng Fong, Noelle Seet, James Lim and Clare Lin (KhattarWong) for the plaintiff; Johnny Cheo Chai Beng (Cheo Yeoh and Associates LLC) for the first defendant; Muthu Arusu (Tan Rajah & Cheah) for the second to fifth defendants; Kirpal Singh (Kirpal & Associates) for the sixth defendant.

Parties : Swiss Butchery Pte Ltd — Huber Ernst and others

Companies

27 April 2010 Judgment reserved.

Woo Bih Li J:

Introduction

1 The plaintiff Swiss Butchery Pte Ltd ("SB") was in the business of retail and wholesale butchery and production operations. In Suit No 245 of 2008/V ("Suit No 245"), SB claims against the first defendant, Huber Ernst, and second defendant, Huber Ryan Ernst, for breach of their duties as a director and an executive of SB respectively and for the tort of conspiracy. Further, SB claims against the other four defendants for, *inter alia*, conspiracy and dishonest assistance. In Suit No 222 of 2008/W ("Suit No 222"), Huber Ernst claims against the other shareholders of SB for relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for oppression against a minority shareholder. By an Order of Court dated 7 July 2008, both suits have been consolidated and the trial of Suit No 245 proceeded before Suit No 222.

2 SB made numerous allegations in Suit No 245 which centred around SB's allegation that Huber Ernst diverted SB's wholesale and production operations to Huber's Pte Ltd for the benefit of Huber Ernst and his two children. There was also a claim for defamation against Huber Ernst and the sixth defendant, Thomas Norbert Kreissl, but this was withdrawn during the proceedings. [note: 1] Further, the defendants in Suit No 222 have offered to buy out Huber Ernst's shares in SB without admission of liability in respect of the allegations of oppression [note: 2] and it became unnecessary to go into such allegations which, in any event, overlapped with the allegations in Suit No 245. I will be giving directions separately on matters pertaining to the valuation of Huber Ernst's shares for the buy-out.

The relevant law and legal principles

3 Before considering the facts, I will set out the applicable legal principles pertaining to the various causes of action *viz*, directors' duties, the tort of conspiracy and dishonest assistance.

The law on directors' duties

4 Section 157 of the Companies Act provides for the general duties owed by a director as

follows:

> 157—(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

5 It is trite that the courts will not interfere with a management decision which is exercised in a *bona fide* manner. As stated in *Walter Woon on Company Law* (Sweet & Maxwell Asia, Third Ed, 2005) ("*Walter Woon*") at paras 8.34 and 8.35:

> 8.34 It is not for the court to gauge what the interests of the company are. It has been said that 'directors must exercise their discretion bona fide in what they consider (not what a court may consider) is the interests of the company'. The courts do not sit as courts of appeal over decisions of management. As Lord Wilberforce put it in *Howard Smith Ltd v Ampol Petroleum Ltd*:
>
> > Their lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.
>
> 8.35 This is judicial recognition of the fact that different people can have different opinions about what is good for a company and in its interests. Directors may take risks with the company's property where they honestly believe that to do so is in the company's interests. This is indeed the essence of entrepreneurship. Just because a director makes a wrong decision does not mean that he has breached his fiduciary duty to the company. The above dicta imply that the test is subjective and the courts will not interfere in a management decision.

6 The above passage in *Howard Smith Ltd v Ampol Petroleum Ltd* ("*Howard Smith*") quoted in *Walter Woon* has been accepted in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ("*Intraco Ltd*") at [325] where the Court of Appeal considered that the transactions entered into by the directors were based on a management decision which in retrospect, turned out to be a poor decision. As the decision was arrived at *bona fide*, the directors were not in breach of their fiduciary duties.

7 In the House of Lords decision of *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134, Viscount Sankey stated at 137 thus:

> … The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cesti que trust*. The earlier cases are concerned with trusts of specific property: *Keech v Sandford per* Lord King LC. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity. …

8 In the same case, Lord Russell of Killowen similarly stated the strict rule of equity at 144 as follows:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to

the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

9 In *Phipps v Boardman* [1966] 3 WLR 1009, Lord Upjohn in his dissenting judgment stated the nature of a fiduciary at 1066 thus:

> Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is *the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict*. …[emphasis added]

10 In *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, Roskill J held at [452]-[453] that the managing director of a company was liable for a breach of his fiduciary duties because he used information obtained while he was the company's managing director for his own personal purposes and profit, thereby putting his personal interest in direct conflict with his pre-existing and continuing duty as managing director.

11 Similarly, in *CMS Dolphin Ltd v Simonet and another* [2001] 2 BCLC 704 ("*CMS Dolphin*"), Lawrence Collins J held at [96] that the underlying basis of the liability of a director who exploits a maturing business opportunity of the company after his resignation is that the opportunity is to be treated as if it were property of the company in relation to which the director had fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property. The director becomes a constructive trustee of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest and exploited it by resigning from the company.

12 It is thus clear that while the court will not question a management decision which was exercised in a *bona fide* manner, anyone who owes a fiduciary duty is not allowed to enter into transactions in which he has a personal interest conflicting with the interest of those whom he is bound to protect. More particularly, a director is not allowed to make use of information obtained while he was a director of the company in question or to exploit a maturing business opportunity of the company for his own personal purposes and profit. Any profit so obtained will be subject to a constructive trust in favour of the company.

The law on conspiracy

13 As held by the Court of Appeal in *Quah Kay Tee v Ong & Co Pte Ltd* [1996] 3 SLR(R) 637 at [45], there are two types of tort of conspiracy – conspiracy by unlawful means and conspiracy by lawful means:

> The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is the additional requirement of proving a "predominant purpose" by all the conspirators to cause injury or damage to the plaintiff, and the

act is carried out and the purpose achieved.

14 In *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [23], Prakash J summarised the elements that must be satisfied to prove both forms of conspiracy:

> In order for the claim of conspiracy to succeed, the elements that have to be satisfied are the following:
>
> (a) a combination of two or more persons and an agreement between them and amongst them to do certain acts;
>
> (b) if the conspiracy involves lawful acts, then the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff but if the conspiracy involves unlawful means, then such predominant intention is not required;
>
> (c) the acts must actually be performed in furtherance of the agreement; and
>
> (d) damage must be suffered by the plaintiff.

15 In *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318 ("*Lim Leong Huat*"), Andrew Ang J held at [34]-[35] that it is not the law that intention or purpose to cause injury or damage to the plaintiff is not relevant to a conspiracy by unlawful means. Ang J cited *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 where Nourse LJ pointed out that it is still necessary to establish an intention or purpose to injure, but such intention or purpose need not be predominant. In *Lim Leong Huat*, it was held that, where a director has acted in a *bona fide* manner within the scope of his authority but nevertheless causes injury or damage to a plaintiff, a claim of conspiracy against him will fail.

16 As for the definition of what constitutes "unlawful means", the Court of Appeal in *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 stated at [120] that the element of unlawfulness covers both a criminal act or means, as well as an intentional act that is tortious. The Court of Appeal cited the House of Lords decision in *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 where Lord Walker of Gestingthorpe said at [93]:

> [A]ll the statements of general principle in the classic cases seem to me to be consistent with the proposition that unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it).

17 With regards to the burden of proof of establishing a claim under the tort of conspiracy, in *Seagate Technology Pte Ltd and anor v Goh Han Kim* [1993] 3 SLR(R) 836, Thean JA stated at [15] that a high degree of proof is needed to discharge the burden of proving an allegation of conspiracy by unlawful means. Similarly, in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd* [2006] 4 SLR(R) 451, Phang J stated at [93] that, although the standard of proof is still the civil standard based on the balance of probabilities, the amount of proof required was higher than that required in a normal civil action.

18 In Suit No 245, SB pleaded its case based on both types of the tort of conspiracy. The case based on the tort of conspiracy by unlawful means is based on its allegation that the defendants

"wrongfully and with intent to injure [SB] and/or cause loss to [SB] by unlawful means conspired and combined together to defraud [SB] and to conceal such fraud and the proceeds of such fraud from [SB]." [note: 3] On this ground, SB's claim would succeed so long as the defendants intended to cause harm to it. There is no need to prove the existence of such a "predominant intention".

The law on dishonest assistance

19 The law on dishonest assistance has recently been clarified by the Court of Appeal in *George Raymond Zage III and another v Ho Chi Kwong and anor* [2010] SGCA 4 ("*George Raymond Zage III*") where V K Rajah JA reiterated the elements of a claim in dishonest assistance at [40] thus:

> The elements of a claim in dishonest assistance are: (a) the existence of a trust; (b) a breach of that trust; (c) assistance rendered by the third party towards the breach; and (d) a finding that the assistance rendered by the third party was dishonest (see generally Bansal Hermant Govindprasad and another v Central Bank of India [2003] 2 SLR(R) 33 ("Bansal") and Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd [2002] 2 SLR(R) 94 ("Caltong")). …

20 Prior to *George Raymond Zage III*, it was uncertain as to whether the test for honesty in a claim under dishonest assistance is an objective test or whether it is a composite test with both an objective and subjective element (see *Bansal Hermant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33; contrast *Malaysian International Trading Sdn Bhd v Interamerica Asia Pte Ltd and anor* [2002] 2 SLR(R) 896). However in *George Raymond Zage III*, V K Rajah JA cited Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd [2006] 1 All ER 377 ("Barlow Clowes"), where the Privy Council affirmed that the objective test of honesty laid down in Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378 was the applicable test and that the decision in Twinsectra Ltd v Yardley [2002] 2 All ER 377 did not depart from this test. It is worthwhile reiterating Lord Hoffman's speech in *Barlow Clowes* (at [15]):

> Their Lordships accept that there is an element of ambiguity in [Lord Hutton's] remarks which may have encouraged a belief, expressed in some academic writing, that the Twinsectra case had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to 'what he knows would offend normally accepted standards of honest conduct' meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were. [emphasis added]

21 The Court of Appeal in *George Raymond Zage III* thus affirmed that the test for dishonest assistance is an objective test: for a defendant to be liable for dishonest assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.

The relationships among the various parties

22 It is appropriate to set out the nature of the relationships among the parties. The persons relevant to these proceedings are as follows:

(a) Foo Chee Tan ("Don Foo");

(b) Foo Yong Peing ("Mark Foo"), son of Don Foo;

(c) Huber Ernst ("Ernst"), the first defendant;

(d) Huber Ryan Ernst ("Ryan"), the second defendant and the elder son of Ernst;

(e) Huber Andre Rudolf ("Andre"), the third defendant and the younger son of Ernst;

(f) Huber's Butchery ("HB"), the fourth defendant;

(g) Huber's Consultancy ("HC");

(h) Huber's Private Limited ("HPL"), the fifth defendant;

(i) Thomas Norbert Kreissl ("Thomas"), the sixth defendant;

(j) Wang Ngaip Wah ("Wang"), the father of Wong Chow Kim, Wong Huai Lam and Wong Siew Ngoh *nee* Huber;

(k) Wong Chow Kim ("Alex");

(l) Wong Huai Lam ("Don's wife"); and

(m) Wong Siew Ngoh *nee* Huber ("Ernst's wife").

23 Wang is the father of Ernst's wife, Don Foo's wife and Alex. [note: 4] Ernst is the father of Ryan and Andre. In 1994, SB was incorporated to carry on the business of wholesale and retail butchery. SB carried on its business at 30 and 32 Greenwood Avenue Singapore 289230 ("Greenwood Avenue"). [note: 5] Ernst, Wang and Don Foo were the first subscribers of SB [note: 6], with each holding on to a $1 share. Together with Ernst's wife, they were the first directors of SB with Ernst as the Managing Director from 1994 to 2 January 2008 when his employment was terminated. On 18 January 2008, he was removed as a director. [note: 7]

24 In December 2002, Don Foo resigned as a director and transferred his shares in SB to his wife in January 2003. Nevertheless, he continued to attend meetings related to SB as her proxy and at all material times, acted on her behalf in respect of SB's affairs. [note: 8] In 2004, the share capital of SB was increased to $15,000, with each shareholder having 5,000 $1 shares. [note: 9]

25 On 5 September 2005, Wang resigned as a director of SB and transferred all the SB shares registered in his name to Alex, who was appointed as a director on or about 20 September 2006. [note: 10] Don Foo was later reappointed as SB's director in December 2007. [note: 11]

26 At all material times, the true shareholders of SB were Ernst, Alex and Don Foo. It was clear that SB was set up pursuant to an agreement between these three persons. It is not disputed that it was agreed that Ernst was to operate the business but that he consulted with Alex and Don Foo from time to time on major matters pertaining to the business. The extent to which he consulted them and ought to have consulted them was in dispute as I shall elaborate below.

27 Ryan was appointed as SB's Deputy Managing Director from 26 April 2005 to 30 September 2006. Although Ryan was not appointed to the board of directors of SB, it is not disputed that he was to assist Ernst and was the "No. 2" in the management of SB's operations. Andre returned to Singapore from Australia in January 2006 after graduating from RMIT University with a Bachelor of Business with distinction in 2004. He was appointed as SB's Sales and Marketing Executive from 1 February 2006 to 30 September 2006. As for Ernst's wife, she was removed as a director of SB together with Ernst on 18 January 2008. [note: 12]

28 HB, the fourth defendant, is a sole proprietorship registered on 30 May 2007 and is wholly-owned by HPL, the fifth defendant. HB is and was at all material times in the business of retail of sale of meat. [note: 13] HPL was incorporated by Ryan on 17 September 2005 with a paid-up capital of $100,000 with Ryan as its Managing Director. [note: 14] HPL's paid-up capital was subsequently increased to $400,000 when Andre joined HPL in 29 March 2006 as a Sales Director with a shareholding equal to Ryan's. [note: 15] Like SB, HPL is in the business of wholesale and retail butchery. [note: 16] On 22 January 2008, Ernst joined HPL as a director after his removal from SB.

29 Thomas was SB's Operations Manager from May 2005 to March 2008. In the same month after he left SB, he joined HPL as a General Manager. HC was registered by Ernst in September 2005.

The chronology of events

30 It is important to bear in mind certain events which took place from the period of June 2005 to January 2008 ("the milestone events") in evaluating the respective cases. The milestone events are set out as follows:

(a) the rejection by Alex and Don Foo of a share issue proposal and a share purchase offer by Ernst in June and July 2005;

(b) the incorporation of HPL in September 2005 by Ryan with a paid-up capital of $100,000;

(c) the viewing of properties for a factory outlet by Ernst, Ryan and Andre from January to March 2006;

(d) Andre joining HPL and the increase of HPL paid-up capital to $400,000 in March 2006, with

200,000 shares to Ryan and Andre each;

(e) the allegation that Alex told Ernst in May or June 2006 that it was a mistake to bring Ryan and Andre into SB;

(f) the purchase of a property at 161 Pandan Loop ("the Property") in July 2006;

(g) the allegation that others were misled about the relationship between SB and HPL;

(h) the divestment of SB's wholesale and production operations in March 2007 to HPL;

(i) the alleged ratification by Alex and Don Foo of the divestment;

(j) a Business Times article on HPL in August 2007;

(k) a letter from Alex and Don Foo to Ernst after the Business Times article;

(l) a talk and tour for the Swiss Association of Singapore at the Property in December 2007; and

(m) the removal of Ernst as Managing Director and the removal of Ernst and Ernst's wife as SB directors in January 2008.

Rejection of share issue proposal and share purchase proposal and the incorporation of HPL

31 Prior to June 2005, Ernst would attend weekly family gatherings held on Saturday evenings with his wife at Wang's house ("weekly gatherings"). Similarly, Don Foo, Alex and their spouses would attend the weekly gatherings. [note: 17] During these weekly gatherings, apart from informally discussing the general affairs of the various families and their children, Don Foo, Alex and Ernst would also informally discuss the business of SB. Ernst would inform both Alex and Don Foo on relevant matters and they would ask him any questions which they wished to know about SB. [note: 18] However, after June 2005, Ernst stopped attending the weekly gatherings and he had since visited Wang's house only once during Chinese New Year in 2007 in circumstances which I shall elaborate on later. [note: 19]

32 The incident which sparked off a chain of events leading to these proceedings was a meeting. Ernst had met with Alex and Don Foo at Polo Club on 8 June 2005. Ryan was also in attendance. At this meeting, Ernst suggested that SB issue Ryan with 6,000 shares at a price of $14.64 per share ("Share Issue Proposal") in order to provide Ryan with an incentive to stay on in SB with the view that he would eventually succeed Ernst. Each of the three shareholders was then holding 5,000 shares. The Share Issue Proposal, if accepted, meant that Ernst and Ryan would hold 11,000 out of 21,000 shares, *ie*, a majority. Ernst handed over a letter containing, *inter alia*, this proposal but Alex and Don Foo merely said they would consider it.

33 The Share Issue Proposal was rejected by way of a 3-page letter dated 18 June 2005 ("Letter of Rejection") drafted by Alex and Don Foo which was handed to Ernst's wife at one of the weekly gatherings. [note: 20] Apart from rejecting the Share Issue Proposal, the Letter of Rejection also stated their disapproval of the appointment of Ryan as the Deputy Managing Director of SB which was apparently done without their knowledge and his salary of $6,500. [note: 21] As admitted in cross-examination, Ernst was very angry with the contents of the Letter of Rejection and he stopped

attending the weekly gatherings from then on. [note: 22]

34 There was a dispute as to whether Ernst had directly told Alex and Don Foo that he had employed Ryan for SB. I am of the view that he did not do so although they might have heard about it in the weekly gatherings but they were unaware of his actual salary.

35 On 4 July 2005, Ernst made a different proposal to purchase all the shares of the other shareholders in SB at a mutually agreeable price ("Share Purchase Proposal") [note: 23] but this was rejected on 14 July 2005. [note: 24] Following this, on 17 September 2005, HPL was incorporated.

36 SB claimed that Ernst bore a grudge against the other shareholders for rejecting the Share Issue Proposal and the Share Purchase Proposal and thus he embarked on a series of wrongful actions which effectively transferred SB's wholesale and production operations to HPL and hence Ryan and Andre. [note: 25] The first preparatory step in this plan, according to SB, was the incorporation of HPL. I would add that although SB did not list out all the preparatory steps which it was relying on in the action in the particulars of its pleadings, I do not think it was necessary to do so as long as the main thrust of its allegations had been pleaded and the defendants were not caught by surprise to the extent that they were unable to respond to the allegations.

37 Owing to the proximity in time between the rejection of the Share Issue Proposal and the Share Purchase Proposal in June and July 2005 respectively and the incorporation of HPL in September 2005, Ernst and Ryan sought to explain the circumstances surrounding HPL's incorporation. Ernst stated in his affidavit of evidence in chief ("AEIC") that Ryan was "crushed by this rejection and felt that he had no future in [SB]". [note: 26] When Ryan told him about the incorporation of HPL, Ernst persuaded him not to leave SB and to prove his worth to the other shareholders. Ernst also stated that he had hoped to turn the other shareholders around to eventually accept his proposal for Ryan to obtain shares in SB once they see the valuable contribution that Ryan was making to SB. [note: 27]

38 For his part, Ryan stated that after rejection of the Share Issue Proposal and Share Purchase Proposal, he became concerned over his job in or about August 2005 and he made the decision to start his own company and incorporated HPL in September 2005. He admitted in trial that the intended business of HPL would be the production and wholesale of sausages and meat products and that HPL's potential customers would include the then-existing customers of SB, including Shangri-la and Four Seasons, *etc*. [note: 28] However, Ryan similarly testified that Ernst persuaded him to give SB another 'go' in the hope that the other shareholders would come around. He then shelved his plans to run his own business. [note: 29] He repeatedly stated that HPL was only meant to be some sort of security and that it was dormant in September 2005. [note: 30]

39 However, the evidence militates against finding that Ernst had asked Ryan to give SB another 'go' or that Ryan agreed to do so. First, the other shareholders were very firm in their rejection of the Share Issue Proposal. In the Letter of Rejection, it was clearly stated that:

> 2. Swiss Butchery was jointly started by 3 partners Ernst, Don and Alex. Ernst approached Don and Alex to start up the business as he had recently lost his job. Don and Alex have indicated right from day one that both have no knowledge of this speciality and agreed to take the risk to join this business venture and giving full trust and faith in Ernst by putting in money to start up the Butchery business. Each party put in about S$200k x 3 = S$600k total for start up. Ernst had just sold his house and therefore, could afford participating with S$200k. Ernst agreed to be the key man running the business full time with salary paid from investment fund…

...

6. Our agreement to go into this specialized business is to realise gains and profitability, and grow the business long term so that the three families can all enjoy the profits together. The equal percentage holding was discussed and agreed unanimously at the very start of the partnership and that we all shared the business risks equally.

7. After 11 years into the business, and just when we are beginning to realize our business return in a small way. What was in the mind of the working managing director now with his proposal of additional share issue and majority shareholding." [note: 31]

40 Similarly, in the rejection of the Share Purchase Proposal, the language used was plain:

"Please be informed that we have no intention to sell our shares as you have requested". [note: 32]

41 Given the clear words used, it was hard to believe that Ernst had hoped to change the other shareholders' mind to eventually accept his proposal for Ryan to be a shareholder of SB with new shares. Another important factor against such a finding is that Ernst stopped attending the weekly gatherings because he was very angry after he received the Letter of Rejection. [note: 33] Thereafter, there were only three or four meetings, at a coffee shop near Greenwood Avenue, where the discussions were apparently not forthcoming or pleasant. Why would Ernst who was in effect severing his ties with Alex and Don still want his son to continue working in SB? Did Ernst really hope to turn his in-laws around? I do not think so.

42 Although Ernst's wife had testified that Ernst continued to go for the weekly gatherings after September 2005 until 2007, [note: 34] this evidence was roundly contradicted by all other witnesses, including Ernst himself. Taking into consideration the uncertain nature of Ernst's wife's evidence when answering questions during cross-examination, I attached no weight to her evidence.

43 I also did not find Ernst or Ryan to be a credible witness on material points. For example, Ernst said that he realised that arithmetically the Share Issue Proposal which he made would put him and Ryan in majority control but he also claimed that it was never his intention to have such control. Ernst and Ryan also said that Ernst only realised that they would gain majority control during a discussion with Ryan on their way to the meeting at Polo Club on 8 June 2005. In my view, the 6,000 new shares was not an arbitrary figure. It was calculated to give them majority control and Ernst knew this all along and not only when he had a discussion with Ryan on the way to the meeting.

44 Ryan suggested that the reason for trying to acquire majority control in SB was so that his efforts put into SB would not be wasted. There was some fear that Alex and Don Foo might otherwise try and sell the business to a third party as Alex had brought third parties to view Greenwood Avenue. In his AEIC, [note: 35] Ryan stated at para 15 the following:

At that time, I was concerned to see that our efforts and hard work in building up SB should not be "wasted", and wanted EH and myself to have more than 50% of the shares in SB, which would allow us to run the business without the risk of Alex Wong and Don Foo selling their shares and giving control of SB to a third party. SB's auditors had prepared a pricing of the shares for our discussion.

45 I do not accept this reason. It would have been very difficult to sell the business without

Ernst's consent as the person running the operations and having a one-third stake in the business. Furthermore, the Articles of Association of SB provide a pre-emption right for existing shareholders in respect of shares held by the other shareholders. Article 28 of SB's Articles of Association states:

> 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 33 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 the fair value.

46 If Alex and Don Foo had really intended to sell their shares in SB, Ernst would be able to exercise his pre-emption right for the shares under the Articles of Association. In my view, Ernst must have felt that he was the person mainly responsible for SB's success. He was not content to remain as a minority shareholder. Neither was he content to let Ryan put in as much effort as he had done in SB unless his family had majority control.

47 Also, HPL's start-up capital was $100,000. Although Ryan was registered as the sole shareholder, the $100,000 was provided by Ernst. [note: 36] If HPL was really intended to be a dormant company, there would have been no reason to start up with such a substantial sum of money. When cross-examined, Ryan testified that in late August 2005, he went to see SB's company secretary, Miss Chua from Prima Management Pte Ltd, and told her that he wanted to set up his own company. She then informed him that the paid-up capital to be filled in the application form was the amount that he wanted to put into the bank. [note: 37] He then decided on $100,000 despite not having the sum. [note: 38]

48 Even then, Ryan's evidence did not explain why he came up with a figure of $100,000 instead of a nominal figure of, say, $2. Ernst's evidence that he gave $100,000 to Ryan even though HPL would not be operational and that it was a backup plan was unconvincing. There was no plausible reason why, Ernst, an experienced businessman, would have given his son $100,000 to be locked up in a company which was to remain dormant. This conduct is hardly consistent with the assertion by Ernst that he had managed to persuade Ryan to stay in SB and to prove his worth to the other shareholders.

49 It is not in dispute that Ernst was already involved in the manner stated above, in the incorporation of HPL in September 2005 after the earlier rejection of the Share Issue Proposal and the Share Purchase Proposal. In my view, Ernst was taking a preparatory step in a conspiracy with Ryan, a conspiracy which was eventually to involve Andre , to divert the wholesale and production operations from SB to HPL.

Ernst, Ryan and Andre viewed properties

50 SB alleged that, from January to March 2006, Ernst and Ryan had visited factories for the benefit of HPL in breach of their fiduciary duties to SB. Andre had joined them for those visits after he retuned in January 2006.To establish this allegation, SB relied on certain photographs found in its computers showing them visiting factories in various locations. [note: 39] Ernst did not deny that they were looking at properties but he testified that they were looking at factory space for SB which was short of space at Greenwood Avenue. Ryan and Andre were then still at SB and he hoped that they could expand SB if they had stayed there. [note: 40] One factor which might support this position is that the photographs were found in SB's computers which could indicate that they might have indeed been looking at factory space for SB.

51 However, this was not the end of the matter. Under cross-examination, Ernst admitted that in early 2006, there was no discussion between him, Alex and Don Foo on the possible acquisition of a factory for SB. [note: 41] As stated above, Ernst would discuss major matters of SB with them. Yet, he did not even inform them about the potential acquisition of a property for a factory outlet, an issue of substantial importance. In contrast, when SB opened a retail outlet in Ridgewood Condominium in 1997 or 1998, this was known to both Alex and Don Foo through discussions with Ernst. [note: 42] Even during the operation of the retail outlet, they had discussions at the weekly gatherings (before Ernst stopped attending) on how to improve the business at that outlet which was not doing well. [note: 43]

52 Also, when a representative from NTUC Fairprice Co-Operative Limited ("NTUC Fairprice"), Mr Chandra Das, approached Ernst in 2001 to ask if SB would be interested in opening an outlet in the NTUC supermarket in Parkway Parade, Ernst had discussed the proposal with Alex and Don Foo. [note: 44] Don Foo's version of events after the discussion differs from Ernst's version in that he stated that he had told Ernst to discuss further with Mr Chandra Das but Ernst did not give any further updates on the proposal. [note: 45] On the other hand, Ernst testified that the proposal was rejected by Alex and Don Foo. [note: 46] Nevertheless, the important point in my view was that a discussion indisputably took place.

53 Contrasting the approach taken by Ernst in the above two incidents with the approach taken when he viewed the various properties with Ryan and Andre from January to March 2006, I am of the view that it was unlikely that Ernst was viewing properties in early 2006 for SB. In addition, Ernst had stated that SB faced space constraint in its operation and that was the number one reason (in terms of importance) why SB ceased its wholesale operations in March 2007. [note: 47] According to Ernst, he only made the final decision to stop SB's wholesale and production operations in January 2007. [note: 48] Space constraint must therefore have been a continuing problem at least from January 2006 to January 2007. Yet, there was no evidence that he took any further step after March 2006 to look for factory space for SB. Instead, it was Ryan who found a property for HPL around July 2006 in circumstances which I shall elaborate on.

Increase of HPL's capital from $100,000 to $400,000

54 Andre stated that he returned to Singapore in January 2006 because Ernst was not in the best of health and he wanted to learn from Ernst and Ryan who had been his "role models". [note: 49] Consequently, he joined SB on 1 February 2006 as a Sales and Marketing Executive. Andre stated that when Ryan told him in March 2006 about HPL's earlier incorporation, he saw a future in working with his brother and hence he joined HPL as a shareholder and director. [note: 50] He added that he felt a little unsafe about his position in SB. [note: 51] The paid-up capital of HPL was then increased to $400,000 on 29 March 2006 and the money was again provided by Ernst. [note: 52]

55 Both Ryan and Andre insisted that they had chosen $400,000 because they felt that it was the right amount as a form of security and that it was an arbitrary figure. [note: 53] Also, HPL was intended to remain dormant at that time. [note: 54] Again, just like at the incorporation stage, the substantial increase in the capital of HPL (by $300,000) begged the question as to why such a huge sum of money was needed for a dormant company.

56 In my view, the increase in HPL's capital showed that Ernst, Ryan and Andre were preparing to use the $400,000 for HPL. This constituted the next step in the conspiracy to divert business operations of SB to HPL following the incorporation of HPL in September 2005 and the viewing of various properties from January to March 2006.

57 Although the fact that Andre joined SB could be said to be an indication that he had wanted to work in SB, the totality of evidence went against such a conclusion. More likely than not, he had joined SB with the intention of biding time; he was waiting for HPL to be fully operational. As will be seen from the subsequent paragraphs, during his time in SB, Andre established contacts with existing and potential clients of SB which proved useful for HPL later.

Alex alleged to have said it was a mistake for Ryan and Andre to join SB

58 According to Ernst, Ryan and Andre, the incident which sparked Ryan's and Andre's departure from SB was that Alex had said in a coffee-shop meeting around May or June 2006 with Ernst and Don Foo that it was a mistake for Ernst to bring his two sons into SB. [note: 55] Ryan stated that Ernst told him about this and he was "deeply demoralized" and he told Ernst and Andre that he no longer felt any motivation to work at SB. [note: 56] As for Andre, he felt very disappointed and that was when Ryan and he decided that they had no future in SB and that it was best if they struck out on their own. [note: 57]

59 SB failed to call Alex as a witness to rebut the allegation of what he purportedly said. As such, I draw an adverse inference against SB under section 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed). On the other hand, as Alex was alleged to have said the above in a meeting where Don Foo was present and Don Foo had denied the allegation there was some evidence to counter the allegation. [note: 58] However, this in itself was insufficient to overcome the adverse inference. Additional evidence would be needed to which I now turn.

60 In Ernst's initial defence during the pleading stage, he did not make any reference to this allegation at all. Even in his amended defence, all that was stated in para 9 of his pleading was:

> In or about 8 June 2005, the 1st Defendant had proposed to the other shareholders that in view of the 1st Defendant's age, Ryan should continue in the Plaintiffs when the 1st Defendant retires. Accordingly, the 1st Defendant had, in or about 8 June 2005, proposed that the Plaintiffs issue and allot 6,000 new shares to Ryan as an incentive for him to stay on with the Plaintiffs. *However, the other shareholders of the Plaintiffs did not agree to this proposal and both Ryan and Andre eventually left the Plaintiffs' employment in or about 20 September 2006*. [note: 59] [emphasis added]

61 The omission to allude to the alleged statement by Alex was glaring to say the least. It was mentioned by Ernst only in his AEIC. Also, for Ryan and Andre, this allegation was included only by way of amendment to their pleadings. [note: 60] It was incredible that the catalyst (as alleged) for the departure of Ryan and Andre from SB and the subsequent operation of HPL would be treated with such scant attention by all three of them during the earlier stage of the proceedings.

62 In addition, the circumstances were such that it was unlikely that Alex would have said that it was a mistake for Ryan and Andre to join SB if Ernst and his family did not have majority control. As stated above, Ernst was the person in charge of SB's operations. Having Ryan and Andre's assistance in SB would only provide greater benefits to SB while at the same time, control in terms of

shareholding would not be conceded to them. This would have been the best of both worlds for Alex and Don Foo and there would be no reason for Alex to have complained at all for the extra help except perhaps for any difference of views over the salaries of Ryan and Andre when he came to learn about the same.

63 In my view, the allegation about Alex's statement was an afterthought in order to explain the earlier viewing of properties in January to March 2006 and to justify Ryan's and Andre's departure from SB on 30 September 2006 in order to concentrate on their activities in HPL.

Purchase of property at 161 Pandan Loop

64 Ryan stated that, after hearing from Ernst what Alex was alleged to have said in May or June 2006, he became aware of a food factory for sale, *ie*, the Property. [note: 61] He paid a deposit of $7,250 on 15 July 2006 for the option to purchase the Property for $725,000 ("purchase price"). [note: 62] It was not disputed that Ryan had made the payment of the deposit for HPL's purposes and that he was still the Deputy Managing Director of SB at that point in time. Neither was it disputed that he did not offer the opportunity to acquire the Property to SB. [note: 63] He had admitted that the Property was suitable for the purposes of SB and that SB was supposedly still looking for a property in July 2006. [note: 64] He should therefore have offered the opportunity to SB.

65 On 31 July 2006, Ernst exercised the option to purchase by making a payment of $29,000. [note: 65] According to Ryan, he was unable to obtain a bank loan of 80% of the purchase price from either the Development Bank of Singapore Ltd or Hong Leong Finance Limited because HPL was not in operation yet and because of his existing salary of $6,550. [note: 66] Hence, he asked Ernst for assistance and the latter approached Hong Leong Finance Limited which was willing to offer him a loan. However, Jurong Town Corporation ("JTC"), the landlord of the Property, informed Ernst that because the Property was a commercial property, it could not be purchased in the name of an individual. [note: 67] Consequently, Ernst registered a sole proprietorship, HC, and used it to apply for a loan from Hong Leong Finance Limited for 50% of the purchase price, *ie*, $363,000. The loan was subsequently granted on 12 September 2006 with Ryan and Andre acting as guarantors. [note: 68] The monthly instalments for repayment of the loan were paid by Ernst through HC. [note: 69]

66 As stated in the preceding paragraph, Ernst exercised the option to purchase on 31 July 2006. This goes against Ernst's evidence in his AEIC that Ryan approached him for financial assistance only in October 2006. He stated at para 89:

> Sometime in October 2006, Ryan asked me for assistance as he could not obtain a loan of $363,000.00 from Hong Leong Finance to finance the purchase of a factory space for use by HPL as he was just starting out and did not have a track record. I met the branch manager at Hong Leong Finance at Beauty World and was told that a commercial property cannot be purchased in the name of an individual.

67 Ernst eventually made payment for the balance of the purchase price of the Property with part-payment from the loan. He returned the deposit of $7,250 to Ryan or HPL on 23 August 2006. HC thus obtained the remaining lease of the Property. On 20 November 2007, HC entered into a tenancy agreement with HPL to lease the Property to HPL. [note: 70]

68 The position taken by Ryan in his AEIC and the evidence at trial in relation to the circumstances

surrounding the purchase of the Property was inconsistent with that taken at the pleadings stage where it was stated at para 9(h) in his defence that:

> "The 2nd Defendant only sourced for factory space for his own intended business operations well after he left the employment of the Plaintiffs in September 2006, and thereafter secured the lease of the premises at 161 Pandan Loop in November 2006." [note: 71]

The above demonstrated a crucial inconsistency in Ryan's position. During trial, he had accepted that when he came to know that the Property was for sale in June 2006, he had already decided to acquire the Property for HPL.

69 In addition, although Ryan insisted that he had purchased the Property without any certainty of further support from Ernst, [note: 72] it is implausible that Ryan and Andre would have committed themselves to the acquisition of the Property, as well as the additional cost of machinery and renovation, without first ensuring that they would obtain some form of support from Ernst in terms of finance and business.

70 From the time when HPL was incorporated to the purchase of the Property, Ernst had supported Ryan and Andre financially to the tune of about $800,000 (HPL's paid-up capital of $400,000 and $384,000 cash as part-payment for the Property, the rest being paid by the $363,000 loan). Furthermore, Ernst contributed another $400,000 towards the purchase of machinery and for renovations to the Property which cost a total of around $1.1m. [note: 73] The level of financial commitment by Ernst clearly shows that he was a part of, if not integral to, the plan of diverting some of SB's operations to HPL.

Misleading others of the relationship between SB and HPL

71 Ernst in his evidence stated that in January 2007, he made a "strategic decision" that SB should focus only on its more profitable retail business and give up its wholesale and processing operations. [note: 74] This was implemented in March 2007 by diverting these operations to HPL. Ryan and Andre testified that they had made clear to others from the beginning that SB and HPL were separate and independent entities.

72 However, when one considers the evidence in the following part of this judgment, it is obvious that instead of making the separation clear, Ernst, Ryan and Andre had misled both employees and third parties who had dealings with SB to think that SB was related to HPL in order to facilitate the divestment of some of SB's operations to HPL and to facilitate the start-up of HPL's own operations.

Employees of SB

73 Several employees and ex-employees of SB such as Joan Say Ju Li ("Joan Say"), Casile Joyce Marie ("Marie"), Tan Heng Hwa ("Tan HH"), Tan Ker Wee ("Tan KW") and Yeow Jia Tian ("Yeow JT") testified that they were under the impression that SB and HPL were related companies.

74 Joan Say was employed by SB as an administrative officer in February 2007 and left on 16 November 2007. [note: 75] She re-commenced employment with Swiss Butchery Food Industries Pte Ltd ("SBFI") on 20 May 2009. [note: 76] Joan Say had stated in her AEIC that in March 2007, she was instructed by Ernst and Thomas to forward all faxes and phone orders meant for SB to HPL as wholesale orders would from then on be handled by HPL. She was under the impression that SB and

HPL was affiliated and HPL was a subsidiary of SB as HPL was run by Ryan and Andre. [note: 77]

75 In cross-examination, Joan Say clarified that Andre had, with the knowledge of Ernst and Thomas, instructed her to forward these faxes. Ernst had told her that Andre would tell her what to write for the faxes. [note: 78] When wholesale customers like Four Seasons Hotel and Goodwood Park called to ask for a written explanation about HPL, she was told by Ernst and Thomas to inform them that all of SB's wholesale orders had been taken over by HPL. [note: 79] This she did. In three of the introductory faxes, it was provided that:

> This is to inform you that Swiss Butchery's wholesale and production operations have been taken over by a new and modern factory under the name of Huber's Pte Ltd with effect from 12th March 2007.
>
> The above factory conforms to the latest hygiene and production standards by incorporating ISO 22000 as well as HACCP.
>
> Should you have any queries, please contact Andre Huber of Huber's Pte Ltd at 8XXX XXXX.
>
> For all your orders, please contact Eunice of tel. no. 6XXXXXXX or fax no. 6XXXXXXX.
>
> We hope this good news and change will further improve the value and quality of our supplies to your esteemed and quality-conscious company.

76 When further elaboration was sought by customers, another set of faxes was sent to them. In two of them, it was provided that:

> Dear Sir/Madam
>
> This is to inform you that Swiss Butchery has re-located its wholesale and production operations to a new and modern factory under the name of Huber's Pte Ltd. Kindly note the following details.
>
> Contact Person: Andre Huber
>
> Designation: Sales Director
>
> Company name: Huber's Pte Ltd
>
> Address: 161 Pandan Loop, Singapore 128456
>
> Telephone: 6XXXXXXX
>
> Fax: 6XXXXXXX
>
> This relocation has been effective 12th March 2007. Any invoices received prior to 12th March 2007 will be paid to Swiss Butchery Pte Ltd. Any invoices received on and after 12th March 2007 will be paid to Huber's Pte Ltd. If in doubt, payment should be made to the company that appears on the top of the invoice.
>
> The new factory conforms to the latest hygiene and production standards by incorporating ISO 22000 as well as HACCP.

Should you have any queries, please contact Andre Huber of Huber's Pte Ltd at 8XXXXXXX.

For all future orders, please contact Eunice at tel. no. 6XXXXXXX or fax no. 6XXXXXXX.

We hope this good news and change will further improve the value and quality of our supplies to your esteemed and quality conscious company.

77 Joan Say testified that Andre was the one who called her and sent her an email with the content to write for the introductory faxes and when she showed Ernst the introductory faxes, he had waved to her and asked her to "go ahead, fax it". [note: 80] Ernst had denied in cross-examination that he had seen these introductory faxes until much later. [note: 81] However, when informed by counsel that in his AEIC, he had alluded to this correspondence, [note: 82] Ernst clarified that what he meant was at the time of affirming his AEIC, he had seen those faxes. [note: 83] This seemed to be an attempt to dissociate himself from any knowledge of the contents of the introductory faxes before they were sent, especially when he admitted that a reader would form the impression that the modern factory under the name of HPL would be part of the SB group. [note: 84]

78 Joan Say also testified that the content of the faxes on elaboration came from Andre. Andre testified that he did not tell Joan Say to state that SB's wholesale and production operations had been taken over by HPL's factory [note: 85] and that he did not see the text of the faxes before they were sent out. His position was that even though he had given her instructions to send the faxes, he did not tell her to use the term "taken over" but to state that SB had "stopped" and to recommend HPL. [note: 86] He further testified that Joan Say sent out the faxes without his input on the full details of the faxes. [note: 87]

79 I find Joan Say to be the more credible of the two witnesses, *ie*, Joan Say and Andre. Even if I were to believe Andre, which I do not, Andre admitted that he had seen the introductory faxes about one or two weeks after they had been sent. [note: 88] Yet he chose not to correct the purported errors because "what was done is done". [note: 89] In my view, he did not correct them because they contained what he wanted them to say.

80 As for Marie, she was employed by SB as an administrative assistant in or about May 2007 and Joan Say was her direct superior. She formed the impression that SB, HPL and HB were related companies when Joan Say told her that they were all run by the same people and the only difference was that HPL mainly dealt with wholesale business while SB did the retail business. [note: 90] Marie stated in her AEIC that after Joan Say left SB in or about October 2007, Thomas had told Marie to continue with the practice of forwarding fax orders sent to SB by wholesale customers to HPL and giving HPL's contact number to phone-order customers for them to place their orders with HPL directly. [note: 91]

81 An important witness was Tan KW, who was employed by Swiss Butchery since October 2006 as a sales executive. Tan KW testified that during this time, Thomas had in one of the weekly staff briefings said that SB's wholesale and meat processing operations would no longer be at Greenwood Avenue and would be moved to Pandan Loop and that two employees would be transferred to Pandan Loop, namely Mike Tan and Johnny. [note: 92] In a separate briefing, Thomas told them that if any customer went to SB's shop at Greenwood Avenue to place orders around closing hours, the staff was to re-direct them to the NTUC Bukit Timah outlet ("NTUC Finest"). This evidence was corroborated by Yeow JT although he could only state that the date of the briefing was before June 2007 and he

could not remember whether it was Ernst or Thomas who conducted the briefing. [note: 93] I note that Thomas did not deny that he had told the employees that SB would be closing its production at Greenwood Avenue (although he disputed the use of the word "transfer") and to re-direct retail customers who went to Greenwood Avenue nearing its closing hours to the outlet at NTUC Finest. However, his position was that he had done so on the instructions of Ernst. [note: 94]

82 Tan KW was under the impression that SB and HPL belonged to the same company and that Mike Tan and Johnny were "still under one roof working with us together at a separate location at a new factory called Huber's Factory." [note: 95] He stated that during the relevant period of time, it was made known to the majority of the staff of SB that SB was either a sister or related company of HPL. Tan KW also testified that apart from redirecting calls from wholesale customers to HPL, there was even a telephone number with Andre's and Ryan's name written on a small note placed just beside the phone in SB's retail shop. [note: 96] Such friendly cooperation served to reinforce to the employees that HPL was in some way related to SB.

83 Another witness called to establish that the employees' general impression was that SB and HPL were related was Tan HH. As Tan HH is currently unemployed, he would have little or no incentive to lie. Tan HH was a Butcher Supervisor and started working for SB since March 2005. Like the above witnesses, Tan HH testified that he was under the impression that SB and HPL were related because Ernst was one of the directors of SB and HPL was operated by his sons. [note: 97] It can be seen that the employees (or ex-employees) were under the impression that SB and HPL were related. If the defendants had indeed been clear to the employees as to the distinction between SB and HPL, it would hardly have been likely that such a misconception would have arisen.

Email with supplier for own brand name

84 Apart from the employees, the email between Ernst, Ryan and Andre and third parties revealed that they were creating the impression that SB and HPL were related. For instance, in a chain of email during the period of September 2006, it was revealed that they initially had a discussion with a supplier, Australian Lamb Company Pte Ltd ("ALC"), about having their own brand name for their products. The first meeting took place with a John Verrell way back in May 2006. [note: 98] On 29 September 2006, Greg Haines, another representative of ALC, [note: 99] sent an email to sales@swissbutchery.com addressed to Andre Huber which states as follows:

> Hi Andre,
>
> John Verrell discussed with your dad & I think you or your brother back in May, offering you your own brand with your Company name.
>
> Please confirm you are happy to do this & send details for the printing of your own brand….

85 In Andre's email dated on the same date, he stated thus:

> Hi Greg,
>
> It would be great if we could have our own brand. I will have to brainstorm some possible brand names with my brother. Please let me know if you have any to recommend.
>
> Commencement date looks to be pushed back to late November – early December. This is due to

the delay in machinery arriving from Germany. I will keep you updated on the progress.

86 Ernst had stated that SB chose not to proceed with the proposal in May 2006 because of costs issues. [note: 100] It has to be noted that counsel for SB had put two different versions of his case to Ryan and Andre respectively. With Ryan, SB's position was that the opportunity for a brand name was offered to SB way back in May 2006 but Ryan converted the opportunity for the benefit of HPL subsequently. [note: 101] As for Andre, SB's position was that the opportunity in May 2006 was offered to HPL at inception.

87 Despite the ambiguity in SB's own position, one thing was clear to me. Ernst was synonymous with SB. The contact with John Verrell must have arisen from business dealings with SB. John Verrell would have thought Ernst, Ryan and/or Andre was representing SB unless it was made clear to him that Ernst was representing SB while Ryan and/or Andre was representing HPL. The meeting with John Verrell was in May 2006, *ie*, before Ryan or Andre had even tendered their notices of resignation dated 31 July 2006 and 31 August 2006 respectively from SB. All three must have been representing SB then. Furthermore, the email from Greg Haines suggested that he was thinking of Ernst and Ryan representing the one and the same company, *ie*, SB. Andre's email reply did not clarify the situation but continued with the deception. The reference to the commencement date was then referring to the commencement of HPL's factory.

Discussion with NTUC Fairprice representatives

88 Another example supporting the allegation that Ernst, Ryan and Andre had actively misled third parties in order to divert business opportunities of SB to HPL concerned the discussion between Ernst, Ryan and Andre and representatives from NTUC Fairprice, namely Lester Lee, Victor Chai and Poh Sen Kah in October 2006 regarding the opening of a butchery counter in NTUC Finest at Bukit Timah Plaza. Ernst's version was that he had met up with the NTUC Fairprice representatives initially. He decided that SB would not be interested because SB had allegedly already rejected an NTUC proposal in 2001. He had asked the NTUC Fairprice representatives to talk to Ryan and Andre, *ie*, with HPL instead. At the next meeting, he was merely having coffee with the NTUC Fairprice representatives and when Ryan and Andre arrived, he left after doing the introductions. [note: 102] Similarly, Andre testified that Ernst merely introduced them and left. [note: 103] He insisted that he and Ryan had clarified that SB and HPL were separate companies. [note: 104]

89 However, the subsequent email which took place after the two meetings suggests otherwise. On 6 October 2006, Poh Sen Kah's email was sent to sales@swissbutchery.com and was addressed to Ernst. The relevant content of the email is as follows:

> Dear Mr. Ernst Huber,
>
> …
>
> 1) Mr. Ernst Huber have brief us that Swiss Butchery production section will be moving out to a new premise under a different name "Huber company" and can be ready by end Nov 2006, he further stress that the new production house will be to producing more Sausages and Hams to supply and to retailer either pre-packed or bulk.
>
> 2) … Swiss Butchery will draft up a proposal for Fairprice for further discussion, do let us know the date so that we can followup.

…

If there is any points that I have missed out, kindly put it into this mail for everybody. [note: 105]

90 As can be seen, contrary to Ernst's assertion that he merely introduced Ryan and Andre at the second meeting and left thereafter, the email stated clearly that it was Ernst who conducted the briefing. Further, on 13 November 2006, Lester Lee, who was the Fresh Food Task Group Manager of NTUC Fairprice, also sent an email to sales@swissbutchery.com addressed to Ernst. The content of the email is as follows:

Hi Mr. Ernst Huber,

The time have pass very fast, believed that you have settled down the new production plant soon and started the Year End Sales.

The new layout plan for Bukit Timah Plaza store is finalize, please do let me know when we can meet again to discuss further with our planned in your convenience time.

Hope that you can spare some time for us to explore the whole project… [note: 106]

91 As can be seen, the email from NTUC Fairprice representatives were sent to sales@swissbutchery.com and addressed to Ernst. More importantly, the contents of Poh Sen Kah's email clearly showed that Ernst was the one who had briefed them about SB moving out to a new production house under a different name "Huber company". This went against his assertion that the NTUC Fairprice representatives were clearly told otherwise.

92 Although Andre repeatedly claimed he had stated clearly to the NTUC Fairprice representatives that SB and HPL were separate, this was not borne out by the evidence. He stated that he always corrected Lester when he called them SB even right up to the time HPL opened. [note: 107] Yet when given the chance to correct the misconception in writing, he did not utilise it. In Poh Sen Kah's email, he had specifically stated that "If there is any points [*sic*] that I have missed out, kindly put it into this mail for everybody." This clearly would have been an opportune moment for Ryan and Andre to clarify any error as to the relationship between HPL and SB but instead, nothing was done.

93 It is unlikely that representatives from an established commercial entity such as NTUC Fairprice would have formed the mistaken impression that SB and HPL were related to each other if it had been explained clearly (and repeatedly) to them that they were separate. More likely than not, Ernst, Ryan and Andre were using SB's name to mislead the NTUC Fairprice's representatives in order to obtain the contract for opening a retail counter at NTUC Finest. The contract was eventually awarded and the retail outlet was operated by HPL through HB. Although Ryan and Andre said that they did not view SB as a competitor of HPL, the fact remained that way back in October 2006, there were already negotiations with NTUC Fairprice to open the butchery counter at NTUC Finest which was undeniably a retail business. HPL was thus competing with SB.

Email to potential wholesale customers

94 Another series of email also revealed that Andre had tried to create the false impression that SB and HPL were related. [note: 108] In November 2006, one Puja Pawa sent an email to sales@swissbutchery.com addressed to Andre concerning the purchase of "swiss butchery products" for his café and it was stated that Andre had mentioned in a previous meeting that he would only be

able to supply him after October. The reply on 14 November 2006 from Andre is telling:

> Dear Puja,
>
> Sorry for the delay in mailing back but I am currently busy with setting up a factory.
>
> The factory will be running under a different name but will be handling the wholesale side of the business. Products will be the same as the Swiss Butchery price list but hopefully prices will be reduced slightly. I am in the midst of coming up with a revised price list. The factory will only be operational in early January. I will contact you once I have the new product / price list to arrange a suitable meeting date. I can be better contacted at andre@hubers.com.sg. [note: 109]

95 It is worth remembering that Andre had already left the services of Swiss Butchery in November 2006 but yet he was still having access to SB's email account. The reason given was that he was trying to help his father. While I accept that he did try to help his father from time to time, he should not have been involved with SB's operations given his intentions for HPL. He should not have been allowed continued (and sole) access to SB's email account and even sending replies which appeared to emanate from SB. Nowhere in his email reply did he state that SB and HPL were separate. True, he stated that he could be contacted at his new email address but more importantly, he had stated that the new factory would be running under a different name and "will be handling the wholesale side of the business." This clearly gave rise to the inference that the only change would be the name of the factory but the product would still be similar to SB's products with a revised price list. I do not think that a reference to a different price list was enough to alert Puja Pawa that this was a completely different set-up.

Correspondence with OBE Organic

96 In response to an email inquiry from Dalene Brook, a representative of another supplier, on 21 November 2006, Andre replied thus:

> Hi Dalene,
>
> …
>
> My brother and I have been busy setting up the factory. This factory will be manufacturing the sausages and ham as well as handling the wholesale side of the business. My dad is still running the retail shop and is currently the person placing orders with you… [note: 110]

97 Again, there is no mention of the separation between SB and HPL. A reader would probably infer from the email that the new factory (which in this case would be HPL's factory) would be a factory of SB and that it would be handling the wholesale side of SB's business.

Correspondence with magazine "Wine & Dine"

98 There was yet another instance where Andre had been misleading a third party about the relationship between SB and HPL. On 1 December 2006, one Jolene Limuco from a magazine publication Wine and Dine asked whether SB would be willing to assist the magazine in their January feature on food manufacturers. Again, this inquiry was sent to the same email account of SB as mentioned. [note: 111] In his reply on 2 December 2006, Andre stated:

> Hi Jolene,

> I trust you are well and feeling as jolly as I am about the upcoming festive season! Sorry but I am unable to assist you for a January feature. Firstly Swiss Butchery is simply too busy during this period and secondly, we will be shifting our production and wholesale business over to the factory in January. The factory is run under a separate company name so doing a feature now will confuse readers. However I will be more than happy to assist you in features once the factory is up and running sometime in mid-January. The factory will place high emphasis on food safety and will utilise modern machinery and equipment to produce high quality products for our customers. [note: 112]

99 Under cross-examination, Ernst had admitted that the word "we" in the email would appear to an ordinary reader to mean SB. [note: 113] Therefore, it in effect suggested that the existing production business of SB would be shifted to the new factory, *ie*, the Property.

Supplies of Meat Products to Brewerks

100 SB also called upon Tan Leng Chuan ("Tan LC"), the executive chef of Brewerks Restaurant, Singapore, Riverside Point Branch ("Brewerks") to give evidence. As the executive chef, he was in charge of sourcing, purchasing and ordering food supplies including fresh meats for Brewerks. He testified that Brewerks had been purchasing its meat supplies from SB since 2002. In early 2007, Andre approached him and told him that SB would be expanding its operation in the name of HPL. [note: 114] According to Tan LC, Andre had told him that SB and HPL were run by the same people and that in future, all orders should be placed with HPL and all invoices would be issued by HPL. Apart from this change, the arrangement for the purchase orders remained the same as when Brewerks were purchasing from SB, *ie*, placing orders with the same clerk and having the same delivery person, *ie*, Kelvin Goh. Tan LC was thus under the impression that SB and HPL were the same. [note: 115]

101 In cross-examination, Tan LC affirmed that Andre had told him that SB and HPL were the same company. [note: 116] When questioned about Brewerks renewing their purchase of meat products from SB in April 2008, Tan LC stated that Brewerks stopped its purchase from HPL because of the many occasions in end 2007/early 2008 when poor quality meat was delivered on Saturdays. He finally decided to stop purchasing from HPL after it delivered less ground beef than agreed for on one Saturday. [note: 117] He added that he had initially not called SB when sourcing new suppliers as he thought that they were the same. It was only when a supplier told him that SB and HPL were separate companies that he contacted SB to purchase from it again. [note: 118]

Conclusion on this issue

102 All the above incidents showed that Ernst, Ryan and Andre intended to, and in fact, took active steps to mislead others into believing that SB and HPL were related. They did so in order to ensure that the divestment of SB's operations would be accompanied by the divestment of SB's business contacts for wholesale and production. Ernst suggested that since SB had ceased its wholesale and production operations, it was only in line with good customer service that SB direct its customers to alternative suppliers or even one particular supplier (in this case HPL) if SB was confident in HPL's quality. However, the various steps undertaken by Ernst, Ryan and Andre from September 2005 to March 2007 show clearly that they were embarking on an elaborate plan to wrongfully deprive SB of some of its business operations in the first place. Also, Andre was able to familiarise himself with the nature of SB's wholesale business and at the same time gain valuable access to SB's wholesale customers. This facilitated the divestment of SB's wholesale and production

operations in March 2007 to HPL, to which I now turn.

Divestment of SB's wholesale and production operations in March 2007 to HPL

103 In March 2007, SB ceased its wholesale and production operations which were taken over by HPL. Ernst testified that he made the decision to cease the wholesale and production operations in January 2007 because of the following reasons which were listed in their order of priority:

(a) space constraint problem at Greenwood Avenue;

(b) fear of losing the Agri-Food & Veterinary Authority of Singapore licence ("the AVA licence");

(c) Ernst's health problems;

(d) continuation of SB's business should anything happen to Ernst;

(e) relative profitability of retail business and wholesale business; and

(f) competition with other players in the wholesale business industry.

Space Constraint Problem at Greenwood Avenue

104 With regards to the alleged problem of space constraint at Greenwood Avenue, Ernst stated in his AEIC at paras 62-63:

> Although the Company had in 2000 moved to its premises in Greenwood Avenue, these were now seriously inadequate for the Company's whole range of retail and wholesale business as well as the manufacture of sausages and processing of meat products. In addition, housed in the premises was the retail outlet, an office and cold room/chiller to store products. Apart from the Greenwood premises, the Company had also rented storage facilities in Kallang for its raw and unprocessed meat.
>
> The company could not continue on this basis without acquiring new premises, hiring more staff, buying more equipment and possibly opening a factory all of which would greatly increase the Company's costs and overheads.

105 At trial Ernst stated that the most important reason for the cessation of wholesale business was the space constraint problem at Greenwood Avenue. As discussed above, although Ernst was viewing properties for a factory together with Ryan and Andre from January to March 2006, which according to them was for SB's purposes, there was no evidence that he took any further step towards this end after March 2006. Yet, about four mouths later, in July 2006, the Property was purchased by HPL using a substantial financial contribution from Ernst. As stated above, Ryan admitted that the Property purchased by HPL was also suitable for SB which according to him, was still looking for a factory at that time. [note: 119]

106 Although Ryan insisted that he did not inform Ernst about the Property before he paid the deposit of $7,250 for the option to purchase the Property, [note: 120] I do not accept this evidence. Ernst had already provided the first $400,000 for HPL. Ryan was still under employment in SB as its Deputy Managing Director and at that time, he was staying with Ernst. [note: 121] Considering the amount of time they spent with each other on a daily basis and Ernst's earlier financial support, Ryan

must have consulted Ernst before the placement of the deposit. Hence, if Ernst was acting *bona fide*, he should have discussed with Alex and Don Foo about a possible acquisition of the Property by SB in order to deal with the alleged space constraint problem. It is not disputed that he did not do so.

107 Accordingly, I am not convinced that the alleged space constraint problem was a reason, much less the crucial reason for the cessation of SB's wholesale and production operations in March 2007. If the problem existed, it could have been solved by SB acquiring the Property but instead, Ernst contributed financially for HPL to do so. I now turn to the other alleged reasons.

Fear of losing the AVA licence for Greenwood Avenue

108 Ernst stated that the fear that the AVA would not renew SB's licence for production at Greenwood Avenue was another important reason for the cessation of SB's wholesale and production operations. He explained that the AVA would eventually not renew SB's licence as SB was not supposed to get the licence for Greenwood Avenue because it was a residential area and that AVA had made an exception for them. [note: 122] In addition, whenever officers from AVA went to Greenwood Avenue for inspection, they would ask him when he would stop the production operations. [note: 123]

109 However, apart from Ernst's assertion, there was no evidence that AVA had ever threatened not to renew SB's licence at Greenwood Avenue. Ernst did not call upon any officer from AVA to give evidence. On the contrary, the AVA licence was renewed on 10 August 2007. [note: 124] Indeed it was Ernst who first wrote a letter to AVA to cancel the licence because SB had stopped the production operation. He applied for a licence from the National Environment Agency ("NEA") instead. [note: 125] However, as the application was more complicated and time-consuming than expected, he had no choice but to renew the AVA licence first as SB could not operate without a licence. [note: 126]

110 When asked to clarify his evidence, Ernst was unable to give a convincing explanation:

> Q: Mr Huber, I will very soon invite you to look at the letter to AVA but right now, I stand on with the question first. Is it your position that because there are problems from AVA, so that it one of your reasons why you decided to cease wholesale business?
>
> A: There was no problem from AVA. It was no longer required. If I understood your… question correctly.
>
> Q: When you say "it was no longer required" because?
>
> A: We stopped the wholesale.
>
> Court: So this is the part, I think both of you have to decide what the dispute is because you say, "No need to have AVA because I stopped --- decided to stop wholesale."
>
> W: Yes.
>
> Court: But I thought your position is, one of the reasons for stopping wholesale is because "I have problems with AVA".
>
> W: No, I had no prob---

Court:So it's like a chicken and egg answer you are giving me. Which is it?

W: No. there was no problem with AVA.

Court:So the AVA licence is not one of the reasons for stopping the wholesale?

W: It is… a reason in the sense that in the long term… that I was always worried that we're going to lose that licence--

Court: Yes, but---

W: because of certain reasons.

Court:You were --- in the long term, you were worried but was it or was it not one of the reasons for stopping wholesale business?

W: Yes, it… was… the fear was one of the reasons, yes.

Court:then why is it that you tell Mr Hee and you tell me, "No, it's not. Because you had already decided to stop wholesale business, so AVA is not… needed"?

W: Was no longer required, that's correct. [note: 127]

111 Ryan had also admitted that the renewal of the AVA licence at Greenwood Avenue was not an issue to SB:

Q Now would you the move on to the paragraph below which says that licence has expired on 31 July.

[Read] "Please observe good manufacturing practices at your premises at all times. The… licence fee of $260.00 has been deducted from you GIRO account on 13 July 2007. The new AVA licence is enclosed for your retention. Please display it prominently at your premises. You may wish to obtain an updated copy of our licensing conditions from the AVA website…"

Would you not agree with me that AVA renewed the licence 2 days after the inspection.

A Inspection 8th August, renewal 10th August 2007, yes.

Q Yes. And would you also accept that AVA had no difficulty in renewing the licence immediately after the inspection?

A That's correct.

Q Would you therefore also accept that as of August 2007, AVA licence was not a problem at all?

A: What do you mean by "it's not a problem?"

Q: That means that AVA had no difficulties in issuing the licence to you all. AVA did not see that AVA licence should not be issued to Swiss Butchery. So my question to you, would you not agree that as of 10th August 2007 --- or as of August 2007, would you agree that AVA licence

was not a problem to SB at al?

A: Yah, I agree. [note: 128]

112 In the circumstances, I do not accept Ernst's evidence that the fear that the AVA licence would not be renewed eventually was a reason for the cessation of SB's production operation as well as the wholesale operation. There was no reason to stop wholesale and production operations in March 2007 when no dead-line to do so had been given by AVA. Indeed, as already mentioned, the AVA licence was in fact renewed in August 2007. [note: 129] In my view, Ernst had timed SB's cessation of the wholesale and production operations to coincide with HPL's commencement of operations. The possible non-renewal of the AVA licence was an excuse in attempting to justify the diversion of SB's wholesale and production operations to HPL.

Ernst's health problems and the continuity of SB's business

113 The issues of Ernst's health problems and continuity of SB's business should anything untoward happens to Ernst were related. Ernst stated in his AEIC that in 2002, he underwent two cancer operations and in 2007 he had another operation to have a stent inserted to clear his blocked arteries. [note: 130] The continuity of SB's business as a whole would be affected if he were incapacitated by his health problems. [note: 131] He stated that being the "main person" together with Thomas, there was no way that SB could have operated at two different premises. [note: 132]

114 Whilst Ernst had correctly summarised his health condition, it was, in my view, not a genuine reason for diverting the wholesale and production operations to HPL. By so divesting, he had taken it out of the hands of Alex and Don Foo to decide on what to do if his health was really an issue to the continuity of SB's entire operations.

Relative profitability of retail business and wholesale business

115 In his AEIC, Ernst stated that SB had never seriously developed its wholesale and production operations because the profit margin for the retail operations was always higher than that for the wholesale operations. [note: 133] However, as provided in the report of Ernst's expert witness, Mr Kon Yin Tong ("Mr Kon's Report"), in 2006, the Gross Profit margin of SB's wholesale operations was 34%. [note: 134] Ernst admitted that this figure was substantial. [note: 135] SB's expert witness, Mr Chee Yoh Chuang, used the figures provided in Mr Kon's Report and computed the Profit Margin after direct expenses for SB's wholesale operations to be 19.7% which was only slightly lower than that for retail operation which had a figure of 20.9%. [note: 136] In addition, Ernst had admitted that the wholesale operation contributed substantially to SB's overall revenue. [note: 137]

116 When faced with the various figures which undeniably showed the profitability of SB's wholesale operations, Ernst had to state that the figures were not much of a consideration when he decided that SB should cease its wholesale operations. [note: 138] In my view, the issue of relative profitability between retail and wholesale operations was a red herring by Ernst.

Competition with other players in the wholesale business industry

117 The point about competition was linked to the issue of relative profitability. Ernst testified that SB was the leader in the retail business of butchery in Singapore whereas in wholesale, there were

more competitors. [note: 139] Hence when he had to decide the future of SB, he chose to focus on retail and to cease wholesale.

118 Ernst in cross-examination stated that he had difficulties in getting reliable staff to run the wholesale and production operations in SB and that was one reason for the cessation of these businesses. [note: 140] This seemed to be inconsistent with the position adopted in his AEIC where he appeared to consider the shortage of reliable staff only in the context of SB's retail operation. [note: 141] Under further cross-examination, Ernst also admitted that given the greater number of competitors in the wholesale market, there would be many experienced staff available. [note: 142] Even though he tried to qualify his evidence by saying that he needed more than just good salespersons because wholesale and production operations went together, he had to eventually concede that the lack of reliable staff was not a reason for the cessation of wholesale and production operations. [note: 143]

119 The question of not having adequate and qualified manpower was also a reason given by Ernst regarding space constraint. His point was that there was no point in acquiring the Property for SB because SB no longer had the services of Ryan and Andre who had tendered their resignation. He gave the impression that Ryan and Andre were indispensable to the continuation of expansion of SB's wholesale and production operations. I do not accept this suggestion. Although Ryan and Andre had helped out in SB during their local student days, their full-time employment with SB was for a short duration only. While I do not mean to trivialise their contributions, they were not as indispensable as Ernst made them out to be. Also there was no concrete evidence to show who he had sought to recruit as their replacements or that he had had difficulties with recruitment generally.

Another factor

120 Apart from rejecting the reasons discussed above, I have considered another factor which showed that Ernst caused SB to cease its wholesale and production operations based not on a strategic business decision but in furtherance of his plan to wrongfully divert SB's operations to HPL.

121 It is true that Ernst was removed as Managing Director and director in January 2008 but there was no evidence that Ernst had tried to improve on SB's retail operations between the time of cessation of SB's wholesale operations in March 2007 and his removal in January 2008. In fact, even back in October 2006, when the opportunity to open a retail shop in NTUC Finest arose for SB, Ernst chose to give up the opportunity and instead provided HPL with the opportunity. I will elaborate on this 2006 opportunity with NTUC Fairprice. As mentioned above, Ernst said he decided not to pursue this opportunity because in 2001, SB had rejected an earlier proposal from NTUC Fairprice to open an SB outlet in one of its supermarkets. His reason was that when he had raised the question in 2001 with Alex and Don Foo, he had been criticised for considering the opportunity as it was merely an attempt by NTUC Fairprice then to learn the business operation of SB. Don Foo's version was that Ernst was asked to pursue the matter then but nothing further was heard from Ernst. Even if I accepted Ernst's version, the proposal from NTUC in 2006 was in respect of its premium supermarket NTUC Finest (as compared to an ordinary NTUC Fairprice supermarket) and was made five years later. [note: 144] He should at least have broached the subject with Alex and Don Foo in 2006 and given them the opportunity to reject it. Instead he passed the opportunity immediately to Ryan and Andre whilst leading NTUC Fairprice to believe, at least initially, that Ryan and Andre were also representing SB.

122 In the circumstances, I do not accept that Ernst made a strategic decision in the *bona fide*

interests of SB when he divested the wholesale and production operations to HPL. He did so in breach of his duties as a director and in conspiracy with the second to fifth defendant, using unlawful means as set out above and below to do so, with the intention to injure SB and profit HPL and his family.

Alleged ratification by other shareholders

123 It is undisputed that Ernst did not have any prior discussion with Alex and Don Foo about the divestment of the wholesale and production operations of SB. Ernst claimed that after the divestment, he did tell both of them in a coffee-shop meeting and also told them that SB would be purchasing (products) from "Huber's", although he did not tell them that HPL was owned by Ryan and Andre. [note: 145] However they remained silent and Ernst took it that they had consented to his decision. [note: 146]

124 It was also suggested by Ernst, Ryan and Andre that the children of Alex and Don Foo would have known about Ryan's and Andre's business, HPL, as they were reasonably close to each other and would have told their parents about the same. Indeed, Ryan said that he was obtaining a personal loan from a bank through Mark Foo and he had to disclose his employment by HPL at the material time.

125 Don Foo's version was that he and Alex did not hear about the divestment directly from Ernst. They learned a little about it from talk about Ryan and Andre's business at the weekly gatherings (which Ernst had ceased to attend) and from monthly accounts which they received. The accounts showed credit sales to be declining. They suspected something was up and that was why Don Foo's son, Mark Foo left his employment with Credit Suisse on 27 May 2007 to join Foo & Associates first with the intention of eventually joining SB. [note: 147]

126 I am of the view that Ernst did not directly tell Alex and Don Foo about the divestment. If he had really wanted to keep them informed, he would have discussed with them before the deed was done. Any knowledge that they acquired indirectly whether through the weekly gatherings, their children or accounts and their lack of objection thereafter do not amount to a ratification of what Ernst (and his sons) had done. The reliance by Ernst on *Eng Gee Seng v Quek Choon Teck and Ors* [2010] 1 SLR 241 ("*Eng Gee Seng*") that inactivity or silence can amount to ratification is unjustified in the circumstances before me. As stated in [34] of *Eng Gee Seng*, in order for a person to be held to have ratified an unauthorised act, it is necessary that at the time of ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify and take the risk whatever the circumstances may have been.

127 In this case, all that Alex and Don Foo had was incomplete information about the divestment of business to HPL through the "loose talk" at the weekly gatherings and the monthly statements. Although they had suspicions, this did not constitute full knowledge of the divestment. In any event, they were not inactive but making their own plans for they must have realised that Ernst could not be trusted to act in SB's interest. In the circumstances, *Eng Gee Seng* is of no assistance to Ernst.

Business Times article

128 In August 2007, HPL commenced operations at NTUC Finest. In a Business Times article ("the BT Article") published on 18 August 2007, [note: 148] it was stated thus:

> Sales Director, Andre, 27, is quick to clarify that Huber's is an independent company and has nothing to do with his father's company. "Swiss Butchery is run by my father but the company

has two other shareholders. There have been many people asking why there's been a change in company name. Simply put, the other two shareholders in Swiss Butchery do not want Ryan and me in the business. Since that was the case, we started our own company Huber's Pte Ltd.

129 This BT article stated clearly that SB and HPL were separate companies unlike the other occasions which I elaborated on above. It seemed to me that the interview given for this article was calculated to give the impression that Ryan and Andre had done all that they could to disassociate themselves from SB.

Letter sent after the BT article

130 After the BT Article was published, Alex and Don Foo prepared a letter dated 29 August 2007 [note: 149] and addressed to Ernst [note: 150] in which they put a disclaimer for signing the audited account of SB for the year 2006. In the letter, it was highlighted that Ernst had given unilateral approval for related party transactions and directors' close family members appointment, salaries and bonus and that Alex and Don Foo would require further clarification on the matter.

A talk and tour for the Swiss Association of Singapore

131 In December 2007, the Swiss Association of Singapore ("SAS") had a tour for its members at the Property. Ernst in his AEIC stated that a few days before the tour, he had been approached by the representative of SAS, Ms Luzia Kappeller to give a talk on the "Swiss Butchery" story and that before the tour, he gave an account of how SB was started. He denied that he conducted the tour thereafter or gave any talk for the benefit of HPL. [note: 151]

132 He elaborated in cross-examination that on the morning of the tour at the HPL factory, he gave the talk on the upper floor in the meeting room about the history of SB and that was his part. After that, the members of the SAS went downstairs for the tour of the HPL factory. [note: 152] However, it was unbelievable that Ernst would go to HPL's factory to give a talk on SB if he truly wanted to disassociate SB from HPL. In my view, the talk given to the SAS was again to mislead others that HPL was related to SB. This view was fortified when one considers the SAS newsletter for January/February 2008 on its website. [note: 153] An article on the tour was headlined "Visit to Huber's Pte Ltd aka Swiss Butchery Factory". This clearly showed the misconception held by the SAS after they visited the Property for the factory tour. Ernst said that this was a genuine mistake but in my view it was not so.

The circumstances leading to the removal of Ernst as managing director and Ernst and his wife as SB directors in January 2008

133 In August 2007, Don Foo approached Walter Schiele ("Schiele"), a master butcher, with a view of employing him at Swiss Butchery. His letter of appointment dated 7 September 2007 stated that his employment would commence on 2 January 2008. As pointed out by counsel, the letter of appointment was issued by Alex even though Ernst was still the Managing Director and was the person in charge of recruitment of staff at that time. [note: 154]

134 Don Foo admitted under cross-examination that they had appointed Schiele without Ernst's knowledge so that they could start a production facility for SB without any disruption in the normal operation of SB especially during the busy Christmas season. [note: 155] The appointment of Schiele was thus part of a plan to remove Ernst from SB after Alex and Don Foo found out about HPL's retail

outlet in NTUC Finest [note: 156] and Schiele's role would be to assist in the management of SB's business after Alex and Don Foo took over the management of SB's operations. [note: 157] In his letter of appointment, Schiele would be entitled to a 20% shareholding in a new subsidiary company SBFI which was incorporated on 12 October 2007. [note: 158] The 20% shareholding was to provide him with the incentive to join SBFI. [note: 159]

135 As stated, Alex and Don Foo intended to recommence wholesale and production operations for SB and SBFI was to be the business vehicle for the acquisition of a production facility. The incorporation of SBFI was therefore a decision made in the interest of SB. This is in contradistinction to the incorporation of HPL which was to usurp SB's business.

136 Don Foo admitted that they had started looking for a production facility for the purposes of SBFI from the date of its incorporation and on 4 January 2008, SB sent out an official notice [note: 160] to its employees stating, *inter alia*, the following:

> Swiss Butchery have the resources, a newly owned and well equipped 3 storey factory building with the latest and most advanced manufacturing machineries and processes to enable us to obtain ISO and HACCP Certification, the expertise of an expatriate of an expatriate Master Butcher, yourselves the existing valued employees, our new management team in business development, sales and public relations, accounting and purchasing, and together we will bring our business to the next level.

Although Don Foo testified that the announcement was incorrect in that on 4 January 2008, SB had not yet purchased the factory, he said that they had the intention to do so. [note: 161]

137 In the meantime, as stated above, Don Foo was appointed as an additional director of SB on 27 December 2007. He admitted that the real reason for his appointment was so that there would be five directors on the Board of Directors of SB and that Alex, Don Foo and his wife would have a majority vote as against Ernst and his wife. [note: 162] On 2 January 2008, at a directors' meeting, the Board of Directors of SB terminated the employment of Ernst as the Managing Director. [note: 163] A notice dated 2 January 2008 for convening an Extraordinary General Meeting ("EGM") was also sent to the shareholders [note: 164] and at the EGM held on 18 January 2008, Ernst was removed as a director of SB together with his wife. Ernst then commenced the action in Suit No. 222 on 31 March 2008 against SB as well as Alex, Don Foo and his wife for relief against minority oppression under s 216 of the Companies Act. SB in turn commenced Suit No. 245 on 7 April 2008 against the defendants in this action.

138 Ernst's position was that Alex and Don Foo had planned to get rid of him and had used the divestment of the wholesale and production operations as the excuse to do so even though they had ratified that decision. As I have said, I find that there was no such ratification and it was Ernst and others who had wronged SB (and the other shareholders).

139 It was also suggested that there was no reason for Ernst to harm SB as he was holding one-third of its equity. In my view, Ernst was already making other plans. He knew his future no longer lay with SB after the Share Issue Proposal and Share Purchase Proposal were rejected. The way forward for him was HPL which his family would have full control of, whether through one son or two.

140 It was also suggested that Ernst's conduct was not covert and that this militated against any suggestion of a conspiracy. In my view, some of Ernst's conduct was covert like his involvement with

HPL. The acquisition of the wholesale and production operations surfaced only later and also not directly. True, discussions with staff were in the open but not discussions with third parties, *eg*, NTUC Fairprice. I have elaborated on other third parties above. I am of the view that Ernst was more frustrated and bold than wise and the evidence points overwhelmingly to a breach of his duties as a director of SB and a conspiracy as already mentioned.

Other allegations against the defendants

141 Apart from SB's main claim for wrongful diversion of its operations to HPL, it made several subsidiary claims against them as listed below:

(a) sale of SB's MADO Mincer to HPL;

(b) sale of SB's Lorry to HPL;

(c) subletting of cold-room facilities from HPL to SB;

(d) Ernst's help in obtaining meat supplies for HPL;

(e)supplying meat samplers for free to Andre for HPL;

(f)purchasing inferior quality meat from HPL;

(g) removal of SB's Recipe Book and Home Delivery Book by Thomas;

(h) inducing or attempting to induce employees to terminate their contracts with SB to join HB/HPL;

(i) claims against Ernst for unwarranted use of SB funds for his personal expenses.

Sale of SB's MADO mincer and transfer of other equipment to HPL

142 On 21 March 2007, Ernst caused SB to sell its MADO Mincer to HPL for $5,000. Ernst stated that he sold the Mado Mincer because after the cessation of SB's wholesale and production operations, it had no further use for the Mado Mincer. [note: 165] With regards to this issue, one Mr Lim Kiat Huat ("Mr Lim"), a director of Zenia Singapore Pte Ltd which is the agent for the MADO brand of industrial machines, stated in his AEIC that SB's MADO Mincer was worth about 30% of its purchase price of $18,000. [note: 166]

143 There is no reason to reject that valuation by Mr Lim. However, the sale of SB's MADO Mincer was a consequence of the wrongful divestment of the wholesale and production operations which cannot be justified even though SB had obtained a fair value for the sale.

144 The other equipment alleged to have been transferred by SB to HPL include a stainless steel smoke trolley with stainless steel trays, a small trolley, baskets, trays, moulds for hams, coloured plastic containers ("the Other Equipment"). The stainless steel smoke trolley has since been returned by HPL on 28 February 2008. [note: 167] Ernst's evidence was that the trays and moulds were borrowed by HPL since they were not used by SB after the change in the business model and were taking up space in SB. An agreement was reached between him and Ryan for the sale of the moulds and the containers by barter trade. [note: 168] There was insufficient evidence of this barter trade. In any event, like the MADO Mincer, the Other Equipment transferred to HPL was because of a wrongful

divestment of SB's wholesale and production operations and thus cannot be justified.

Sale of SB's lorry to HPL

145 SB claimed that Ernst caused SB to sell its lorry with Registration No. YL6642Z ("SB's Lorry") to HPL at an undervalue and on unduly favourable credit terms. Ernst's evidence was that he had reminded Alex and Don that SB's Lorry was to be sold to HPL because SB had stopped its wholesale and production operations. However, Don Foo testified that on August 2007, Ernst informed the directors of SB that the Singapore Land Transport Authority required SB's Lorry to be sold and scrapped. [note: 169] Further, the directors' resolution which purported to ratify the sale of SB's Lorry made no mention of the fact that it was to be sold to HPL. All that was stated was:

> It was resolved that Mr Huber Ernst, … be hereby authorised to conduct request for Transaction Pin/Application of De-Registration / Transfer of Vehicle Ownership / PARF and or COE Rebate for an on behalf of the Compnay and also be authorised to sign, initial, accept or execute all documents in connection with the transaction vehicle no.: YL 6642Z. [note: 170]

146 Don Foo stated that SB's Lorry was purchased in 2004 at a total price of about $60,000 inclusive of the refrigerator unit installed at the back of SB's Lorry. The purchase price of SB's Lorry itself was $43,000 and that for the refrigerator unit was $18,500. [note: 171]

147 SB's Lorry was sold together with the refrigerator unit to HPL at a price of $25,000 in 2007. Although Ernst called upon Mr Beh Kok Hwa ("Mr Beh") to give evidence that the value of SB's Lorry at the time of sale to HPL was about $23,000 to $24,000, Mr Beh admitted that his assessment was based on a sale to a second-hand dealer and a direct sale between a seller and purchaser would fetch a higher price. [note: 172] His assessment was also premised on the basis that the refrigerator unit had no value.

148 In my view, Mr Beh's assessment was not justifiable. In any event the sale of SB's Lorry to HPL, just like the sale of the Mando Mincer, was unjustified as it was part of the plan for the divestment of SB's operations to HPL. Indeed it was Ernst's position that when those operations had been divested there was no longer any need for SB's Lorry.

Subletting of cold-room facilities from HPL to SB

149 SB's complaint for this issue was that Ernst had terminated SB's existing cold room rental at AIS Building for $2800 per month in May 2007 and through HPL, Ernst had arranged for SB to sublet other cold room facilities from HPL for $2,675 from June 2007 to May 2008, thereby effectively paying for HPL's own cost of their own cold room facilities. [note: 173] Ernst's version was that he had saved some money for SB. It seems to me that Ernst could not make up his mind whether to treat HPL at arm's length or not. He should have as it was really a competitor of SB notwithstanding explanations that HPL was targeting a different market from SB's. In any event, no damage was caused to SB for this arrangement.

Ernst's help in obtaining meat supplies for HPL

150 With respect to this allegation, although Ernst admitted that he visited suppliers in Switzerland and Australia with Ryan and Andre in November 2007, [note: 174] his explanation was that he went on such trips for the purposes of SB whereas Ryan and Andre went for the purposes of HPL. SB's counsel did not challenge this position in cross-examination and so I would have to accept it.

Supplying meat samplers for free to Andre for HPL

151 According to Tan KW's evidence, Andre would obtain meat samplers from SB at Greenwood Avenue and that Thomas had allowed Andre to obtain the meat samplers for free. I accept Tan KW's evidence that he was instructed by Thomas on two separate occasions to throw the order chit away. [note: 175] In my view, if Thomas had intended for HPL to pay for the meat samplers, there would have been no reason to throw away the order chit. Further, although Andre adduced several invoices to show that HPL had paid for the meat samplers, Tan KW was certain that those invoices were not for meat samplers as the weight of the products reflected in the invoices exceeded those of meat samplers and also there were items which he had personally packed but were missing in those invoices. [note: 176] Hence, I find that HPL had improperly obtained meat samplers for free from SB.

152 With regards to this claim, Thomas did not allege to have been instructed by Ernst to give HPL free samplers. He had provided the free samplers on his own accord to favour HPL wrongfully and accordingly, I find him liable for dishonest assistance.

Purchasing inferior quality meat products from HPL

153 SB's witness, Tan HH, stated that throughout 2007, SB purchased large quantity of inferior quality meat including end cuts and meat trimmings from HPL. These end cuts and meat trimmings were of low value and difficult to sell. He further testified that the meat purchased from HPL were not fresh. [note: 177] However, he conceded that end cuts are not completely useless and may be used towards preparing products such as marinated fillet, stir-fried beef and beef shaslik. Tan HH also admitted that Thomas' instructions to SB's employees to package the end cuts in small portions or to marinate them so that they can last longer were reasonable. [note: 178]

154 As for Tan KW, he stated in his AEIC that after March 2007, SB would receive meat trimmings from HPL. As the meat trimmings consist of fats around the meat, end cuts and other parts of the meat which were odd-shaped, they were not marketable. Prior to HPL's commencement of its production operations in March 2007, SB had never purchased meat trimmings.

155 Thomas did not dispute that SB had purchased end cuts although he insisted that SB did not purchase meat trimmings. [note: 179] He testified that end cuts were not inferior meat and SB used them for its meat products such as the marinated beef fillet with bacon which was popular amongst SB's customers. [note: 180] After SB stopped its wholesale and production operations, it purchased the end-cuts from HPL because Ernst had obtained a 10% discount from the latter. [note: 181]

156 In a particular invoice for products purchased by SB from HPL, Thomas wrote the following sentence:

> Pls try not to send Beef Cheeks, hardly anybody buys." [note: 182]

157 Don Foo stated that this sentence meant that HPL had been sending certain items to SB without any order for those items and those items had been accepted by Thomas. I agree. Thomas had caused SB to purchase or to accept inferior quality product from HPL. Putting aside the issue of end cuts, I accept the evidence of Tan HH and Tan KW that SB had purchased meat trimmings from HPL, which as admitted by Thomas, were of no value and also that some of the meat purchased from HPL was not fresh. However this allegation pertained to Thomas and not Ernst.

Removal of SB's recipe book and home delivery book by Thomas

158 SB claimed that SB's Recipe Book and Home Delivery Book went missing after the new management took over on 3 January 2008 and that they were removed by Thomas. SB further alleged that the closed-circuit television ("CCTV") in the premises at Greenwood Avenue was frequently switched off during the month of January 2008 when Thomas was still under employment at SB. Presumably on one of those occasions, Thomas must have removed the Home Delivery Book and Recipe Book.

159 The Home Delivery Book contained records of SB's customers, such as their names, addresses, the items purchased and the price of the items purchased. [note: 183] The contents of the Recipe Book were disputed. Tan HH alleged that the Recipe Book contained information on the recipes used by the SB staff such as the different types of ingredients used. [note: 184] On the other hand, Thomas claimed that the Recipe Book contained information on daily recipes recorded by him. [note: 185]

160 After considering the evidence, I find that the allegation against Thomas has not been sufficiently made out. First, the SB's employees (both former and existing) called upon to give evidence were unable to testify that they saw Thomas removing specifically the Recipe Book and Home Delivery Book. For instance, Yeow JT could only state in his AEIC that he saw Thomas remove two books from SB's counter. [note: 186] Further, under cross-examination, Yeow JT stated that the books allegedly taken by Thomas were hardcover books and did not look like the mock copy of the Recipe Book which was produced by SB. Most importantly, there is no evidence that Thomas took the books, if he did, out of the premises of Greenwood Avenue.

161 Given the less than satisfactory nature of the evidence on this issue, I am unable to accept SB's allegation that Thomas had removed SB's Recipe Book and Home Delivery Book for the benefits of HPL.

Inducing or attempting to induce employees to terminate their contracts with SB to join HB/HPL

162 SB claimed that at the weekly Saturday briefings held at Greenwood Avenue, Ernst and Thomas led SB's then existing employees to believe that SB and HPL were related companies 'under the same roof'. This created a belief in the minds of some of SB's employees that HPL and SB were related companies. [note: 187]

163 As stated by Tan KW during cross-examination:

> Q: And when you said "work there at HPL", can you elaborate what your understanding when this word "transferred" as you've used in your affidavit, what do you mean?
>
> A: My understanding at that point of time, okay, "transferred" means, to me, they are still belongs to the same company, okay? That mean they still under one roof working with us together but at a separate location at a new factory called Huber's Factory. [note: 188]

164 Yeow JT stated at para 6 of his AEIC that in early 2007, the staff were informed during one of the Saturday briefings that SB would be closing down its production at Greenwood Avenue and that the employees in the production line would be transferred to the factory at 161 Pandan Loop. He was under the impression that HPL was a subsidiary of SB and that HPL was somehow linked to SB. Under cross-examination, Yeow JT gave the following evidence:

Q: All right. My instructions are that the line that you have there, "that the employees in the production line would be transferred to the factory at 161 Pandan Loop"; that was never said at this briefing.

A: Whether this word "transferred" was say or not, I cannot fully re-remember … but from my understanding when they tell us it's going to be closed and there's another outlet coming up in Pandan Loop and doing the same thing as what --- what the department is going to be closed down, the staff has to … go over there. [note: 189]

165 SB provided a list of former SB's employees who joined HPL from March 2007 to February 2008. These employees were Eunice Ooi, Lee Chee Hiong, Mike Tan Liong Peow, Liang Soon Hwa and Ng Chung Khai. However, they were not called upon to give evidence on the circumstances surrounding their departure from SB. But SB did call Gregory Mark Hughes ("Gregory"), who was allegedly approached by HPL whilst working for SB, to give evidence.

166 Gregory stated in his AEIC that in June 2007, [note: 190] he visited SB at Greenwood Avenue to look for a job. Shortly after, Ernst called him for an interview at Greenwood Avenue. He subsequently attended another interview with Ernst at 161 Pandan Loop. Although Ernst had told him that SB, HPL and HB were not related, Ernst said he was aware that most people would assume that the three companies were related. [note: 191] At the second meeting, Ernst offered him the managerial post at the upcoming butchery outlet at NTUC Finest. [note: 192] Although Gregory verbally agreed to the offer, he did not sign the employment contract and was instead employed by SB in August 2007. [note: 193] Gregory's explanation was that after he was offered the managerial post at NTUC Finest, Ernst told him that the then-operation supervisor of SB had asked if he could be given the opportunity to manage the butchery outlet at NTUC Finest, which meant that there was a vacancy at SB and which was thus offered to Gregory. [note: 194]

167 Gregory also stated that he approached Thomas in January 2008 after the new management took over the running of SB and the latter told him that he should not stay with SB anymore as the new management had no experience in running the business. At around that time, Thomas also showed Gregory an SMS from Ernst asking if he was willing to join HPL and HB. [note: 195]

168 Although Gregory's evidence was disputed in trial, I accept his account of the events. At the material time, Ernst was still the managing director at SB. He had no business in conducting job interviews for HPL. This job interview was thus part of his plan to divert SB's wholesale and production operations to HPL and to set up a retail outlet for HPL. I will say more about Thomas later.

Use of SB's funds for Ernst's personal expenses

169 SB claimed in its pleading that EH had used SB's funds to pay for his personal expenses which were not part of his employment agreement, nor incurred in the course of or for the purpose of SB's business for the period 1 January 2005 to 31 December 2007. [note: 196] However, this head of claim has been abandoned by SB.

Application of the Legal Principles

170 In my judgment, based on the above finding of facts, both Ernst and Ryan had breached their fiduciary duties owed to SB and had also engaged in a conspiracy to injure SB. After the rejection by

Alex and Don Foo of Ernst's bid to obtain the majority shareholding in SB through the Share Issue Proposal and Share Purchase Proposal, they embarked on a series of steps to injure SB. They did this by diverting SB's wholesale and production operations to HPL.

171 By usurping the business opportunity for SB to open a retail butchery outlet at NTUC Finest for the benefit of HB (which as stated above, was a wholly-owned subsidiary of HPL), Ernst again preferred his personal interests over those of SB. This opportunity came to SB while Ernst was still the managing director of SB and the exploitation of that opportunity constitutes a breach of Ernst's fiduciary duties (see *CMS Dolphin*) and was also a step in the overall conspiracy to injure SB.

172 Both Ryan and Andre were involved in the plan to divest SB's wholesale and production operations to HPL. For Ryan, his role began from the incorporation of HPL in September 2005 when he was registered as the Managing Director and sole shareholder of HPL with $100,000 start-up capital. The incorporation of HPL as the business vehicle to facilitate the divestment of SB's wholesale and production operations was a clear breach of his duty of loyalty owed to SB while he was still employed as its Deputy Managing Director. Similarly, the purchase of the Property for HPL in July 2006 was another instance of a breach of his fiduciary duties. As for Andre, his participation began when he returned from Australia in January 2006 and became registered as a 50% shareholder of HPL in March 2006. I find that the three of them were clearly part of the plan to cause injury or damage to SB. The various acts leading to the divestment such as the purchase of the Property and misleading others of the relationship between SB and HPL are undoubtedly acts done in furtherance of the plan.

173 As stated above, HPL is jointly-owned by Ryan and Andre and HB is a wholly-owned subsidiary of HPL. HPL was set up as the business vehicle to usurp SB's wholesale and production operations. HB was set up to run the retail outlet at NTUC Finest after usurping the business opportunity meant for SB. At all material times, Ryan and Andre formed the effective management of HPL and HB. As held in *Cook v Deeks* [1916] AC 554 at 565, where the directors of a company had wrongfully diverted business belonging to the company to another company, the latter company would be liable to account for the profits to the first company. Accordingly, both HPL and HB, being the business vehicles used for the usurpation of SB's business, are liable to account for the profits to SB.

Thomas

174 As for Thomas, I note that the allegations made by SB against Thomas in relation to the tort of conspiracy are far less comprehensive as compared to the other defendants. The main paragraphs in the statement of claim pertaining to the claim of tort of conspiracy are paras 10-12. However, in these three paragraphs, Thomas was mentioned only in relation to the following matters:

(a) removing the Home Delivery Book and Recipe Book from SB's premises at Greenwood Avenue;

(b) re-direction of wholesale orders for SB to HPL;

(c) instructing SB's employees to inform SB's customers to go to HB's counter at NTUC Finest when SB was closed; [note: 197]

(d) inducing SB's employees' to terminate their employment contracts with SB and join HPL; [note:

198]

(e) giving of free meat samplers to HPL; and

(f) purchasing inferior quality meat from HPL. [note: 199]

175 There was no evidence that Thomas had been part of the conspiracy to divert SB's wholesale and production operations and to set up HPL to compete with SB. [note: 200] Further, it is not disputed that Thomas has no shareholding in either HPL or HB. Bearing in mind the high burden of proof imposed on SB to establish that Thomas was part of a conspiracy, I find that the evidence is insufficient to establish that Thomas had been part of the conspiracy between Ernst, Ryan and Andre.

176 However, this is not the end of the matter. The other claim against Thomas rests upon the allegation of dishonest assistance. As stated above, the law in this area has been clarified by the Court of Appeal in *George Raymond Zage III* where the objective test of honesty was accepted. A defendant will be liable for dishonest assistance if he has knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.

177 As regards the removal of the Home Delivery Book and Recipe Book, I have concluded that SB has failed to establish that Thomas removed them from Greenwood Avenue.

178 As for the re-direction of wholesale orders for SB to HPL and instructing SB's employees to inform SB's customers to go to HB's counter at NTUC Finest when SB was closed, I am prepared to give Thomas the benefit of the doubt that he was merely following Ernst's instructions.

179 As for inducing SB's employees to terminate their employment contracts with SB and join HPL, the evidence against Thomas was vague as to whether he was merely following Ernst's instructions or he had done more to encourage SB's employees to move to HPL. The burden of proof is on SB and I find that SB has not discharged its burden.

180 However, owing to his role in supplying free meat samplers to Andre and the purchase of inferior quality meat products from HPL, I find that Thomas has acted dishonestly. Given his position that he was clear about the fact that SB and HPL were separate and independent entities, [note: 201] he must have known that Andre and hence HPL ought not to have been given free samplers. He also ought to have rejected inferior quality meat products from HPL. Nevertheless, there is no separate claim for damages for these allegations which were made to support the overall allegation that he was a party to the conspiracy.

181 There is also a counterclaim by Thomas for $15,653 being unpaid salary and compensation for leave. This was not disputed by SB. There was also a claim for knowing receipt against Andre, HB, HPL and Thomas but it is not necessary for me to deal with that in the circumstances.

Conclusion

182 I grant judgment against the first to fifth defendants in Suit 245 for damages to be assessed or an account for profits, with interest and costs of the assessment or accounting to be determined by

the Registrar. I make no order on the claim against Thomas. I grant judgment for Thomas against SB for $15,653 and interest at the rate of 5.33% from the date of his counterclaim to the date of judgment.

183 I will hear the parties on costs of the action up to and including the date of my judgment.

[note: 1] Notes of Evidence ("NE") 1/7/09 at pp 4-5

[note: 2] NE 8/7/9 at p 37

[note: 3] Statement of Claims para 13(i)

[note: 4] NE 1/7/09 at p 16

[note: 5] NE 9/7/09 at p 71

[note: 6] NE 2/7/09 at p 12

[note: 7] Plaintiff's Supplemental Bundle of Pleadings ("SBP") at p 83

[note: 8] SBP at p 79

[note: 9] NE 2/7/09 at p 25

[note: 10] SBP at p 80

[note: 11] NE 2/7/09 at p 14

[note: 12] SBP at p 83

[note: 13] Statement of claim at para 5: admitted by Ernst's defence at para [11]

[note: 14] Bundle of AEIC vol 8 tab 17a exhibit RH-2

[note: 15] Agreed Bundle of Documents ("ABD") vol 1 at pp 285-287

[note: 16] SBP at p 5

[note: 17] NE 1/7/10 at p 17

[note: 18] NE 1/7/10 at pp 18-19

[note: 19] NE 19/1/10 at p 45

[note: 20] ABD vol 1 at p 237; see NE 2/7/09 at p 48

[note: 21] ABD vol 1 at p 239

[note: 22] NE 19/1/10 at p 45

[note: 23] ABD vol 1 at p 240

[note: 24] ABD vol 1 p 243

[note: 25] Plaintiff's Opening Statement at p 6

[note: 26] Bundle of AEIC vol 8 tab 11 at p 13

[note: 27] Bundle of AEIC vol 8 tab 11 at p 13

[note: 28] NE 26/1/10 at pp 27-28

[note: 29] Bundle of AEIC vol 8 tab 17a at p 6 paras 24-25; see too 26/1/10 at p 41

[note: 30] Bundle of AEIC vol 8 tab 17a at p 6 paras 24-25

[note: 31] ABD vol 1 at p 237

[note: 32] ABD at vol 1 p 243

[note: 33] NE 19/1/10 at pp 44-45

[note: 34] NE 25/1/10 at p 11

[note: 35] Bundle of AEIC vol 8 tab 17a para 15

[note: 36] NE 26/1/10 at p 31

[note: 37] NE 26/1/10 at p 34

[note: 38] NE 26/1/10 at pp 35-41

[note: 39] Bundle of AEIC vol 1 tab 1 pp 276 to 280C

[note: 40] NE 19/1/10 at pp 58-59

[note: 41] NE 19/1/10 at p 57

[note: 42] NE 2/7/09 at p 7

[note: 43] NE 19/1/10 at p 6

[note: 44] NE 2/7/09 at p 5

[note: 45] NE 2/7/09 at p 6

[note: 46] NE 19/1/10 at p 5

[note: 47] NE 20/1/10 at p 74

[note: 48] NE 21/1/10 at p 8

[note: 49] NE 25/1/10 at p 57

[note: 50] NE 25/1/10 at p 60

[note: 51] NE 29/1/10 at p 10

[note: 52] NE 26/1/10 at p 59

[note: 53] NE 27/1/10 p 3; NE 28/01/10 at p 67

[note: 54] NE 28/1/10 at p 27

[note: 55] NE 25/1/10 at p 28

[note: 56] Bundle of AEIC vol 8 tab 17a at [31]

[note: 57] Bundle of AEIC vol 9 at tab 18 at [12]

[note: 58] NE 6/7/09 at p 27

[note: 59] SBP at p 82

[note: 60] SBP at p 101

[note: 61] NE 26/1/10 at p 3

[note: 62] NE 25/1/10 at p 56

[note: 63] NE 25/1/10 at p 53

[note: 64] NE 25/1/10 at p 56; NE 26/1/10 at p 9

[note: 65] NE 26/1/10 at p 54

[note: 66] NE 25/1/10 at p 60

[note: 67] NE 18/1/10 at pp 31 to 32

[note: 68] ABD vol 2 p 363 read with NE 26/1/10 at p 54

[note: 69] NE 26/1/10 at p 58

[note: 70] ABD vol 2 pp 430-439

[note: 71] SBP at p 108

[note: 72] NE 26/1/2010 at p 60

[note: 73] NE 27/1/10 at p 22; see SB's submission at [95]

[note: 74] SBP vol 8 tab 11 at [17]

[note: 75] NE 13/1/10 at p 39

[note: 76] NE 13/1/10 at p 5

[note: 77] NE 13/1/10 at p 14

[note: 78] NE 13/1/10 at p 12

[note: 79] ABD vol 3 pp 621- 625

[note: 80] NE 13/1/10 at pp 18-19

[note: 81] NE 20/1/10 at p 29

[note: 82] Bundle of AEIC vol 8 tab 11 at pp 27-28

[note: 83] NE 20/1/10 at p 37

[note: 84] NE 20/1/10 at pp 42-43

[note: 85] NE 28/1/10 at p 53

[note: 86] NE 29/1/10 at p 24

[note: 87] NE 29/1/10 at p 28

[note: 88] NE 29/10/01 at p 25

[note: 89] NE 29/1/10 at p 26

[note: 90] NE 13/1/10 at p 61

[note: 91] Bundle of AEIC vol 7 tab 4 at p 4

[note: 92] NE 13/1/10 at p 107

[note: 93] NE 14/1/10 at pp 57-58

[note: 94] NE 1/2/10 at pp 70-71

[note: 95] NE 13/1/10 at p 108

[note: 96] NE 13/1/10 at p 116

[note: 97] NE 13/1/10 at p 89

[note: 98] ABD vol 2 p 388

[note: 99] NE 26/1/10 at p 47

[note: 100] NE 9/1/10 at p 67

[note: 101] NE 26/1/10 at p 48

[note: 102] NE 22/1/10 at p 19

[note: 103] NE 29/1/2010 at p 13

[note: 104] NE 29/1/2010 at p 16

[note: 105] ABD vol 2 p 426

[note: 106] ABD vol 2 at p 426

[note: 107] NE 29/1/10 at p 21

[note: 108] AB vol 2 at 442

[note: 109] AB vol 2 p 442

[note: 110] ABD vol 2 at p 440

[note: 111] ABD vol 2 p 463

[note: 112] AB vol 2 p 463

[note: 113] NE 20/1/10 at p 12

[note: 114] Bundle of AEIC vol 7 tab 8 at p 3

[note: 115] Bundle of AEIC vol 7 tab 8 at p 4; NE 14/1/10 at p 45

[note: 116] NE 14/1/10 at p 46

[note: 117] NE 14/1/10 at pp 47-48

[note: 118] NE 14/1/10 at p 49

[note: 119] NE 25/1/10 at p 67; NE 26/1/10 at p 8

[note: 120] NE 25/1/10 at p 56

[note: 121] NE 20/1/10 at p 75; see too NE 26/1/10 at p 15

[note: 122] NE 18/1/10 at p 33

[note: 123] NE 21/1/10 at p 40

[note: 124] Bundle of AEIC vol 8 tab 11 at p 114

[note: 125] Bundle of AEIC vol 8 tab 11 at p 113

[note: 126] Bundle of AEIC vol 8 tab 11 paras 107-109

[note: 127] NE 21/1/10 at pp 28-29

[note: 128] NE 26/1/10 at p 12

[note: 129] Bundle of AEIC vol 8 tab 11 at p 114

[note: 130] Bundle of AEIC vol 8 tab 11 at 67

[note: 131] NE 21/1/10 at p 74

[note: 132] NE 21/1/10 at p 2

[note: 133] Bundle of AEIC vol 8 tab 11 at p 15

[note: 134] Bundle of AEIC vol 6 tab 16 at p 50

[note: 135] NE 20/1/10 at p 57

[note: 136] Supplemental Bundle of AEIC vol 9 tab 3 at p 27

[note: 137] NE 20/1/10 at p 64

[note: 138] NE 20/1/10 at p 72

[note: 139] NE 20/1/10 at p 75

[note: 140] NE 21/1/10 at p 31

[note: 141] Bundle of AEIC vol 8 tab 11 at paras 65-66

[note: 142] NE 21/1/10 at p 34

[note: 143] NE 21/1/10 at pp 34-35

[note: 144] NE 22/1/10 at pp 23-24

[note: 145] NE 21/1/10 at p 54

[note: 146] NE 21/1/10 at p 50-51

[note: 147] NE 12/1/10 at p 62

[note: 148] ABD vol 3 pp 779-781

[note: 149] ABD vol 3 p 787

[note: 150] NE 3/7/09 at p 34

[note: 151] Bundle of AEIC at vol 8 tab 11 at p 35

[note: 152] NE 18/1/10 at p 52

[note: 153] ABD vol 4 at p 1076

[note: 154] NE 6/7/09 at p 4

[note: 155] NE 6/7/09 at p 4

[note: 156] NE 6/7/09 at p 5; see NE 8/7/09 at p 25

[note: 157] NE 12/1/10 at p 62

[note: 158] NE 6/7/09 at p 22

[note: 159] NE 6/7/09 at p 8

[note: 160] ABD vol 4 at p 1079

[note: 161] NE 6/7/09 at p 24

[note: 162] NE 2/7/09 at p 18

[note: 163] ABD vol 4 at p 1071

[note: 164] ABD vol 4 at p 1085

[note: 165] Bundle of AEIC vol 8 tab 11 at paras 129-130

[note: 166] Bundle of AEIC vol 8 tab 15 at p 2

[note: 167] SB's submission paras 111-112

[note: 168] Bundle of AEIC vol 8 tab 11 at [131]-[132]

[note: 169] NE 7/7/09 at p 13

[note: 170] AB vol 3 p 786

[note: 171] See exhibit P9

[note: 172] NE 22/1/10 at p 82

[note: 173] Statement of claim at para 10(j)(ii)

[note: 174] Bundle of AEIC vol 8 tab 11(a) at [95]-[96]

[note: 175] NE 14/1/10 at p 11

[note: 176] NE 14/1/10 at p 12

[note: 177] NE 13/1/10 at p 99

[note: 178] NE 13/1/10 at p 98

[note: 179] NE 01/2/10 at p 83

[note: 180] NE 01/2/10 at p 79

[note: 181] NE 01/2/10 at p 79

[note: 182] ABD vol 4 at p 996

[note: 183] Bundle of AEIC vol 7 tab 7 at [14]

[note: 184] Bundle of AEIC vol 7 tab 7 at para 4

[note: 185] NE 2/2/10 at p 48

[note: 186] Bundle of AEIC vol 7 tab 7 at para 9

[note: 187] SBP Statement of Claim p 11

[note: 188] NE 13/1/10 at p 108

[note: 189] NE 14/1/10 at p 58

[note: 190] Bundle of AEIC vol 7 tab 3 at para 15

[note: 191] Bundle of AEIC vol 7 tab 3 at para 7; see too NE 14/1/10 at p 80

[note: 192] NE 14/1/10 at p 78

[note: 193] NE 14/1/10 at p 80

[note: 194] NE 14/1/10 at p 81

[note: 195] Bundle of AEIC vol tab at paras 8-9

[note: 196] Bundle of Pleadings, SOC p 21

[note: 197] SOC para 10(d)(i),(ii),(iii), 10(j)(v)-(vi)

[note: 198] SOC para 10(e)

[note: 199] SOC para 10(j)(v)-(vi)

[note: 200] 6th Defendant's submission at para 137

[note: 201] NE 1/2/10 at p 42

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