Raffles Town Club Pte Ltd *v* Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)
[2010] SGHC 163

Case Number : Suit No 46 of 2006/J

Decision Date : 29 May 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

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Parties : Raffles Town Club Pte Ltd — Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)

Companies – Directors – Duties

Companies – Directors – Remuneration

Companies – Directors – Shadow directors

29 May 2010 Judgment reserved.

Chan Seng Onn J:

1 The litigation plaguing Raffles Town Club Pte Ltd ("the Plaintiff", also referred to as "RTC") and its associated or related parties has entered yet another stage. In this particular suit, the Plaintiff is suing the Defendants, namely Peter Lim, Lawrence Ang, William Tan and Dennis Foo, for breaching their duties as directors of the Plaintiff whilst they were still directors of the Plaintiff.

2 As the proprietor back in 1996 of the Raffles Town Club ("the Club"), the Plaintiff had allowed 18,992 individuals to be accepted as members of the Club. This later spawned much litigation and this suit is but one link in the chain of litigation that has dogged RTC. The table of contents that follows would aid in navigating through this somewhat lengthy judgment:

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Dramatis Personae

3 The Plaintiff, RTC, is the owner and operator of the Club and was initially incorporated in Singapore on 11 July 1996 as a public limited company, under the name "Raffles Town Club Limited". The following year, on 5 November 1997, it was converted into a private exempt company and renamed Raffles Town Club Pte Ltd.

4 Europa Holdings Pte Ltd ("EH") is another company that was also incorporated under the laws of Singapore. It was placed under voluntary liquidation on 7 March 2002 and was subsequently wound up on 28 February 2006. Until its winding up, EH was in the food and beverage business and operated a chain of pubs and restaurants as well as a now defunct country club, the Europa Country Club & Resort ("ECCR") (see [14] below). At all times material for the purposes of the present action, RTC and EH had the same registered shareholders and directors.

5 Peter Lim is the 1st defendant in this suit. RTC has alleged that at all material times, and particularly between September 1996 and April 2001, Peter Lim had been, contrary to his official title as a "consultant" of RTC, a *de facto* and/or shadow director of both RTC and EH. The Plaintiff contends that during this period, Peter Lim was the person in accordance with whose directions or instructions the directors of RTC and EH were accustomed to act. No major decisions as regards EH and RTC were made without his consent and/or approval. RTC also alleged that at all material times, Peter Lim had been a shareholder of both EH and RTC, and his shareholdings were held on trust by the 2nd, 3rd and 4th defendants.

6 The 2nd defendant, Lawrence Ang, was a director of RTC from 10 October 1996 to 18 May 2001 and a director of EH from 29 November 1993 to 13 May 2001. He was also a shareholder of both EH and RTC at all material times.

7 William Tan, the 3rd defendant, was a director of RTC from 18 January 1997 to 1 October 1998 and a director of EH from 27 November 1992 to 1 October 1998. He too was a shareholder of both EH and RTC at all material times.

8 As for Dennis Foo, the 4th defendant, he was a director of RTC from 11 July 1996 to 12 September 2000 and a director of EH from 29 November 1993 to 30 April 2001. Like the other Defendants, he was also a shareholder of both EH and RTC at all material times.

9 Margaret Tung and Lin Jian Wei, the 1st and 2nd third parties in this action, are the current directors and shareholders of RTC. Margaret Tung became a shareholder of RTC on 12 May 2001 and was appointed to the board of directors of RTC on 30 April 2001. Lin Jian Wei became a shareholder of RTC on 12 May 2001 and was appointed to the board of directors of RTC on 26 June 2001. Lin Jian Wei's wife, one Zhang Shi Qing, was a shareholder of RTC from 20 June 2001 to 16 September 2004 and a director of the company from 26 June 2001 to 16 September 2004.

Background facts

10 RTC is no stranger to litigation. The most prominent of these is perhaps "the members' suit" of *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] SGHC 278 ("the members' suit"). There, disgruntled members of the Club—having discovered that the general membership of the Club was in excess of 18,000 members—sued RTC for breach of contract and misrepresentation. Rajendran J sitting in the High Court dismissed their claims, finding that there had been no actionable misrepresentation and no breach of the contract to deliver a premier club. However, the Court of Appeal in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Tan Chin Seng 2003*") partially reversed his findings. It found that RTC had breached an implied term of the contract to provide a premier club. In *Raffles Town Club Pte Ltd v Tan Chin Seng & others* [2005] 4 SLR(R) 351, the Court of Appeal ordered that compensation of $3,000 was payable to each plaintiff in the members' suit. By then, the new directors of RTC were Margaret Tung and Lin Jian Wei. RTC claimed that it did not have sufficient funds to pay out the compensation to all its members and

subsequently obtained approval from the Court for a Scheme of Arrangement ("the Scheme") under s 210 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Companies Act"). RTC itself is now suing Peter Lim, Lawrence Ang, William Tan and Dennis Foo for breach of trust and/or fiduciary duties owed by them to RTC between the period of 1996 and April 2001. The 2nd and 3rd defendants, Lawrence Ang and William Tan, have joined Margaret Tung and Lin Jian Wei as 1st and 2nd third parties to the action. But there were happier times.

Early days before RTC – Europa

11 As mentioned earlier (at [5] above), RTC alleges that Peter Lim was a shadow or *de facto* director at the material time even though he was listed as a "consultant" on RTC's books. Some history is necessary to appreciate the significance of Peter Lim's role in RTC and EH and how his sphere of influence grew.

12 Before RTC came into being and well before Peter Lim arrived on the scene, William Tan was best of friends with one Tan Buck Chye – whom he knew from National Service. In 1987, Tan Buck Chye introduced William Tan to Lawrence Ang. Their many common interests such as visiting pubs and discos brought them close together, and at trial William Tan even testified that the three of them were in many ways closer than brothers.

13 A pub the trio frequented was Europa Changi, which was owned by Dennis Foo. Sometime in 1990, the trio approached Dennis Foo with regard to running a pub. Eventually in July 1990 they purchased a 50% shareholding interest in Europa Changi from Dennis Foo. A second pub called Europa International Plaza was opened at International Plaza in October 1990. This was followed by a third pub, Europa East Coast, in 1991. Under Tan Buck Chye's leadership, Europa's business of running pubs and discos prospered. It was clear to and conceded by Lawrence Ang, William Tan and Dennis Foo that Tan Buck Chye was indeed the brains behind Europa's successful pub business.

14 Around 1994, EH made a maiden foray into the country club business. It was Tan Buck Chye's idea to set up a country club, ECCR at the old Chequers Hotel premises on Thomson Road and Lawrence Ang, William Tan and Dennis Foo went along with his idea. Lawrence Ang put up about $2 to $3 million as a temporary loan for the ECCR project. Though more than 12,000 membership applications were received by ECCR, Tan Buck Chye decided to only accept around 5,000 members. The majority of the cash generated by the membership fees of ECCR were all transferred out to EH either in the form of management fees or dividends. By 1997, when the entrance fees collected by ECCR fell to a low of $1.8 million, no management fees were collected from ECCR by EH. Spurred on by the maiden success of ECCR, Tan Buck Chye decided that EH should expand further into the lucrative country club business.

The Club's beginnings

15 On or about 27 March 1996, EH tendered a $100 million bid for a piece of land released by the Urban Redevelopment Authority of Singapore ("URA") for the purpose of building a private recreation club ("the RTC Project") which later turned out to be the Club. EH won the tender but it emerged that the second highest bid for the land parcel was a distant $46.6 million. The perception that followed was that EH had bid too much for the land. Lawrence Ang, Tan Buck Chye, Dennis Foo and William Tan became concerned over whether they could raise the necessary financing to proceed with the RTC Project. On 27 March 1996, Tan Buck Chye, William Tan and Lawrence Ang discussed their options late into the night at Tan Buck Chye's house. Tan Buck Chye explained that he was still confident of the viability and profitability of the RTC Project and the possibility of bringing in an investor to assist with the financing was mooted. The discussions ended the following morning at 5

am.

Entry of Peter Lim

16 Tan Buck Chye eventually suggested approaching Peter Lim who was then known as the "*Remisier King*" in social circles. Tan Buck Chye informed Lawrence Ang and William Tan that he had met Peter Lim at a social function sometime at the end of 1995. He was clearly enamoured by Peter Lim's reputation. Lawrence Ang's evidence in this regard was as follows: [note: 1]

COURT: Tell me why you called Peter Lim "Boss".

A: Peter Lim is -- actually is the boss.

COURT: Did he ask you to call him "Boss"?

A: He -- he didn't.

COURT: Then why did you invent the name for him?

A: Because he's the one who make the decision. Also, Mr Tan Buck Chye call Mr Peter Lim "god". Not only "boss".

COURT: Are you joking?

A: No, sir. When -- when first time Mr Tan Buck Chye met Mr Peter Lim, he was so happy, he called me, he said, "Hey, Lawrence, we are going to make a lot of money, because we met a god, money god". He say, "We are going to make a lot of money, no worry". He is so happy, that's why -- that is why he called Peter Lim god. Behind, he say, "Hey, the god, god".

Tan Buck Chye's alleged remarks proved to be prescient in more ways than one.

17 In June 1996, Peter Lim made his first investment in the RTC project, channelling the funds through Lawrence Ang. This gave him a 20% beneficial shareholding in the RTC project. Then, sometime in June 1996, Tan Buck Chye suggested that Peter Lim's participation be enlarged: from Peter Lim's 20% stake in the RTC project to 20% of EH, thereby including all of EH's businesses as well as the RTC project. Lawrence Ang and William Tan had reservations about inviting Peter Lim to participate in EH given that they had, at that time, only known him for less than two months. However, Tan Buck Chye managed to convince them to allow Peter Lim's participation in EH. In return for his 20% stake in EH, Peter Lim would have to pay $15 million (in addition to a $5 million investor's capital).

18 By 11 July 1996, Raffles Town Club Limited was incorporated to own the Club. Raffles Town Club Limited was incorporated with two issued shares registered in the names of Tan Buck Chye and Dennis Foo. Tan Buck Chye and Dennis Foo subsequently transferred their shares in Raffles Town Club Limited to EH. On 24 December 1996, the shares of Raffles Town Club Limited were transferred by EH to Erasmia Pte Ltd ("Erasmia"). Lawrence Ang, William Tan and Dennis Foo were the shareholders of Erasmia at the material time. On 20 August 1997, Erasmia was renamed "RTC Holdings Pte Ltd". Following the conversion of Raffles Town Club Limited to RTC (a private exempt company) in November 1997, the shares in RTC, which were then held by RTC Holdings Pte Ltd, were transferred to Lawrence Ang, William Tan and Dennis Foo in the same proportion as their shareholding in EH.

Peter Lim versus Tan Buck Chye

19 Cracks started appearing in the relationship between Peter Lim and Tan Buck Chye. According to Lawrence Ang, the relationship between Peter Lim and Tan Buck Chye started to sour between August 1996 and October 1996. It will be recalled that Peter Lim had previously bought into a 20% stake in EH priced at $20m. This had been based on Tan Buck Chye's valuation of $100m for EH. However, sometime in August 1996, Peter Lim started complaining that pub closures (such as one Xanadu disco) and restricted hours did not make EH worth $100 million any longer and he contended that Tan Buck Chye's valuation was wrong and that he had overpaid for his stake in EH. Peter Lim's own valuation of EH was only $60m. Tan Buck Chye argued that Peter Lim had invested at a $100m valuation and should stick by his bargain. Arguments ensued over the value of the Europa Group. By September 1996, Peter Lim was urging all of them to quickly launch the Club. Peter Lim was heavily involved in the discussions leading up to the membership launch of the Club. While Tan Buck Chye was producing internal papers showing a pre-launch plan of up to 8,000 members, Peter Lim was telling Lawrence Ang, William Tan and Dennis Foo that RTC needed upwards of 10,000 applicants – otherwise the entire RTC project should be abandoned.

20 Then, in October1996, the staff of EH were informed that Tan Buck Chye—previously the Chief Executive Officer of EH—would be in charge of only corporate and strategy planning. To put it crudely, a power struggle had materialised. It appeared that both Peter Lim and Tan Buck Chye were each trying to win Lawrence Ang and William Tan over to their side. As for Dennis Foo, it was clear on the evidence that he had always been partial towards Peter Lim. From mid-October 1996 to 30 November 1996, the Club conducted, with much success, the priority membership launch. Around 24,000 applications were received of which around 18,992 applications were accepted. It was also during this period that Peter Lim convinced Lawrence Ang, William Tan and Dennis Foo that EH needed to carry out a rights issue to beef up its balance sheet and to improve its chances of a possible future listing. He even promised to arrange the financing for them to take up their rights issue shares. However, he was clear that he would not help Tan Buck Chye or his wife, Teriya. By this time, Peter Lim and Tan Buck Chye were hardly on speaking terms with each other. Eventually, a meeting to approve the rights issue was called with a day's notice, and subsequently Tan Buck Chye did not take up his rights issue shares; nor did his wife. As a result, their stake in EH was halved.

21 In the end, on 16 April 1997, Tan Buck Chye and Teriya sold their shares in EH for $7 million and their shares in RTC (or more accurately, Erasmia, which held 100% of RTC then) for $1 million. They probably did not realise how many members the Club had by that time accepted at $28,000 per member and how much entrance fees had been received by that time and was still coming in.

22 While appearances suggested that it was Lawrence Ang who had purchased all of Tan Buck Chye's and his wife's shares, in reality, almost half of these shares were held for Peter Lim's benefit. This was admitted by Lawrence Ang during cross-examination by RTC's counsel, Mr Ang Cheng Hock SC: [note: 2]

Q: You see what is filled up is that the declaration of the beneficial interest of yourself is for 765,100 shares; right?

A: Yes, sir.

Q: What is stated here is not true, because actually Peter Lim owns—according to you—at various stages, 32.222 per cent or 39-over per cent; correct?

A: Yes, sir.

Q: What you told the company auditors in this document is not true; right?

A: It's based on our black-and-white, sir.

…

Q: Your case, Mr Ang, is that all along, you hold these shares on trust for Peter Lim; correct?

A: Yes, sir.

Q: You signed documents, you told the auditors that you are the beneficial shareholders of all the shares that are in your name; right?

A: Yes, sir.

…

Q: Are you saying that for all these years while you were a director, you signed documents put in front of you without realising what the legal effect is or what it really means? Are you saying that?

A: Sir, all this—is only the first time I hold shares for people---"people" means Peter Lim. All the time I never hold share for other people.

23 Lawrence Ang conceded that he had effectively assisted Peter Lim in hiding the latter's assets from Peter Lim's ex-wife; Peter Lim had been undergoing divorce proceedings with his wife (now ex-wife) at the material time, and had informed Lawrence Ang and the rest that it was not convenient for him to join the company in his own name: [note: 3]

Q: …Do you know that Mr Peter Lim was hiding his assets from his wife?

A: He—

Q: He told you that, right?

A: Yes, yeah, he say that it is not convenient for him to come in as his own name,

Q: So you understand that he was hiding his assets from his wife; correct?

A: Yes, can be say that. If you ask me to think now, yes.

Thus, on paper, Lawrence Ang held nearly 80% of the shares in Erasmia/Raffles Town Club Limited and EH because of the EH rights issue and the purchase of Tan Buck Chye's and Teriya's shares. However, the actual beneficial shareholding in EH and Erasmia/Raffles Town Club Limited after Tan Buck Chye's departure was roughly in the proportion of 40:40:10:10, being Peter Lim's, Lawrence Ang's, William Tan's and Dennis Foo's shares respectively.

Subsequent events

24 On 19 June 1997, two days after Tan Buck Chye and Teriya had sold their shares in Erasmia/Raffles Town Club Limited and EH, RTC decided that EH would be paid a marketing commission of 10% for each member's entrance fee of $28,000. As mentioned above (at [23]), the respective shareholdings of Lawrence Ang, Peter Lim, William Tan and Dennis Foo after Tan Buck Chye and Teriya

sold their shares stood at approximately 40:40:10:10. Peter Lim was now a shareholder in RTC and EH and was also appointed a "consultant". At his behest, certain key individuals were appointed to RTC as managers, accountants, and directors. Prior to this, sometime in November 1996, one Chan Lay Hoon had been appointed upon Peter Lim's directions, to be RTC's financial controller. She would oversee the running of the accounts department of RTC and was also in charge of supervising the administrative and membership departments. On 1 July 1998, she was appointed to the Board of Directors of EH and RTC and also further appointed as one of two cheque signatories (alongside Lawrence Ang) for RTC and EH on 28 September 1998. This too was presumably on Peter Lim's instructions.

25 While it had been agreed in June 1997 that a marketing commission of 10% would be paid to EH (see [24] above), the Defendants eventually decided sometime in October 1997 that the commission payable to EH would be increased to 15% per membership entrance fee. The four Defendants subsequently entered into a written Management Agreement ("Management Agreement") with EH for its marketing services in relation to the hugely successful priority membership launch of the Club. The Management Agreement was backdated to 28 September 1996.

26 In March 2000, the Club opened its doors to members. For the first three to six months after the Club opened, it suffered from overcrowding and the staff struggled to cope with the many members and the members' families attending at the Club's premises. However, the usage level declined subsequently and became manageable after this initial overcrowding as testified by one Moh Siang King. Moh Siang King was the finance manager of RTC at the material time, and as a witness in the trial of this action, I found her to be non-partisan and reliable and her evidence, credible.

27 In June 2000, Peter Lim finally settled the division of his matrimonial assets with his wife. He then started asking for his 40% stake in EH and RTC in August 2000, which apparently had not been disclosed at the matrimonial proceedings. Specifically, he asked Lawrence Ang to cause RTC and EH to issue 40% of their shares to him and 10.1% shares to Dennis Foo. This was when Lawrence Ang realised that Peter Lim wanted control of both EH and RTC. Peter Lim's demands did not accord with the collective arrangement they had in place since Tan Buck Chye's departure in 1997, namely, that Lawrence Ang and William Tan would own slightly more than 50% of EH and RTC. Acceding to Peter Lim's demands would give Peter Lim and Dennis Foo majority ownership and control of EH and RTC.

Souring of the relationship between Lawrence Ang and Peter Lim

28 Towards the end of August 2000, a board meeting was held where legal documents were placed before Lawrence Ang. He was told to execute the documents immediately to grant an option to Peter Lim to officially take up a shareholding of 40% in RTC and EH. However, having witnessed how Peter Lim had got rid of Tan Buck Chye and Teriya from EH and RTC, and forced the removal in late 1998 of William Tan as a director of EH and RTC over a trivial dispute between William Tan and Chan Lay Hoon, Lawrence Ang understandably demurred and said that he wanted to seek legal advice. This angered Peter Lim who allegedly threatened to destroy the Club. Nevertheless, Lawrence Ang subsequently obtained legal advice and decided that he had to take control of the board, which was at that time populated with Peter Lim's nominees. Lawrence Ang then moved to call an Extraordinary General Meeting ("EGM") to sack Peter Lim's nominees from the board. Peter Lim immediately responded with an application for an injunction and sued Lawrence Ang and William Tan for majority control and ownership of EH and RTC. As expected, Dennis Foo took Peter Lim's side in this dispute.

29 These legal manoeuvres culminated in a trial, Suit No 742 of 2000 ("S 742/2000") which took place in March 2001. It was in the course of this trial that it was revealed to the public for the first time that RTC had taken in 19,048 members, making it the largest social club in Singapore by far. The

members felt they had been deceived and were furious, and this eventually translated into the members' suit (see [10] above). For ease of reference, the 19,048 members will be referred to as "the 19,000 members".

30 In April 2001, Peter Lim, Lawrence Ang, Dennis Foo and William Tan settled their claims vis-à-vis one another. Peter Lim and Dennis Foo sold their approximately 50% stake in RTC and EH to Lawrence Ang and William Tan; Margaret Tung and Lin Jian Wei then acquired their stake in RTC and EH from Lawrence Ang and William Tan. Meanwhile, the members' suit was brewing and commenced by November 2001. I have alluded to Rajendran J's findings in the said suit above, at [10]. On appeal, the Court of Appeal found in the members' favour and subsequently ruled in the assessment of damages hearing that RTC would have to pay $3,000 to each of the 4,885 plaintiffs in the members' suit for breaching an implied term in the contract to provide a premier club. As mentioned earlier (at [10] above), the Scheme was subsequently entered into by RTC and all its members wherein RTC was going to compensate all its members almost $53m in total at $3,000 per member (to be paid either in vouchers, part cash/part vouchers or by way of reduction of the prevailing transfer fee).

31 The present suit has now been instituted against the Defendants for breaching their duties as directors of RTC during the period of 1996 to 2000. The material facts concern the various acts of the Defendants during that period.

The Plaintiff's claim

32 The Plaintiff alleges that the four Defendants had each breached their: [note: 4]

(a) duty to act in good faith in the best interests of RTC;

(b) fiduciary duty of loyalty;

(c) duty to exercise reasonable skill and care in the discharge of their managerial functions and responsibilities;

(d) duty to act with due care and diligence; and

(e) duty to act honestly and use reasonable diligence in the discharge of their duties pursuant to s 157 of the Companies Act

by devising a scheme the purpose and effect of which was to enable them to "siphon substantial sums of money from RTC for their own benefit." This alleged scheme is quite elaborate as seen below.

Acceptance of the 19,000 members

33 First of all, the Plaintiff avers that the scheme had involved the Defendants' conducting a founder members' launch in which the Club was marketed as an exclusive and premier members' recreation club. Membership was deliberately priced at $28,000 to be payable in instalments so as to

ensure a maximum number of applications for membership. The promotional material had also stated that founder membership at $28,000 was a one-off opportunity and that future membership of the Club would cost some $40,000. This, the Plaintiff alleges, was intended to attract and net as many members as possible so as to maximise the revenue generated by RTC from the membership launch regardless of its obligations to its members. The Plaintiff further contends that the Defendants and/or each of them knew and/or ought to have known that the maximum number of initial members for an exclusive, premier club on the site with the intended facilities was for around 7,000 members. Any more than this number would result in serious overcrowding and the Club would cease to be exclusive and premier. As a result of the acceptance of a large number of members totalling 18,992 in the priority membership launch, $531,776,000 was envisaged to be received by RTC over the next 4 years from membership fees. The Plaintiff alleges that the Defendants in accepting the 19,000 members had breached their director duties and/or were negligent in failing to control the number of applications and/or had no proper regard to RTC's interests in accepting the 19,000 members when the intended facilities were adequate for only a "maximum initial membership of around 7,000 members." The Plaintiff further submits that the Defendants are also liable for the offence of cheating under s 415 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal Code") for making representations to the press and in the promotional materials that gave the impression that there would be 7,000 members and that the Club would be "exclusive and premier".

Circumventing s 162 and s 403 of the Companies Act

34 Another prong in the Plaintiff's claim is its contention that the Defendants had each wrongfully authorised, sanctioned, claimed and paid themselves substantial and unreasonable sums in the form of directors' remuneration, expenses and consultancy fees which were neither reasonable nor justified nor in the interests of RTC.

The Management Fees

35 This second part of the scheme allegedly involved the Defendants' attempts to circumvent ss 162 and 403 of the Companies Act in order to obtain a substantial portion of the monies received by the Plaintiff by way of membership fees for their personal benefit. To this end, the Plaintiff alleges that the Defendants caused RTC to enter into a "sham" Management Agreement with EH (see [25] above) under which RTC undertook to pay 15% of the prevailing membership fee per accepted member to EH as commission. The Management Agreement was backdated to 28 September 1996. In total, $78,267,723.80 ("$78m") was paid to EH by RTC between 11 May 1997 and mid August 1999 as management fees pursuant to the Management Agreement. The Plaintiff contends that EH never provided the Plaintiff with any of the services enumerated in the Management Agreement. Rather, it avers, it had been RTC, not EH which undertook the work pertaining to the membership launches. Further, the Plaintiff claims that if there had been any work done or services provided by EH pertaining to the management, sales, marketing and/or promotional services provided to RTC, they were *de minimis* and nowhere sufficient to justify the level of fees paid by RTC to EH. The Management Agreement was thus a "sham" and, according to the Plaintiff, the $78m was actually received by the four Defendants as "directors' loans" and/or "advances on dividends".

Directors' remuneration

36 As for the directors' remuneration, RTC contends that some $13,142,088.00 ("the $13m") had been paid to the Defendants as "purported remuneration". The Plaintiff claims that the $78m of management fees and the $13m of purported directors' remuneration "amounted in substance" to an unauthorised return of RTC's capital to its shareholders and that these payments were simply "dressed up payment of dividends out of capital" under circumstances where RTC could not lawfully

pay dividends as it had no profits by accounting standards. Under s 403 of the Companies Act, dividends may only be payable "out of profits".

Conspiracy

37 According to the Plaintiff, *in toto*, this implementation of the said scheme had involved conduct which caused injury to RTC wrongfully, negligently and/or intentionally – inasmuch as RTC was deprived of its property and of its ability to meet its obligations to members of the Club and rendered liable to the latter for breach of contract. The breach of duties owed by the Defendants to the Plaintiff and the circumvention of the provisions in ss 162 and 403 of the Companies Act meant that the Defendants were liable to RTC in conspiracy and in breach of s 157 of the Companies Act.

The use of $33m

38 The Plaintiff also pleads that, between February 1997 and April 1997, the Defendants had, in breach of their fiduciary duties, in breach of trust and without proper regard for RTC's interests, caused a sum of $33m to be transferred from its accounts to an offshore banking account in the name of Raffles Town Club (International) Ltd ("RTCI"). It contends that the Defendant had applied these monies as if they were loans to the Defendants for their own purposes and benefit. Overall, the Plaintiff claims that there had been a breach of duty and misapplication of RTC's property pursuant to a conspiracy. The Plaintiff avers that the $33m was a disguised directors' loan in breach of s 162 of the Companies Act. Further, the Plaintiff was deprived of the use of these monies for its benefit. Hence, the Defendants' conduct constituted a misfeasance and misapplication of RTC's funds in breach of trust and their fiduciary duties towards RTC.

39 Pursuant to the above allegations raised against the Defendants, the Plaintiff is claiming: [note: 5]

(a) Damages for conspiracy and/or breach of duty and/or negligence together with interest at such a rate and for such a period as the Court thinks fit pursuant to s 12 of the Civil Law Act [(Cap 43, 1999 Rev Ed) ("the Civil Law Act")]; and

(b) An indemnity in respect of any and all liability on the part of RTC to members of the Club arising out of the facts and matters herein complained of; and

(c) Profits and/or damages pursuant to s 157(3) of the Companies Act (Cap. 50).

(2) Further or alternatively:

(a) A declaration that the Defendants and each of them as former directors of the Plaintiff in the case of the Second to Fourth Defendants and as former de facto Managing Director and/or de factor Director and/or shadow director of the Plaintiff in the case of the First Defendant have been guilty of misfeasance and breach of trust and/or duty in relation to the Plaintiff by making or causing to be made the said payment to EH and themselves;

(b) A declaration that the Defendants and each of them are jointly and severally liable to the Plaintiff for the monies misapplied by them.

(c) An order that the Defendants and each of them repay the Plaintiff the said sums, together with interest at such a rate and for such a period as the Court thinks fit pursuant to s 12 of the Civil Law Act (Cap 43) or under the equitable jurisdiction of the Court;

(d) Profits and/or damages pursuant to s 157(3) of the Companies Act;

(3) All necessary accounts and enquiries including an account and inquiry as to what has become of the monies paid out under the Management Agreement and whether any and if so, what parts thereof remain;

(3A) An order that the Defendants (or each of them as may be appropriate) pay and/or transfer to the Plaintiff such monies or property or other asset as may be found to be due to the Plaintiff upon the taking of accounts and conduct of the inquiry.

(4) Costs.

(5) Further or other relief.

In addition, the Plaintiff remarked that it would give each of the Defendants credit for what would have constituted reasonable directors' remuneration and expenses for the period May 1997 to August 2000. [note: 6]

40 Before I delve into an analysis of the issues enumerated in the Plaintiff's claim as set out above, it is necessary for me to examine the veracity of the Plaintiff's allegation that the 1st Defendant, Peter Lim, had been either a shadow or a *de facto* director of RTC. The result of accepting the Plaintiff's submission is that Peter Lim would have the ordinary duties of a director imposed upon him. I therefore deal with this preliminary matter in the following section.

The law on shadow and *de facto* directors

41 The distinction between a "shadow" and "*de facto*" director is not always an easy one to draw and the two terms have sometimes been used interchangeably. In a way, both these terms have often been used with ill-deserved confidence, as if it is apparent from their labels what they mean. In the following section I will attempt to demystify the law in this area.

Shadow directors

42 It is interesting to note that while the current version of the Companies Act (Cap 50, 2006 Rev Ed) ("the 2006 Act") contains no definition of "shadow director" or "*de facto*" director, its predecessor, the Companies Act (Cap 50, 1994 Rev Ed) ("the 1994 Act") had in s 149(8) drawn a distinction between a "director" and a "shadow director":

(8) In this section-

…

"director", in relation to a company, includes a "shadow director"; …

"shadow director", in relation to a company, means a person *in accordance with whose directions or instructions the directors of a company are accustomed to act* except that a person shall not be deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity.

[emphasis added]

Meanwhile, s 4 of the 1994 Act which defined "director" provided that:

> "director" includes any person occupying the position of director of a corporation by whatever name called and includes a person *in accordance with whose directions or instructions the directors of a corporation are accustomed to act* and an alternative or substitute director … [emphasis added]

43 In its October 2002 report, the Company Legislation and Regulatory Framework Committee recommended the repeal of the separate definitions of "director" and "shadow director", pointedly remarking that (see *Company Legislation and Regulatory Framework Committee Report* (October 2002), Chapter Three – Corporate Governance, at para 2.1.2):

> [There is] a drafting anomaly in s 149(8), CA and s 149A, CA, which attempt separate definitions of "director" and "shadow director" only for these provisions. The particular definitions of director and shadow director have the effect of repeating substantive definitions in s 4(1), CA and s 4(2), CA and are accordingly superfluous and warrant repeal. We also note the reference to shadow directors in Rule 2 of the Companies (Application of Bankruptcy Act Provisions) Regulations.

44 Simply put, the Committee was of the view that the definition of "director" in s 4(1) of the 1994 Act already encompassed that of a "shadow" director. As is plain from the wording of the respective provisions which both contain the phrase "in accordance with whose directions or instructions the directors of a corporation are accustomed to act", it is hard to resist the logic of this view and it was given judicial credence in *Heap Huat Rubber Company Sdn Bhd and Others v Kong Choot Sian and Others* [2004] SGCA 12 ("*Heap Huat Rubber Company*") where the Court of Appeal remarked that (at [66]):

> We do not feel that it is helpful to refer to Kong as a "shadow director". Instead, we prefer to regard Kong as a "director" under the definition provided in s 4 of the Singapore Companies Act (Cap 50, 1994 Rev Ed).

45 Unsurprisingly, the 2006 Act has dispensed with the distinction between a "director" and "shadow director" and has simply retained the following definition in s 4(1):

> "director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director …

It can thus be safely said that a "shadow director" is one "in accordance with whose instructions and directions the directors are accustomed to act". By "accustomed", this means that there must be a "pattern of behaviour" (per Lord Millet J in *Re Hydrodam (Corby) Ltd* [1994] BCC 161 ("*Re Hydrodam*") at 163) on the part of the rest of the directors in complying with the shadow director's directions or instructions. In her article, Pearlie Koh, "Shadow Director, Shadow Director, Who Art Thou?" (1994) 14 C&SLJ 340 ("Pearlie Koh"), the learned author has observed that the word "accustomed" (at p 343):

> …suggest[s] some degree of habit. There must be some consistent pattern in the behaviour of compliance. Occasional instances of compliance would not be sufficient to satisfy the definition. Equally, in the converse situation where there is such a pattern of compliance, the occasional exercise of independent judgment by the board should not excuse the alleged shadow director.

I concur with her views. For the directors of a corporation to be "accustomed to act" in accordance

to the alleged shadow director's directions and instructions, a discernable pattern of compliance with the shadow director's instructions or directions would suffice. Even though there may be occasional departure from this pattern for *whatever reason*, the essence of shadow directorship may still remain intact. Ultimately, it is a question of fact to be determined by the court having regard to all the facts and circumstances in each case.

46 I should add that in *Re Hydrodam*, apart from requiring that there be a "pattern of behaviour" in complying with the alleged shadow director's directions or instructions, Millet J had also stated that the board of directors would not have "exercise[ed] any discretion or judgment of its own, but acted in accordance with the directions of others." This formulation imposes an additional element into the definition which as Associate Professor Pearlie Koh has noted, is "unnecessary" (Pearlie Koh, [45] *supra*, at p 344). Indeed, I find that the introduction of an element of "manipulation" or "puppeteering" into the definition generates more confusion. The rationale for the concept of a "shadow director" was, in all likelihood, to circumvent the difficulty of imputing directorship to an individual who had not put himself out as a director of the company and had not acted as if he was on equal standing with the *de jure* directors, yet exerted real influence on the corporate decisions of the company. To call such an individual a "director" would create a schism in one's ordinary understanding of a "director" since, in most cases, such an individual would have taken the greatest caution not to come across as being on par with the *de jure* directors and would not be perceived as a director at all – whether *de jure* or *de facto*. Yet, as someone who was directing the directors in important corporate decisions, the definition of a director had to be extended so that the law could hold him responsible for his actions. This is where the concept of a "shadow director" is helpful.

47 Consequently, if a board of directors exercising independent judgment finds itself consistently complying with the alleged shadow director's instructions or directions, such an individual is as much a shadow director as one whose instructions or directions are consistently complied with by a board which does not exercise independent judgment but simply abides by or follows those instructions or directions. This might be counter-intuitive since the term "shadow director" has over time, acquired a pejorative meaning – with phrases such as "lurking in the shadows", "puppet master", "cat's paw" tacked to it. However, it must be borne in mind that incorporating such additional requirements into the definition would defeat the rationale of the "shadow director definition" (which is an extended definition of "director") as "it would be all too easy for the [board of] directors to recite that, having considered the 'advice' of the alleged shadow director, they had on their judgment decided to follow that advice" (N R Campbell, "Liability as a Shadow Director" [1994] JBL 609 at 613). Indeed, the raison d'être of this concept is to ensure that those who are responsible for the important corporate decisions of a company are held to task regardless of what they are called and their motives or manner in making such corporate decisions.

48 The test is, thus, simple: is there sufficient evidence showing that the directors of a corporation are accustomed to act on the directions or instructions of that person? If yes, then the status of a shadow director may be imputed to him. Whether the board has exercised its decision independently or otherwise is irrelevant and has to be so: otherwise, the rationale underpinning the "shadow director" concept would be subverted. It follows, therefore, that the shadow director is not necessarily a sinister puppeteer who is manipulating the board from the wings of a stage as our imaginations would have us believe. Indeed, the "shadow director" epithet is sometimes exaggerated as Morritt LJ observed in *Secretary of State for Trade and Industry v Deverell and another* [2001] Ch 340 (at 354-355):

> …[T]he use of epithets or descriptions in place of the statutory definition of a shadow director… may be very effective in graphically conveying the effect of the definition in the light of the facts of that case, as shown by their frequent use in the reported cases to which I have referred. But,

> it seems to me, they may be misleading when transposed to the facts of other cases. Thus to describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implies a degree of control both of quality and extent over the corporate field in excess of what the statutory definition requires. What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them. Further, in my view, it is not necessary to the recognition of a shadow director that he should lurk in the shadows, though frequently he may, for example, in the case of a person resident abroad who owns all the shares in a company but chooses to operate it through a local board of directors. From time to time the owner, to the knowledge of all to whom it may be of concern, gives directions to the local board what to do but takes no part in the management of the company himself. In my view such an owner may be a shadow director notwithstanding that he takes no steps to hide the part he plays in the affairs of the company. Lurking in the shadows may occur but is not an essential ingredient to the recognition of the shadow director.

Morritt LJ's remarks resonate with my earlier expressed view at [45] above.

49 Before I conclude this section on the concept of the shadow director, I must address the implications of a finding that a person is a shadow director. By virtue of s 4(1) of the 2006 Act, a shadow director would be considered a director and thereby, in my judgment, have the ordinary duties of a director imposed on him. This is unlike the case in the UK where its company legislation (including the UK Companies Act 2006) does not equate a shadow director with a "director" for all statutory purposes. For instance, in *Ultraframe (UK) Ltd v Fielding* [2006] FSR 17, Lewison J found that the mere fact that a person fell within the statutory definition of "shadow director" was not enough to impose upon him the same fiduciary duties as are owed by a *de jure* or *de facto* director, though the learned judge accepted that in a particular factual matrix a shadow director's actions may extend beyond the exertion of indirect influence and thereby subject him to certain fiduciary duties.

De facto directors

50 So much for shadow directors. As for the term "*de facto*" directors, there does not appear to be any local judicial pronouncement on its exact meaning. Perhaps it is clear enough from the description "*de facto*" that a *de facto* director is one who is not formally appointed as a director but in fact acts as a director by exercising the powers and discharging the functions of a director. He is therefore in substance a director. Whether a person is to be regarded as a "*de facto*" director because he has acted as a director though not formally appointed is, as such, very much a question of fact; and, in any case, previous case law has relied on Millet J's formulation in *Re Hydrodam* where the learned judge defined a *de facto* director as (at 163):

> … a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although not validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director.

51 I note, however, that the Australian courts have not applied Millet J's requirement that the alleged *de facto* director himself must claim to be a director. In *Mistmorn Pty Ltd (in liq) and Hugh Jenner Wily v Michael Yasseen* 33 ATR 332 (FCA) ("*Mistmorn*"), the respondent, Mr Yasseen, had described himself as a "consultant" of Mistmorn Pty Ltd and testified that he had not intended to be a

director and had never claimed to be one. Nonetheless, the Federal Court of Australia found that he had been a *de facto* director, as he (at 341):

> … involved himself in the affairs of [the company] as only a director of the company would have been expected to do. I do not say that he held himself out to be a director, for, as I have said, I think that he intended not to be a director, but he dealt with the matters one would expect a director to handle.

52 In another Australian case, *Deputy Commissioner of Taxation v Austin* 39 ATR 485 (FCA) ("*Austin*"), the court observed that even though the respondent had never believed that "in law, he was … acting as a director", it found on the evidence before it that the respondent was nonetheless a *de facto* director. It is interesting to note that at the time *Austin* and *Mistmorn* were decided, s 60(1) of Australia's Corporations Act 1989 ("the 1989 Act") had defined "directors" as including a reference to:

> (a) a person occupying or acting in the position of director of the body, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position;
>
> (b) a person in accordance with whose directions or instructions the directors of the body are accustomed to act …

53 As can be seen, the wording of ss 60(1)(a) and (b) of the 1989 Act are substantially similar to s 4(1) of the 1994 Act and the 2006 Act. Since *Austin* and *Mistmorn*, there has been some tweaking of the definition of "director" in Australian legislation. Sections 60(1)(a) and (b) of the 1989 Act have reappeared as s 9 of the Corporations Act 2001 ("the 2001 Act") which is currently in force in Australia:

> Unless a contrary intention appears: …
>
> director of a company or other means:
>
> (a) a person who:
>
> (i) is appointed to the position of a director; or
>
> (ii) is appointed to the position of an alternate director and is acting in that capacity;
>
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
>
> (i) they act in the position of a director; or
>
> (ii) the directors of the company are accustomed to act in accordance with the person's instructions or wishes.

54 Quite plainly, the essence of ss 60(1)(a) and (b) of the 1989 Act is retained in s 9 of the 2001 Act notwithstanding the substitution of the word "directions" with "wishes". The similarity in wording and essence of these provisions with s 4(1) of the 1994 Act and 2006 Act is hard to miss. In Martin Markovic, "When are you a director when you're not a director? The law of *de facto* directors" (2007) 25 C&SLJ 101, the learned author pointed out that though the words "shadow" and "*de facto*" directors are not mentioned in the Australian statutory definition, it is "widely accepted" that the definition in s 9 includes them both. He observes that the words in s 9(b)(ii) that "the directors of the

company are accustomed to act in accordance with the person's instructions or wishes" has "attracted the label 'shadow directors'", whilst s 9(b)(i) "act in the position of a director" has "attracted the label '*de facto* director'". By parity of reasoning, it can be said that our s 4(1) which speaks of a person "occupying the position of director of a corporation by whatever name" alludes to a *de facto* director and the phrase "in accordance with whose directions or instructions the directors of a corporation are accustomed to act" alludes to "shadow directors".

55 In summary, it is not required that a *de facto* director intends to be a director or has claimed to be a director. Lending force to the Australian approach is the fact that recent English authorities have since tinkered a little with Millet J's definition. In *Re Kaytech International plc* [1999] BCC 390 ("*Re Kaytech*"), the English Court of Appeal endorsed the remarks of Jacob J in *Secretary of State for Trade and Industry v Tjolle* [1998] BCC 282 ("*Re Tjolle*") where in declining to formulate a single test for *de facto* directorship, Jacob J had opined (at 290):

> [I]t may be difficult to postulate any one decisive test. I think what is involved is very much a question of degree. The court takes into account all the relevant factors. Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (*eg*, management accounts) on which to base decisions, and whether the individual has to make major decisions and so on. Taking all these factors into account, one asks, "Was this individual part of the corporate governing structure?", answering it as a kind of jury question. In deciding this, one bears very much in mind why one is asking the question. That is why I think the passage I quoted from Millett J is important. There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or law.

56 Robert Walker LJ, delivering the judgment in *Re Kaytech* remarked (at 402):

> I do not understand Jacob J, in the first part of that passage, to be enumerating tests which must all be satisfied if de facto directorship is to be established. He is simply drawing attention to some (but not all) of the relevant factors, recognising that the crucial issue is whether the individual in question has assumed the status and functions of a company director so as to make himself responsible … as if he were a de jure director.

His Lordship also pointed out that:

> … the two concepts [of shadow and de facto director] do have at least this much in common, that an individual who was not a de jure director is alleged to have exercised real influence (otherwise than as a professional adviser) in the corporate governance of a company. Sometimes that influence may be concealed and sometimes it may be open. Sometimes it may be something of a mixture, as the facts of the present case show.

57 Robert Walker LJ observations are instructive. Indeed, it must be right that both shadow and *de facto* directors must have exercised "real influence" in the corporate governance of the company, otherwise it would not make sense to impute directorship and its attendant duties to such individuals.

58 In *Gemma Ltd v Davies* [2008] BCC 812 ("*Gemma*"), Jonathan Gaunt QC (sitting as a deputy judge of the High Court) eloquently expressed the principles, rather than an iron-clad test, in inquiring whether there had been *de facto* directorship. Drawing together the various threads of analysis found in the various cases cited to him by counsel including *Re Hydrodam* (as well as *Re Richborough*

Furniture Ltd [1996] BCC 155, *Re Tjolle*, *Secretary of State for Trade and Industry v Jones* [1999] BCC 336, *Re Kaytech, Secretary of State for Trade and Industry v Hollier* [2007] BCC 11 and *Secretary of State for Trade and Industry v Aviss* [2007] BCC 288 ("*Re Mea Corp*")) the judge observed at [40]:

> From those cases I derive the following propositions material to the facts of this case:
>
> (1) To establish that a person was a *de facto* director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director (per Millett J. in *Re Hydrodam (Corby) Ltd (in liq.)* [1994] BCC 161 at 163).
>
> (2) It is not a necessary characteristic of a de facto director that he is held out as a director; such "holding out" may, however, be important evidence in support of the conclusion that a person acted as a director in fact (per Etherton J. in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch); [2007] BCC 11 at [66]).
>
> (3) Holding out is not a sufficient condition either. What matters is not what he called himself but what he did (per Lewison J. *in Re Mea Corp Ltd* [2006] EWHC 1846 (Ch); [2007] BCC 288).
>
> (4) It is necessary for the person alleged to be a de facto director to have participated in directing the affairs of the company (Hollier (above) at [68]) on an equal footing with the other director(s) and not in a subordinate role (above at [68] and [69] explaining dicta of Timothy Lloyd Q.C. in *Re Richborough Furniture Ltd* [1996] BCC 155 at 169–170).
>
> (5) The person in question must be shown to have assumed the status and functions of a company director and to have exercised "real influence" in the corporate governance of the company (per Robert Walker L.J. in *Re Kaytech International Plc* [1999] BCC 390).
>
> (6) If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt (per Timothy Lloyd Q.C. in *Re Richborough Furniture Ltd* (above)), but the court must be careful not to strain the facts in deference to this observation (per Robert Walker L.J. in *Kaytech* at 401).

59 These are well-reasoned and sound guidelines which I find most salutary in clarifying the current legal position. Instead of pointing to specific acts as indicia of *de facto* directorship, one must look at the *aggregate* of the acts of the controller in question. As can be seen, the English courts do not regard the "holding out" of a person as a director *per se* as being conclusive of his status as a director or otherwise (unlike Millet J's formulation). As Jonathan Gaunt QC remarked at [42] (citing Lewison J in *Re Mea Corp Ltd* at [82]), "what is important is not what he called himself, but what he did".

60 In *Gemma* ([58] *supra*), Jonathan Gaunt QC found that while there had been slight evidence of the defendant being held out as a director, the defendant really had no "real influence" on the corporate decision making process, being compliant and even subservient towards her husband (who was a director in the company) in major corporate decisions.

61 Though it may be argued that England, unlike Australia, does not have a statutory definition of "*de facto* directorship", it is readily apparent from Jonathan Gaunt QC's judgment that the subjective intentions of the controller are of peripheral, if any significance. Indeed, the test is an objective one:

what matters is what he did, not what he called himself.

Summing up

62 To put it simply, *de facto* directors are those who "act as directors" and shadow directors are those who "in effect, command the directors how to act". Control over the company's affairs may be exercised directly by those who perform that role (*de facto* or *de jure* director) or indirectly by controlling those who are nominally in charge (shadow director) (*per* Chesterman J in *Emanuel Management Pty Ltd v Fosters Brewing Group Ltd* [2003] QSC 205). While section 4(1) of the 2006 Act provides for both these scenarios, as a practice note, it would be profitable for lawyers to rely on the definitions as set out in s 4(1) of the 2006 Act, instead of inventive but indeterminate interpretations of "shadow directors" and "*de facto* directors".

63 With this legal quagmire out of the way, I now turn to the Plaintiff's allegation that Peter Lim was a *de facto* or shadow director of RTC and EH.

The Plaintiff's claim that Peter Lim was a shadow or *de facto* director

64 To enumerate all the facts that the Plaintiff has relied on to prove its claim that Peter Lim was either a shadow or *de facto* director would add unnecessary length to this judgment. I thus highlight below the salient facts relied upon by the Plaintiff instead of reproducing in their entirety the evidence on this issue:

(a) Peter Lim had admitted under cross-examination that he was present at formal and informal meetings at which the other Defendants would be present and where matters in relation to RTC and EH would be discussed. Minutes of various such meetings disclosed at trial reflected Peter Lim as one of the attendees. Chan Lay Hoon testified that where Peter Lim was listed as being in attendance in the minutes of such meetings, it would generally mean that Peter Lim had been present at and involved in the meetings;

(b) Peter Lim had conceded that in many areas of key decision making in RTC and EH, the rest of the Defendants would defer to him. During the time of Peter Lim's involvement with RTC and EH, appointments of several key individuals in EH and RTC were made at his behest. On Peter Lim's own evidence, these appointments were key management decisions;

(c) Chan Lay Hoon's evidence was that whatever Peter Lim recommended would be implemented. For example, Peter Lim procured RTC to change its company auditors from Thong & Lim to HT Khoo & Co, which was a firm of auditors that Peter Lim was accustomed to using. Chan Lay Hoon confirmed that all the directors of RTC were accustomed to taking directions from Peter Lim on many areas in relation to RTC and EH such as finance, management and operations;

(d) Peter Lim admitted that he had pressed for the membership launch of the Club to take place in late 1996 because cash flow was needed for RTC and RTC did as told;

(e) Peter Lim admitted putting in place a system and arranging for Chan Lay Hoon to administer and process the membership applications. He had further arranged for the membership operations to be housed at one of his offices at Circular Road;

(f) Chan Lay Hoon testified that the acceptance of about 19,000 founder members by the Club was a major decision which required Peter Lim's consent. She also mentioned that the payment of the 15% commission to EH per membership entrance fee was another major decision which

required Peter Lim's consent;

(g) Peter Lim had conceded that he had a "dominant position" in RTC and EH; and

(h) Third parties had regarded Peter Lim as a director of RTC and even addressed him as such.

65 From the above, it is plain that Peter Lim was no ordinary "consultant". He had played an active and influential role in the major corporate decisions of RTC and the other directors had often deferred to him. On cross-examination, Peter Lim revealed:

Q: What you're saying is that throughout, since you became involved in the club in 1996, all the way to 1998, you were in a dominant position, but in late 1998 your dominant position was very strong? Is that what you're saying?

A: No. It's just increasing level of dominance.

Q: Am I correct to say that what you are telling the court is that as at late 1998, it's very clear that you have a dominant position in RTC and Europa Holdings?

A: Yes, I've just say that.

Q: Yes?

A: Yeah, late 1998. Yeah.

Q: So as far as you are concerned, no one can dispute that in late 1998 onwards, you had a clear dominant position in RTC, in Europa Holdings?

A: Oh, yes, sir. [note: 7]

66 Peter Lim's case however is that the rest of the directors did exercise independent judgment when he made recommendations to them, and if they had agreed to his suggestions or taken up his advice, it was because this was good for the company and not because they were borne out of compulsion. But this is not borne out in Dennis Foo's evidence in cross-examination: [note: 8]

Q: Fair enough. Do you agree that Peter Lim is "he who must be obeyed" insofar as company decisions --

A: Yes.

Q: -- key appointments --

A: Yes.

Q: -- major decisions of the company are concerned?

A: Yes.

Q: Really, when you agree that he is "he who must be obeyed" in these areas, when he made such decisions the directors really had to agree, they didn't really have a choice?

A: I think -- you see, I mean, I understand it then -- and I definitely understand it now -- that if Peter Lim wants to do something, he don't need me to concur. He probably will need Lawrence Ang to concur. And I don't think he even need William Tan to concur. But he is forceful, he's persuasive in his ways -- I experienced some of it -- but most of the time he don't even need to tell me, you know.

But what I'm trying to say here is -- but, not to be obeyed, in your words, "obeyed", then it may land up in a situation like this. I mean, there was fear -- I don't know it will land up this way -- which is the worst, I mean, ever possible scenario. I think there will be consequences, so I really can't answer this question exactly. Maybe I take a look at it again.

His word must be obeyed. To most extent, yes, and I must qualify it in this context.

Q: Yes. When he makes a decision, it's really something which the rest of the directors would follow? It's not a case of him consulting the other directors, persuading them to agree; it's a case of him saying, "Okay, look, we should do this", and everyone just agreed.

A: Let me put it this way. We have to ask him, but he don't have to ask us.

Q: Okay.

A: I think that's a more simple way of putting it.

Q: I think that's very apt. So he decides, but if you all want to do anything, you have to ask him?

A: Yeah, but I think one other person must concur, it's Lawrence Ang. I think. I believe so, actually, by now.

Q: So Peter Lim exerted enormous influence in the decision-making process of Europa Holdings and RTC; correct?

A: Yes.

67 Lawrence Ang, William Tan, Dennis Foo and Chan Lay Hoon all agreed that Peter Lim had a say in the major decisions of RTC and that they had often deferred to his decisions. When Chan Lay Hoon was cross-examined on the scope of Peter Lim's appointment as a consultant, the following transpired:

Mr Ang: You say Mr Peter Lim is a consultant; right, Ms Chan?

A: Yes.

Q: The scope of his consultancy work, his advice, what areas he gives consulting advice to the company, RTC, must be in his consultancy agreement; right?

A: As I understand, there is no written agreement.

Q: So we'll never know what exactly is his scope of work; correct?

A: I think from the course of working and observation, I have a rough idea.

Q: His scope of work is such that he's able to say that no major decisions in RTC were made without his consent; right?

A: Yes.

COURT: Do you mean that's a consultant's job? A consultant such that "You do nothing without my consent", that's a consultant? That's your definition of "consultant"?

I thought consultants don't do that. Consultants only present, the shareholders decide. Now this consultant is such that you cannot do anything without his approval. That's a consultant?

A: Your Honour, I think maybe in this situation there's a little bit of grey area, if I may say, that --

COURT: Grey in what way?

A: He's a consultant, and he also has a prospective 40 per cent interest when the club open. And -- and as when -- and as when the year go past, and it's draw nearer, nearer to the club opening date, and obviously, I think, his influence will be greater as it goes. [note: 9]

68 Based on the objective evidence before me, the inexorable conclusion is that Peter Lim was highly influential and had been the dominant influence in many major corporate decisions of RTC. In fact, he had admitted that important decisions were undertaken by him and this is buttressed by his remark in his 1st affidavit in S 742/2000 (at para 74), that:

> … when [William Tan] resigned his directorships, *inter alia*, of RTC and EH on 30 September 1998, he wrote to me to tender his resignation… This was a clear recognition of my dominant position in RTC and EH… I was already exercising strong influence even before becoming a 40% shareholder. No major decisions in EH and RTC were made without my consent.

69 On the facts, therefore, it is clear to me that Peter Lim had been a *de facto* director of RTC. He was in direct control of the affairs of the company; and his presence at meetings, both formal and informal, militate strongly in favour of a finding of *de facto* directorship. Peter Lim had not attempted to indirectly control RTC through the rest of the Defendants. Rather, he had unabashedly exerted direct control over RTC's corporate decisions without apology. This was not the job of a consultant. Whilst the fact that third parties regarded him as a director of RTC is irrelevant to my analysis, it may be viewed as reinforcing the notion that Peter Lim was indeed "occupying the position of director of a corporation" (see s 4(1) of 2006 Act), albeit as a "consultant". Nonetheless, he would be caught by s 4(1) as the provision makes it clear that the label attached to the controller is irrelevant. Consequently, Peter Lim as a *de facto* director of RTC will be subject to the duties ordinarily imposed on directors.

Analysis of the Plaintiff's claim

70 I will now deal with the issues as outlined at [33]-[38] above *in seriatim*.

Acceptance of the 19,000 members

71 To recapitulate, the promotional materials had stated that RTC would deliver an exclusive club with first class facilities "without peer in terms of size, facilities and opulence". The Plaintiff argues

that by late 1996 or early 1997 at the latest, the Defendants and/or each of them knew and/or ought to have known that the maximum number of initial members for an exclusive premier club on the site with the intended facilities was about 7,000 members. Any more would result in serious overcrowding and the Club would cease to be exclusive or premier. It alleges that the Defendants had connived to mislead the public as to the Club's premier and exclusive status and had also deliberately concealed the true membership figures from its members. This, the Plaintiff alleges, amounted to the commission of a "fraud" upon the applicants.

72 In support of the above allegations, the Plaintiff cited three interviews given by Dennis Foo to the press in November 1996 and April 1997. In the first two interviews, he had stated that he "*hoped*" to rope in 5,000-6,000 members. As for the last, he had been quoted as stating that the Club had over 4,500 members from the two membership drives when the total membership figure was already well known to the Defendants. Furthermore, the Club's March 1997 newsletter (signed off by Dennis Foo) stated that the Club would be taking in members periodically bearing in mind that there was an optimal membership level based on the size of the Club's facilities.

73 It was also highlighted by the Plaintiff that the Defendants had testified at trial that RTC had been converted into a private exempt company to keep the membership size of the Club confidential. Even the staff at RTC, the Plaintiff submitted, were led to believe that the total membership of the Club had been between 5,000-6,000 members: an internal information fact sheet that had purportedly been circulated among the RTC staff expressly stated that the total membership of the Club was approximately 7,000. Referring to discussions amongst the Defendants in acquiring additional premises or facilities, the Plaintiff averred that this surely meant that the Defendants knew that the Club's facilities could not cope with 19,000 members. All these actions, the Plaintiff alleges, were inconsistent with the Defendants' claims that they had acted honestly and in good faith towards RTC.

74 The Defendants' collective response was that they had acted in the best interests of the Club. They asserted that had they taken in 5,000 to 6,000 members at the entrance fee of $28,000, the Club would have been unable to survive. Though it was conceded that there had been instances of "active concealment" of the membership figures after the launch, they contended that this was done after the Defendants became aware of the 19,000 membership size, not before, as alleged by the Plaintiff.

Were the representations fraudulent and/or in bad faith?

75 Before the representations can even be *argued* to be fraudulent and/or in bad faith, it must first be shown that Dennis Foo had knowledge of the number of members that had been accepted at the material time the various interviews were conducted. The objective evidence before me was that it was Peter Lim, Lawrence Ang, William Tan and Tan Buck Chye who were actively involved in the sorting out of the membership applications and other matters pertaining to the priority membership launch. Dennis Foo's role, it appeared, was to be the "face" of RTC and/or EH which to his credit, he did well. It appeared to me that he pretty much adopted a hands-off approach with regard to the membership applications and was solely focused on raising the profile of the Club and drumming up publicity for it. I doubt that he had kept tabs on the number of members that were being accepted progressively during the period of the membership launch in November 1996 as the other Defendants and Tan Buck Chye were already in charge of the situation. Dennis Foo also testified that when he spoke to the press in November 1996, he was unaware of Peter Lim's break-even figure of 10,000 members. He submitted that his rationale for stating that RTC hoped to have 5,000 to 6,000 members was based on his own calculation of what RTC would require to deliver the Club*, ie*, pay for the Land ($100 million) and construction costs (estimated $70 million), albeit that he had failed to take the tax liability into account.

76 On a balance of probabilities, I find that Dennis Foo was indeed unaware of the actual number of members that had been accepted at the material time. Hence, it cannot be said that his representations had been fraudulent or made in bad faith. However, taking the Plaintiff's case at its highest and assuming that Dennis Foo did have the requisite knowledge during the relevant periods, my finding would be the same.

77 Indeed, while Dennis Foo's supposed representations in the press and newsletter *plausibly* created an impression that the Club would be taking in around 5,000 to 6,000 members, it must be noted that in these representations, RTC did not, whether through the Defendants or Dennis Foo himself, *lie* to the public as to the actual membership size. Nor did it represent that it would take in *only up to* 5,000 to 6,000 members. It is pertinent to refer to the actual press interviews that the Plaintiff cited. The first interview appeared in the Business Times on 15 November 1996. The journalist had simply written in the second paragraph of the interview that:

> Dennis Foo, director of Europa Holdings, said the Raffles Town Club *hopes to rope in 5,000-6,000 founder and public members* in its initial membership drive.
>
> …
>
> … at the end of 1998, another 1,000 memberships will be open to the public at $60,000 …

78 The second interview was published on 17 November 1996 in the Straits Times:

> Eventually when the club is ready, Mr Foo expects membership to cost $60,000. Meanwhile teaser ads have gone on television …
>
> Altogether, the club *hopes to have 5,000-6,000 members* and is targeted at the new rich, who want a taste of the "lifestyle of the rich and famous."

79 The Plaintiff argues that these statements above were "highly misleading and false", designed to give the impression that the membership size in the Club would be very limited and that at the price of $28,000 per member,it would be a great buy. However, in both interviews, Dennis Foo had merely stated that the Club "hoped" to get 5,000 to 6,000 members. He had not represented that membership size would be limited to 5,000 to 7,000 members or that the membership size was in fact only about 5,000 to 7,000 members. Further, the questions were not reported. The context in which Dennis Foo made the above remarks is crucial to understanding the motive and reasons for his remarks. Reading the extracts, one cannot come to the irrefutable conclusion that Dennis Foo had unequivocally meant in these statements that RTC was looking to accept a maximum of 5,000 to 7,000 members. In fact, a very plausible interpretation of his remarks is that RTC had "*hoped*" to attain such a membership size as 5,000 to 7,000 was the minimum critical mass required for RTC to cover its costs – this comports with his submission that this notion of covering costs was operating in his mind when he gave the interviews (see [75] above).

80 As such, I would be slow to find that, as the Plaintiff has claimed, Dennis Foo's statements, made on behalf of the Defendants or otherwise, were calculated to and did in fact deceive the public. The interviews say little; further, it has not been proven that as a result of these interviews, members of the public had been deceived and therefore applied for membership. Indeed, for an act of misrepresentation to be actionable, it must be shown that it had induced a party to enter into a contract (see [83] below).

81 I come now to the third interview dated 19-20 April 1997 in the Business Times which reported

that:

> Mr Foo says the club now has more than 4,500 members from two membership drives—the first priced at $28,000 and the second at $40,000. Europa is so confident of its product that its third membership drive will see another price hike to $50,000.

82 According to the Plaintiff, this was designed to "perpetuate the misleading impression that the membership was limited and exclusive" despite the fact that by this time the 19,000 members had already been accepted. Dennis Foo's evidence is that he did not recall granting such an interview, nor did he recall making such a statement or seeing the facsimile of 25 November 1997 to RTC (which enclosed the aforesaid interview). I make no finding on this. But assuming that Dennis Foo was well aware of the acceptance of 19,000 members, I do not see how it negates the truth of the representation that the "club [now] has more than 4,500 members". 19,000 is indeed more than 4,500 and Dennis Foo, assuming that he knew about the 19,000 members, was not bound to disclose *how much more* than 4,500 the actual figure was. While he may have been economical with the truth, it would be a stretch to decry his statements as being fraudulent or having been made in bad faith. In any event, those members who had applied for membership and had been accepted by RTC as members would have applied for membership before this third interview was published in the Business Times in April 1997 – further launches for ordinary memberships at $40,000 that took place in March and July 1997 only saw a further 83 applications being accepted on top of the 18,992 applications that had been accepted from the priority membership launch. Hence, even if there had been a misrepresentation in the aforesaid interview, it could not be relied upon by members who had been accepted before April 1997 and this alleged misrepresentation would not be actionable. As for members who had applied after all the three interviews cited above had been published, it has not been shown that they had relied on Dennis Foo's statements or that they had been defrauded.

83 At [20] of *Tan Chin Seng 2003*, the Court of Appeal cited from p 237 of *Anson's Law of Contract* (OUP, 28th Ed, 2002):

> An operative misrepresentation consists in a false statement of *existing or past fact* made by one party (the "misrepresentor") before or at the time of making the contract, which is addressed to the other party (the "misrepresentee") and which *induces the other party to enter into the contract*. [emphasis added]

The Court of Appeal further observed that (at [21]):

> There is also a need to differentiate between actionable representation and future promise and this is elucidated in Andrew Phang's *Law of Contract (Second Singapore and Malaysian Edition)* (1998) as follows at pp 444 to 445:
>
> > A representation, as we have seen, relates to some existing fact or some past event. It implies a *factum*, not a *faciendum*, and since it contains no element of futurity it must be distinguished from a statement of intention. An affirmation of the truth of a fact is different from a promise to do something *in futuro*, and produces different legal consequences. This distinction is of practical importance. If a person alters his position on the faith of a representation, the mere fact of its falsehood entitles him to certain remedies. If, on the other hand, he sues upon what is in truth a promise, he must show that this promise forms part of a valid contract. The distinction is well illustrated by *Maddison v Alderson* [(1883) 8 App Cas 467], where the plaintiff, who was prevented by the Statute of Frauds from enforcing an oral promise to devise a house, contended that the promise to make a will in her favour should be treated as a representation which would operate by way of estoppel. The

contention, however, was dismissed, for:

> The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts. [see (1883) 8 App Cas 467 at 473].

84 Suffice to say, I do not find that there had been any *promise* made by Dennis Foo and/or the Defendants that only 5,000 to 6,000 members would be accepted by RTC and even if there had been such a promise, it has not been shown that members had relied on such a promise to their detriment. Neither has it been shown that such a promise (if it existed) formed part of the contract between RTC and the members. While it is indeed the case that there had been a breach of the implied term that RTC would deliver a premier club, it must be recognised that there was no specific promise to accept only 5,000 to 6,000 members; neither can one conceivably imply into the contract between RTC and its members that there had been such an implied term. There was nothing in what Dennis Foo said that was tantamount to a misrepresentation or a fraudulent statement. People were attracted to the Club because they believed (and rightly so) that it would be exclusive and premier, not because they *thought* it would have 5,000 to 6,000 members. I would thus roundly reject the Plaintiff's claim that the Defendants "never had the intention to fulfil RTC's promise to the public and/or potential members that RTC would deliver a premier and exclusive club" and that "alternatively, when the Defendants caused RTC to accept 18,992 applications as members of the Club, they did not have the intention to fulfil RTC's promise that RTC would deliver a premier and exclusive club." [note: 10] The Plaintiff's analysis is parochial as it is unduly fixated upon the number of members as determining the exclusivity of the Club.

Was the desire to maximise the number of applications not bona fide?

85 The Plaintiff submits that the Defendants had wanted potential applicants to believe that they would form part of an exclusive group of up to 7,000 members belonging to an exclusive and premier club so as to maximize the number of applications for memberships received. First, there is nothing objectionable in wanting to maximize the number of applications. Most if not all clubs would be desirous of this. It must be borne in mind that the Club was, and still is, a proprietary Club, not a member's Club. As a business, its objective would be to maximize revenue and profits. In J F Josling and Lionel Alexander, *Law of Clubs* (Oyez Longman, 5th Ed, 1984), it is stated (at p 10):

> A proprietary club is in essence a business in which an individual or a partnership of individuals, or a company, provides the facilities and amenities of a club for the use of persons who are in reality customers, but who generally pass under the description of members. These members will have no interest in the club property or income; they stand in a contractual relationship, not with each other, but with the proprietor, the incidents of the contract being construed out of the rules which he lays down for them to observe...
>
> …
>
> A member's club is quite different from a proprietary club… Such a club does not, in its ordinary transactions, carry on a business …

86 Secondly, whilst the Defendants plausibly wanted to maximize the number of applications, they did have a selection process such that not all and sundry who applied obtained membership. If their sole purpose had been to defraud the members there would have been no need for such a selection

process. They could have simply accepted all 24,000 applicants as members and gained an additional $140,000,000 in entrance fees.

87 Thirdly, simply because the Defendants allowed the Plaintiff to accept the 19,000 members did not mean that they had not acted *bona fide*. A small membership size *per se* does not denote exclusivity. Conversely, a large membership size does not mean a club is not exclusive. At trial, it was revealed that RTC had rejected applicants who were above a certain age because it was believed that such applicants would have a decreasing earning capacity in the future. This is in a sense, an instance of exclusivity. Dictionaries have defined the term to mean admitting only members of a socially restricted or very carefully selected group. Exclusivity must thus be referable to some criteria. It cannot be based on membership size alone. It is not a game of numbers. Hence a club may have few members but that may not mean that it is exclusive in the ordinary sense of the word – it might just be unpopular. Conversely, if the membership size of a club were to stand at say 25,000 members comprising of only millionaires from all over the world including Singapore, does it necessarily mean that it cannot be deemed "exclusive" simply because the membership size is larger than that of other clubs in Singapore (be they proprietary in nature or otherwise)? This cannot be so. As the Court of Appeal observed in *Tan Chin Seng 2003* (at [38]):

> We accept that the 19,000 people whom the respondent admitted as members does not *per se* prove a breach. The real question is whether the Club has, by admitting so many members, ceased to be an "exclusive" or "premier" club, having regard to the dimensions of the facilities available.

Further, the Court of Appeal remarked (at [50]):

> Bearing in mind that we are here concerned with a "premier" club, it is clear that its facilities are inadequate to cater for the need of 19,000 members (plus their spouses, families and guests) in three major areas, the food outlets, the swimming pool and the gym; and probably also the bowling alley. The test of a premier club must surely be, besides the physical aspect, the ease with which members can gain access to facilities. While the occasional wait, such as on festive seasons, is acceptable, it should not be a regular feature on weekends and public holidays. It is plain logic that where you have a large number of members, the pressure on facilities will naturally increase, even though members may not turn up all at the same time or at the same regular intervals.

88 The Court of Appeal had found in *Tan Chin Seng 2003* that RTC had breached an implied term of providing a premier club (see *Tan Chin Seng 2003*, at [37]) because of the overcrowding that had occurred, resulting in the limited access to the facilities and hence a loss of that "premier" feel. One may argue that the overcrowding had resulted really from a lack of facilities rather than the acceptance of the 19,000 members and hence the acceptance of the 19,000 members did not constitute a breach but such reasoning, I acknowledge, may be quite artificial. Nonetheless, it must be borne in mind that it was the overcrowding that had led to the loss of a "premier" feel. In any case, this issue of accepting the 19,000 members had already been disposed of in *Tan Chin Seng 2003* and should not be invoked in this suit for the reasons in the following section.

Number of applications to be accepted was a commercial decision

89 As I have mentioned above, it must be borne in mind that the overcrowding was the crux of the members' suit, not the acceptance of the 19,000 members. Indeed, it is highly doubtful that the applicants had paid for membership on the premise that the total membership size would be 5,000 to 7,000 members. Rather, it was the promise of exclusivity and premier status that drew them to

become members of the Club and the inquiry should not be unduly fixated on figures. What should be the threshold for a Club to, on one hand, maximise the number of applications and on the other, ensure that it is "exclusive"? There is no formula for determining which figure would strike the best compromise. Simply because the decision to accept the 19,000 members later proved to be, arguably, imprudent (in that there was overcrowding during the initial few months immediately following the opening of the Club) does not automatically mean that the Defendants had been fraudulent or negligent.

90 Eventually, determining how many members to accept was a commercial decision. The Defendants assert that it was in the best interests of the Club that they took in the 19,000 members and that the Club would not have survived had it not accepted this number of applications. The Plaintiff highlights that the Court of Appeal in *Tan Chin Seng 2003* at [21]) because of the overcrowding that had occurred, resulting in the limited access to the facilities and hence a loss of that "premier" feel. One may argue that the overcrowding had resulted really from a lack of facilities rather than the acceptance of the 19,000 members and hence the acceptance of the 19,000 members did not constitute a breach but such reasoning, I acknowledge, may be quite artificial. Nonetheless, it must be borne in mind that it was the overcrowding that had led to the loss of a "premier" feel. In any case, this issue of accepting the 19,000 members had already been disposed of in *Tan Chin Seng 2003* and should not be invoked in this suit for the reasons in the following section.

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90 Eventually, determining how many members to accept was a commercial decision. The Defendants assert that it was in the best interests of the Club that they took in the 19,000 members and that the Club would not have survived had it not accepted this number of applications. The Plaintiff highlights that the Court of Appeal in *Tan Chin Seng 2003* at [21] had rejected this argument as being "strange" and "astonishing". However, read in its context, the Court's remarks there were in response to the Court's view that RTC was attempting to ignore its contractual obligation to provide a premier club and to maintain it as such. It stated that "if the Club had made a wrong bargain or calculation, it had only itself to blame and it should not be allowed to shift its responsibilities". The passage should not be read as dismissing the merits of the Defendants' own belief that the 19,000 members were needed for the Club to survive.

91 Much has been made of the fact that additional facilities had been considered (but not, in the end, procured) for the Club. In this regard the Plaintiff relied on the testimony of Dennis Foo and Peter Lim as well as the summary projected cash flows ("the projected cash flows") prepared by Tan Buck Chye whilst he was still at RTC. [note: 11] In these projected cash flows which were contained in a document entitled "Summary Project Evaluation", Tan Buck Chye had in this section titled "Summary Projected Flows", prepared estimates of the inflows and outflows of cash for membership sizes of

6,000, 8,000, 10,000 and 12,000 members respectively. A footnote entry adverted to "contingency costs" of $10m in the projections for membership sizes of 8,000 upwards. Dennis Foo also testified that he had felt that additional facilities would have to be procured owing to potential overcrowding and that he had shared such concerns with the other Defendants before the Club opened. Peter Lim on the other hand conceded that meetings had taken place in relation to the possibility of acquiring further facilities, but he had chosen to adopt a wait-and-see approach. He said he would wait till 3 to 6 months after the Club had opened before assessing the situation. All these, the Plaintiff contends, point to the fact that the Defendants were well aware that 7,000 was the optimum membership size for the given facilities.

92 First, it is not disputed that the projected cash flows had been prepared by Tan Buck Chye. However, there was no evidence that the Defendants had been of the view that a membership size of upwards of 8,000 would require additional facilities to prevent overcrowding, an inference the Plaintiff appears to have drawn from Tan Buck Chye's projections. According to the projected cash flows, 8,000 members were sufficient for RTC to make a profit of $15.7m. Yet, Peter Lim was of the view that a minimum, critical mass of 10,000 members was required to break even. Lawrence Ang himself was of the view that the minimum membership size would be 12,000 to 13,000. Lawrence Ang's evidence was that Tan Buck Chye had also suggested at their meetings that 20,000 members would not be a problem for RTC and that Tan Buck Chye himself had contemplated that the Club would be very crowded in the first three to six months regardless of the membership intake. In any case, it is clear to me that there was no consensus amongst the Defendants that (a) they would take in only 8,000 members; and (b) an intake of 8,000 members and above would give rise to overcrowding.

93 Second, it was not evident that a concern that there might be overcrowding had led to a consideration that additional facilities would have to be procured. The mere words in the footnote of the projected cash flows had simply stated "contingency for project cost overrun budgeted at S$10m (excl interest) for membership intake of 8,000 and above". In fact, in the Summary Project Evaluation document, Tan Buck Chye had remarked in a section titled "Scenario Analysis" that an intake of 10,000 to12,000 members would be: [note: 12]

> … profitable but a situation to be managed. With the right approach and strategies, we should reach an eventual maximum membership base of 15,000 which is comparable to Singapore Swimming Club and Guild House and reasonably proportionate to other Clubs in terms of size.
>
> It would not be possible to market any significant amount of new members at the official price but eventual membership can still reach 15,000 through the alternative channels explained under Option A.

"Option A", I note, does not mention the procurement of additional facilities. In fact, such additional facilities were only mentioned in a Summary Project Evaluation document under a section titled "Longer Term Perspectives" in which Tan Buck Chye suggested that it would be "profitable" to combine the operations of Raffles Town Club and Europa Country Club and another club "to capitalise on synergies and critical mass". This, he proffered, would allow them to have a base to "build on a super club membership incorporating a JB golf club cum weekend retreat and a Singapore Marina". This actually supports Lawrence Ang's evidence at trial that additional facilities were considered to add value to the Club membership rather than to address potential overcrowding. On the balance of probabilities, I would thus reject the Plaintiff's submissions that the projected cash flows evinced the Defendants' state of mind that the facilities of the Club could accommodate only 7,000 members.

94 According to Moh Siang King, six months after the Club opened, the usage level had stabilised so that there was no overcrowding and in March 2001 there was in fact an underutilisation of the

Club's facilities. The Club membership has now dwindled to 15,700 (at the time of the Defendant's closing submissions) and according to Moh Siang King again, RTC experiences an attrition rate of 300 members per year. She also agreed that the overcrowding had occurred due to the pent-up demand arising from the 15-month delay in the opening of the Club. Further, in the first week of the Club's opening, free food had been catered for the members and their families and guests. Though members were invited in tranches to enjoy the complimentary meals, often they would return the following day for complimentary food. The coffee house had also sold its food at competitive prices for the first few weeks. There is no doubt in my mind that this concatenation of circumstances led to the overcrowding in the first few months of opening. Indeed, the pent-up anticipation of visiting Singapore's presumably most premier club meant that the members in their excitement would jump at the opportunity to visit the Club's premises in the first few weeks following its opening. The free flow of food for members and their guests only boosted the Club's popularity with its members as did the competitively priced food from the coffee house.

95 Novelty takes time to wear off and in this instance, it took about 6 months (as had been envisaged by Lawrence Ang Tan Buck Chye himself) before the usage rate stabilised by which time there was no more overcrowding. On cross-examination, Moh Siang King testified as such: [note: 13]

Mr THIO: It's reasonable for the management of the club to look at it after six months and say, "It's okay, it's running well, it's not overcrowded"; fair?

A: Yes.

…

Q: …there was a very dramatic drop in utilisation from March 2000 to March 2001; correct?

A: I think when it comes to 2001, you can see the drop.

Q: It's quite a steep drop?

A: Yes.

96 In Kala Anandarajah, *Corporate Governance: Practice and Issues* (Academy Publishing, 2010) ("*Corporate Governance*"), the author notes at para 06.023 that:

> It is a clear principle of law that where a director is required to act *bona fide* in the interest of the company, he must act according to what he considers, not what a court may consider, is in the interest of the company. In other words, the director is to act in a manner which he thinks is best suited for the company. This makes commercial sense in that it is the directors who know the business of the company best, and so should be the ones to determine in a reasonable manner what is best for the company. The duty is evidently subjective, in that the court will not consider it broken merely because in the court's opinion, the particular exercise was not in the company's interest. In the words of the court in *Pergamon Press Ltd v Maxwell* [1970] 1 WLR 1167, the court will not take it upon itself to order that a particular power vested in the directors should be exercised in a particular way. In *Idamene v Symbion Health* [[2007] 64 ACSR 680 at [114]] Lindgren J held that there "is a well-known line of authority to the general effect that it is the province of directors, not the courts, to identify where the interest of a company lie, and that the courts do not exercise a supervisory function over the business judgments of directors."

97 As a proprietary club, it was in the interests of the Club and hence RTC to maximize profits as well as to ensure its long term commercial viability. However when members of the Club were aggrieved that the Club was not as premier or exclusive as they had expected it to be due to the overcrowding, their recourse was to sue the proprietor of the Club, *ie*, RTC, which they did. That chapter is now closed as far as this court is concerned. RTC's defeat in the members' suit does not translate into the Defendants having failed in their duty of good faith towards RTC. It is important to distinguish between the grievances the members had towards RTC and the Defendant's duties towards RTC. In accepting the 19,000 members, the Defendants had made a commercial decision which raked in healthy profits for RTC. Though the wisdom of this decision may be questioned on hindsight owing to the members' suit, it cannot be that directors are automatically in breach of their duties whenever a commercial decision generates some undesirable results. For that matter, I do not believe that when the directors accepted the 19,000 members they had any inkling that the acceptance of that number would later generate a law suit from the members. Neither was it the case that knowing or realising the likelihood of that eventuality, the Defendants nevertheless recklessly proceeded to put RTC at risk of a law suit by proceeding with accepting the 19,000 members. I find that the Plaintiff has not proven on a balance of probabilities that the decision to take in the 19,000 members, having regard to the directors' assessment of all the relevant business factors including the financial viability and profitability of the business, was not made in good faith and in the best interests of RTC at the time the decision was made. As a proprietary Club, what is good for RTC is also necessarily good for all the directors and shareholders of RTC. Actions taken by directors with a view to maximising net profits for RTC both in the long run and short run cannot *prima facie* be said to be taken in bad faith, even though events may subsequently show that a different decision should have been taken. The relevant factors for evaluating whether the directors' duties towards the company have been fulfilled at the time the business decisions were made should not be considered with the full benefit of hindsight.

98 In *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 at [29], the court held that the test for whether a director had acted *bona fide* was whether an honest and intelligent man in the position of the directors, taking an objective view, could have reasonably concluded that the transactions were in the interests of the company. In that case, the management decision taken by the directors turned out on hindsight, to be a poor decision but nonetheless *bona fide*.

99 There is no compelling evidence in this case that the Defendants had taken an unreasonable position in accepting the 19,000 members. As I have pointed out earlier, the acceptance of 19,000 members *per se* should not in and of itself amount to negligence or a lack of *bona fides*. Through strategic and savvy planning, it might have been that overcrowding would never have occurred and RTC would never have been sued. Indeed, there was unrebutted evidence from Lawrence Ang and William Tan that the Defendants had meetings with Tan Buck Chye where it was agreed that the Club would be able to handle up to 20,000 members.

100 The $100 million price tag for the land on which the Club was built meant that the Defendants needed to net a large amount of membership fees. As a result, the Defendants argue, a large membership was required. However, the Plaintiff counter argues that RTC could have charged a much higher membership fee than $28,000 and accepted fewer members instead. This is a superficially attractive argument. However, there is no market survey adduced by the Plaintiff to show that on a balance of probabilities, if a higher membership fee of say $75,000 per member had been set, RTC would have been likely to get about 7,000 members, thereby netting RTC about the same total membership fee of $532 million (as with 18,992 members at $28,000 per member). What if RTC could only garner 3,500 members because the membership fee had been set far too high at $75,000 per member, and the total membership fees collected amounted to only $262 million? Obviously, RTC and the Club could well run into financial difficulties with the high costs incurred for the land at about

$100 million and the expensive building costs which increased from $60-70 million to $100 million. Further, there would be a shortfall of some $262 million in membership fees which could otherwise have translated into net profit for RTC and which shortfall on any account would be disastrous for RTC from the business and profitability angles. The Plaintiff has not shown me any expert forecast that RTC would still have been able to secure the same $532 million in total membership fees if membership numbers were to be set at only 7,000 members, which mathematically must mean charging a minimum of $75,857 per member. One can harbour all sorts of wishes and set the membership fee at $75,857 and hope to get at least 7,000 members to achieve a collection target of $532 million in membership fees. But the market may not have delivered the number of members to accord with RTC's expectations if the membership fee had been set at the very high level of $75,857 per member. Evidently, this is one area involving business decisions, forecasts and risk taking. In such cases, the Court should be very slow to step into the shoes of the directors and substitute its own view for the sort of *bona fide* business decisions that should have been made in the best interest of RTC at that time.

101 In my view, it is all too easy for the Plaintiff, with the full benefit of hindsight, to pontificate on what the Defendants should have done. The law is clear that commercial decisions will not be lightly interfered with by the court unless the directors had acted unreasonably or not *bona fide*. I do not think that pricing the membership competitively, presumably in a bid to attract more people and thereby maximise the possible return from memberships for the benefit of RTC, reflected adversely on the Defendants. It was in the nature and purpose of a proprietary club to do so. In fact, with hindsight the directors had done their sums quite well and made the right decision to set the membership fee at $28,000 per member. RTC in fact had benefited from their decision rather handsomely, even after allowing for the compensation of some $33 million (partly in kind) to the members as a result of the members' suit, which I find could not have been in the directors' contemplation at the time they made their decision to accept the 19,000 members. Even if it had been in the directors' contemplation, and assuming both that they had estimated a potential law suit damages claim of $50 million and that they had deliberately taken a decision to net say $200 million more in net profits for a risk of paying out only $50 million, one still cannot conclude that that decision is no longer *bona fide* and cannot on any account in the best interests of RTC because regard must be had to the fact that the net result is still a huge gain of $150 million for the company. Sometimes, the directors of a company may decide that the cost of potential claims should be regarded as part of the costs of the business itself if the gain in the future is going to far offset any such cost. Again, it does not follow that such a decision, taken with full knowledge of all risks but which nevertheless increases the net profit to the company, must necessarily be a decision that has been made in breach of their director's duties to their company, simply because a risk was taken and the risk materialised. Business decisions all involve risks and the taking of calculated risks does not translate *per se* into an automatic breach of a director's duties. It is part of business.

Justification for taking on the 19,000 members

102 There is a sound and credible explanation for why the Defendants had accepted the applications of the19,000 members. Between the acceptance of the applications and the Club's opening, Lawrence Ang had believed that there would be a fall in the numbers. He explained at trial that people may pass away, fall ill or simply change their minds. Indeed, by the time the Club had opened, there were around 18,000 members. Lawrence Ang's projected attrition rate was somewhere around 10-20% and he gauged that by the end of club's life there might only be 10,000 members left. Also, as mentioned earlier (at [95] above), Lawrence Ang had expected the usage rate to stabilise within 3 to 6 months and the evidence confirmed that there was indeed no problem with overcrowding after 6 months. The experience with ECCR was that after the initial period of 3 to 6 months, many promotions had to be conducted to encourage members to return to ECCR. As such, a critical mass

was important.

103 I am inclined to accept Lawrence Ang's evidence that the Defendants had contemplated attrition rates at the time they made their decision to accept the 19,000 members. The fact that huge costs had been incurred in constructing the Club and had been weighing on their minds was also undeniable. Undoubtedly, a large amount of membership fees would be required for RTC to break even. Lawrence Ang had felt that at least 12,000 members were required to break even and Peter Lim had also thought that 10,000 members were not enough. I should mention that 340,000 publicity brochures were mailed out to the public. The Plaintiff argues that this meant that the Defendants never meant for the Club to be exclusive. I think this argument goes too far. If anything, the number of brochures mailed out suggests that the Defendants were unsure of how successful the launch would be and were simply hoping to increase the probability of people applying for membership.

104 It is clearly outside the purview of the Court's jurisdiction to determine whether the Defendants had made a wise commercial decision. I have found that there was no fraudulent behaviour on the part of the Defendants. The only inquiry before me then is whether they are nonetheless liable in negligence as this was the Plaintiff's alternative claim. Would the reasonable director have done what the Defendants did, *ie*, accept these 19,000 applications and thereby unwittingly expose RTC to litigation and the need to compensate aggrieved members of the Club?

105 What I have gathered from the evidence presented to me is that while the Defendants initially did not have a set figure of the number of membership applications to accept, they were of the view that 10,000 members would be insufficient. Bearing in mind too that there was an optimal membership base required to break even and also to avoid overcrowding, 19,000 was a figure they eventually settled for. They had considered attrition over the next 3 to 6 months and over the long term based on their experience with ECCR. The Defendants were eager for the Club to work well and, according to Lawrence Ang, at no time did they discuss the issue of overcrowding. Their discussions regarding the acquisition of additional facilities were directed towards adding value to the Club membership and not so much towards addressing the issue of overcrowding.

106 There is also no evidence to show that it was blatantly clear that the acceptance of the19,000 members had caused the Club to cease to be exclusive or premier and that the Defendants were aware of this. The Defendants had genuinely believed that they were acting in the best interests of RTC and it appears to me that it never crossed their minds that by accepting the 19,000 members, the initial overcrowding would result in RTC being sued by its members (indeed, it was because of the Defendants' internal legal disputes that had led to the revelation that the 19,000 members had been accepted). There was no breach of their duties of honesty and good faith in my opinion. Nor could one say that, on a balance of probabilities, the reasonable man in the position of the Defendants exercising due care and diligence would not have done what the Defendants did. After all, acceptance of the 19,000 members brought in a lot of money for RTC. There was no reason at that point in time for the Defendants to contemplate litigation. I do not think that the reasonable man would have thought or foreseen that overcrowding only at the initial stages immediately following the launch would lead to a law suit against RTC. I would add that there was no evidence at trial adduced to show that a certain number of members would be just right for the Club to maintain its promise of being exclusive and premier.

107 RTC may have failed the Club's members because it did not manage the overcrowding problem effectively in the first few months following its opening; it thus unwittingly reneged on its implied promise to deliver a premier and exclusive Club. However, this did not ultimately mean that the Defendants had breached their duties of good faith towards RTC or had acted dishonestly at the time they decided to take in the 19,000 members.

108 The Plaintiff next avers that the Defendants had committed an offence of cheating under s 415 of the Penal Code when the latter instructed the Club's staff to misrepresent to the members the true membership size of the Club and when Dennis Foo made certain remarks to the press. Criminal offences must be proven beyond reasonable doubt. The evidence relied on by the Plaintiff in this regard did not satisfy me that the Defendants had cheated the applicants. However, even if the Defendants had cheated the applicants, this did not translate into the Defendants committing a fraud on RTC, a separate legal entity.

109 In summary, there is a distinction to be drawn between acting dishonestly towards the members and acting dishonestly towards RTC. I reject the claim that there had been a fraud on the applicants, but even if this had indeed been the case, it cannot be said that RTC had been defrauded in the process. I find that the Defendants had not breached its duties of honesty and good faith towards RTC, nor had they been negligent in accepting the 19,000 members.

The management fees

110 The Plaintiff strenuously argued that the Management Agreement was a "sham" agreement, conceived in mid-1997 as an afterthought. Its case is that the Defendants realized in 1997 that they were "sitting on" a goldmine. However, the Plaintiff was unable to recognise the entrance fees as income until after the Club had opened. Without income, there could be no profits to speak of and the Defendants would not be able to draw out the funds legally as dividends since dividends have to be declared out of profits under s 403 of the Companies Act. As RTC was not a private exempt company at that point of time, the Defendants would also be unable to take loans from RTC. According to the Plaintiff, the Defendants thus hatched a plan to siphon out the monies via a sham Management Agreement.

111 At the outset, I should mention that this argument that the management fees were an afterthought actually somewhat weakens the vigour of the Plaintiff's submission that the Defendants had breached their duties of honesty, good faith and care towards RTC in accepting the 19,000 members. Indeed, if the Plaintiff is right to say that the Management agreement was an *afterthought*, then the only plausible reason for the Defendants' maximizing of the number of applications must have indeed been for RTC's benefit since at that point in time, the Defendants ostensibly had no intention to siphon out any of the monies for their personal benefit. Accepting the 19,000 members would not be lacking in *bona fides* since there was no nefarious intention then. In fact, on the Plaintiff's own case, the Defendants only realized in 1997 that they were effectively sitting on a gold mine.

Was the Management Agreement a sham?

112 What constitutes a sham agreement? According to Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at 802:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, *I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create*. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* (1882) 21 Ch D 309, CA and *Stoneleigh Finance Ltd. v. Phillips* [1965] 2 QB 537), *that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common*

intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. [emphasis added]

113 RTC argued that the real purpose of the Management Agreement was to siphon out monies for the Defendants' personal benefit and that the management fees paid under the Management Agreement were "disguised dividends". Alternatively, it argued that the work done by EH for RTC was *de minimis* and hence the $78m paid in remuneration for work done by EH was excessive.

114 The burden of proof in an allegation of a sham agreement is on the party alleging the sham (*U H G v Director General of Inland Revenue* [1974] 2 MLJ 33). In the present instance, I am not convinced that the Management Agreement was designed to give to "third parties or the court an appearance of creating between the parties legal rights and obligations different from the actual legal rights (if any) which the parties intend[ed] to create". First, the Management Agreement was entered into exclusively by RTC and EH which had the same directors and shareholders. It has not been shown that the Defendants intended the court and/or third parties to be deceived or that the court and third parties had in fact been so deceived as a result of this Management Agreement.

115 Second, there is no evidence to show that the Defendants did not intend for the Management Agreement to regulate the rights and obligations of RTC and EH. One of the Plaintiff's main arguments in contending that the Management Agreement was a sham is that EH had not done any work for RTC or the Club. Instead, it submits, it was RTC that had paid for all the costs and expenses of the launch including the advertising, publicity and promotional costs to third party service providers amounting to around $2.5m. This, according to the Plaintiff, was certainly contrary to clause 7.5 of the Management Agreement which provided that EH would pay for all costs and expenses incurred in connection with the marketing and promotional campaign referred to in clause 5 of the Management Agreement. Consequently, the Management Agreement was a sham.

116 If the Management Agreement was indeed a sham as the Plaintiff argues, then it follows logically that the clauses therein were unlikely to be adhered to since they were merely to give third parties or the court false "appearances". However, the mere fact that the clauses were not given effect does not necessarily import that the Management Agreement was a sham. It could simply evince a breach of the Management Agreement. The nature of the Management Agreement is, logically, a prior question to the issue of whether the clauses were fulfilled or not. Thus, whether the clauses were adhered to or not is not conclusive of the genuineness (or lack thereof) of the Management Agreement.

117 Indeed, as I have mentioned earlier (at [114] above), the inquiry is whether the Defendants had intended to give "third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". That EH allegedly did not do work for RTC is not only not proven, even if it had been the case, it involves a leap of logic to say that the Management Agreement was thus a sham.

118 That the Management Agreement was presumably conceived in mid-1997 but backdated to June 1996 was another plank in the Plaintiff's submission that the Management Agreement was a sham. The Plaintiff cited the case of *John Holmes v Alfred McAlpine Homes (Yorkshire) Ltd* [2006] EWHC 110 ("*John Holmes*"), where the Court held,at [23], that:

> … the back-dating of documents as was done in this case is generally wrong. It is wrong to seek to give an agreement retrospective effect by back-dating it. If it is agreed that a written agreement should apply to work done before it is entered into, it should be correctly dated with

> the date on which it is signed and expressed to have retrospective effect, i.e. to apply to work done before its date. Backdating is liable to lead to the suspicion that it was done in order to mislead third parties, including a court before which the agreement is to be placed…Backdating is at best due to incompetence or lack of thought, and at worst due to dishonesty. It should not be done.

I would not regard that court as laying down a general principle that the backdating of documents is always objectionable. Sometimes in the interests of commercial expediency, parties to an agreement may backdate it without stating that it is to have retrospective effect. In *John Holmes*, a firm of solicitors had failed to explain to their client that a conditional fee agreement entered into by them and the said client had been backdated. The court nonetheless found that the agreement was enforceable as the solicitors' failure to inform the client that the agreement had been backdated did not cause prejudice to the said client. Similarly, there is no prejudice suffered by either EH or RTC by the backdating of the Management Agreement. I would also highlight Mr Justice Stanley Burnton's remarks in *John Holmes* that (at [22]):

> An allegation that the agreement was deliberately backdated in order to mislead the defendant or its solicitors or the court into believing that it was entered into the date it bore, in order for example, to give the impression that the uplift of 25% had been agreed before there was an admission of liability, *would be a serious allegation of impropriety (indeed of dishonesty) which, if established, would certainly lead to the unenforceability of the agreement*. [emphasis added]

Indeed, dishonesty and fraud must be proven, established before a court finds that the backdating of a document was actuated by dishonest or fraudulent motives or was pursuant to a dishonest or fraudulent purpose. It is *apropos* to note at this juncture the observation of Andrew Phang JA in *Chua Kwee Chen and others (as Westlake Eating House) v Koh Choon Chin* [2006] 3 SLR(R) 469 at [39]:

> In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), more evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). In this regard, a distinction ought not, in my view, to be drawn between civil fraud and criminal fraud.

119 Consequently, I would reject the Plaintiff's submission that the backdating of the Management Agreement "shows that they were highly conscious of the need to create the impression that the idea for RTC to pay [management fees] had been conceived before the Defendants found out, after the successful membership launch in November 1996, that RTC would receive a windfall in membership entrance fees." [note: 14] The backdating is an equivocal fact. It was equally probable to me that the Management Agreement was truly conceived in 1996 before the Defendants knew that the launch would be a success and hence, they endeavoured to attract as many members as they could so that EH would receive a larger sum of management fees. As shareholders and directors of EH, they would also have EH's interests at heart. In any case, I found the backdating to be consistent with Lawrence Ang's and William Tan's evidence that the idea to pay EH management fees was conceived in September 1996 and that there had been a verbal agreement then to pay management fees of between 10% to 20% of the entrance fees to EH. Nothing had then been formalised, plausibly because the Club's success was yet unknown.

120 The Plaintiff has pointed out that the first time the matter of the management fees was mentioned in the minutes of a meeting was a year later after the alleged oral agreement, *ie*, in the minutes of a 19 June 1997 meeting where a "marketing commission of 10%" was stated to be made

payable to EH. There is nothing peculiar about this. Till the Defendants were certain of the quantum and resolved to pay EH the management fees, there would be little reason for them to minute this idea in September 1996 when it was first conceived. That the minutes did not refer back to a prior oral agreement should not be construed adversely against the Defendants who were dealing amongst themselves, and moreover, doing so informally as directors and shareholders of both RTC and EH.

121 Further, it was always open to the Defendants to retroactively ink a Management Agreement between RTC and EH after the work that EH had done for RTC. Even if there had been no prior arrangement for EH to be paid management fees, simply because it was later decided that EH would be remunerated for work done for RTC did not suggest any bad faith on the Defendants' part.

122 The Plaintiff also contended that the $78m in management fees was used by the Defendants to procure shareholdings in ABR Holdings, a public-listed company. It alleges that the Defendants were keen to acquire shares in ABR and as EH had run out of funds, the Defendants had to find another way to obtain monies to acquire the ABR shares. Seeing the "cash pile" sitting in RTC from the membership fees, they decided to divert the monies to EH through the payment of the "management fees". [note: 15] The Defendants then drew from these management fees to EH as advanced dividends for themselves. Thus according to the Plaintiff, disguised dividends were paid by RTC to the Defendants via EH as a conduit at a time when RTC had no profits to declare. This reinforces its claim that the Management Agreement had been a sham.

123 Once again, the Plaintiff is employing backward reasoning. Because it is convinced that the Management Agreement is a sham, it assumes that any transaction related to the $78m must be tainted with bad faith. However, simply because the management fees might have been used to fund the acquisition of ABR Holdings did not mean that the $78m were not legitimate management fees, much less prove that the Management Agreement was a sham. How the management fees were ultimately used does not affect their legitimacy. I should also add that there was no concrete evidence that the $78m was drawn specifically for the purpose of funding the ABR shares. The Plaintiff had relied on Lawrence Ang's evidence on cross-examination that the plan to acquire ABR using the management fees paid by RTC to EH as the source of funding was conceived in end-1997: [note: 16]

Q: -- Peter Lim planned the whole process of the [ABR] acquisition; is that correct?

A: Yes, sir.

Q: He told you how to do it, how to get the fund, etcetera?

A: Yeah. Peter Lim, together with Ms Chan Lay Hoon.

Q: They came up with the idea, "Okay, this is what we are going to do to acquire ABR, and this is how it's going to be funded", etcetera; correct?

A: Yes. Yes, sir.

….

Q: So this idea [or] plan to acquire ABR must have been discussed and agreed sometime in the second half of 1997?

A: Third half, sir.

…

Q: The last quarter?

A: Yes.

Q: As you said, RTC, no problems; the money could come from the $78 million in commissions paid by RTC; correct?

A: Yes, sir.

124 This only shows that the Defendants had intended to use the management fees as their source of funding to acquire the ABR shares and nothing more. For the Plaintiff to contend that the Management Agreement was devised *in order that* the Defendants could acquire the ABR shareholdings is a logical leap.

125 Another string in the Plaintiff's bow was its claim that the marketing commission was raised from 10% to 15% without any convincing reason(s) from the Defendants and this was evidence that they had intended the management fees to fund the acquisition of the ABR shares. The Plaintiff avers that a 10% commission would be insufficient to acquire the ABR shareholdings, whilst a 15% commission would suffice. I find this argument to be somewhat contrived and I am not satisfied that it has been distinctly proven that the Management Agreement was conceived in order to acquire the shares in ABR.

126 For the reasons stated above I do not think that the Management Agreement has been proven to be a sham at all. There must be compelling evidence shown by the Plaintiff that the Management Agreement was intended to defraud third parties or the court. Drawing the court's attention to equivocal facts and inviting it to draw adverse inferences from them cannot be sufficient to affirm an allegation of fraud.

127 Given that I have found that the Management Agreement was not a sham, the inquiry can end here. However, I will nonetheless address RTC's arguments that EH did no work for RTC. First, as I have pointed out, simply because EH may not have done work for RTC does not translate into the Management Agreement being a sham. It may simply be a contractual breach. What the Plaintiff is effectively doing is reversing the burden of proof in asking the court to draw such an adverse inference.

128 Secondly, RTC's expert witnesses themselves had proffered that based on the work envisaged by the Management Agreement, the quantum of 1% and 3% commission would be appropriate for EH's marketing services. However, the expert witnesses did not value other aspects of services provided by EH, an issue which I shall return to later.

129 Thirdly, I note that the Management Agreement itself only states the basis on which the commission is to be paid, *ie*, that it was to be 15% of the membership fee. It did not state what exactly the commission would be for. Clause 7.1.1 simply provides that:

[The Principal shall pay to [EH] fees on the following basis:]

In respect of each Club membership sale concluded by Europa or its appointed Agents through the introduction of the purchaser by the same and subject to the acceptance by [RTC], at its sole discretion, of the said purchaser as a Club member, a commission equivalent to 15% of the

prevailing entrance fees, to be determined by [RTC] from time to time, per accepted Club member …

From the above clause, it appears that the commission payable was premised on EH's efforts in recruiting members to the Club. Although it was not expressly stated as such, it must be implied that the commission was payable for work EH did in bringing members into the Club. The question is: exactly what work did EH have to do to obtain this commission? The Plaintiff submits that EH was to be remunerated *only* for work done under clauses 3, 4 and 5 of the Management Agreement and even then, it had clearly not carried out its duties under these clauses.

130 The 15% commission was not referable to any of the clauses pertaining to the work meant to be done by EH (*ie*, clauses 3, 4 and 5). I would thus be slow to impute to the parties that the 15% commission was intended by them to be for work done by EH for RTC restricted *only* to those matters as contemplated by clauses 3, 4 and 5. These clauses provided that:

3. CONSULTANCY SERVICES

[EH] shall review, advise on and make recommendations as to the sales, marketing and promotional strategy of [RTC] in respect of the Club only and the Club memberships offered by [RTC].

4. MANAGEMENT SERVICES

4.1 [EH] shall provide the following management services:-

4.1.1 [EH] shall as it deems fit and subject to the approval of [RTC], in its sales, marketing and promotional efforts, directly appoint any other person, firm or company, including but not limited to Banking Corporations, as its sales and marketing agent ("the Agents") in the Territory, in respect of the Club memberships offered by the Principal.

…

5. SALES AND MARKETING SERVICES

5.1 [EH] shall provide the following sales and marketing services:-

5.1.1 Formulate, present to [RTC] and carry out an appropriate promotional and publicity campaign in the Territory in respect of the Club only and the said Club memberships offered by [RTC], including a suitable press relations programme, the holding of exhibitions, the preparations, publication and distribution of brochures, newsletters, sign boards and other promotional materials and a proposed time-table and budget covering all advertising, promotional materials and public relations costs and expenses …

131 I am of the view that EH was entitled to be remunerated for work done apart from those set out in clauses 3, 4 and 5 because it had indeed done such work. It was EH that had the expertise and relevant know-how in launching country clubs (as shown in its experience in running ECCR) and RTC would have to draw on the resources of EH. Moh Siang King testified that between RTC and EH, it had to be the latter doing the work because at the material time, RTC was just a shell company. The Defendants testified that the conceptualisation, planning and execution of the launch of the Club were the efforts of EH. It was EH (through the Defendants) which had liaised with various third parties such as printers and designer for the Club's brochures and publicity materials and the media

for television advertising. EH also had to liaise with various banks and credit card companies including American Express, DBS and Standard Chartered Bank regarding the launch of the club as priority banking customers had been targeted as potential Club members. When many disgruntled banking customers had their applications rejected, it was EH that had to field these complaints. Tele-marketers were also employed as part of the membership launch, and training had to be provided to these tele-marketers. EH paid these tele-marketers salaries on behalf of RTC and was subsequently reimbursed for these expenses. EH was also responsible for mailing out 340,000 publicity brochures and the processing the 20,000 odd membership applications received in 1996. It had also made available its ECCR membership database for RTC to recruit members from.

132 Crucially, it was not disputed that EH had a strong market reputation and branding for its chain of Europa pubs and entertainment outlets. As far as the Defendants were concerned it seems, the Club was perceived to be an EH project: after all, it was EH that first bid for the land on which the Club stands. Newspaper articles would also mention EH in connection with the Club and not RTC. Guy Guillemard, an accounting expert witness for the Plaintiff, agreed that the Europa name was "publicly associated" with the Club [note: 17] and that it "helped a lot" that the Club was associated with the "well-known Singapore brand [EH]". [note: 18] He also agreed on cross-examination that based on documentary evidence presented to him EH had certainly done work:

Q: Based on the tax correspondence, then, and from the documents that you have seen, would you agree that [EH] did carry out some work? Let's leave the value of that work aside. Do you agree that they carried out work?

A: [EH] carried out work for the project?

Q: Yes.

A: How would you define "work"? The marketing work?

Q: Absolutely. It appears so. Because it's not particularly documented—I think you will agree—it's hard to determine whether people who came from Europa were then on the payroll of RTC when they did the work, or whether they were sitting in Europa's offices at Europa's expense doing the work, or a bit of both. There simply isn't a trail of information that I've seen about who was providing what services from where and under what hat.

Q: My question was this, and maybe you might want to explain this: based on the documents you have seen, can we agree that [EH] did carry out work in respect of the launch?

A: I am sure.

Q: The launch attracted 24,000 applications; are you aware of that?

A: Yes. And 19,000 were accepted, I think.

Q: By that standard, in terms of attracting interest the launch was extremely successful; would you agree?

A: Defined in those terms, it was. [note: 19]

I am of the view that looking at the aggregate of the work and effort expended by EH, it had indeed satisfied clauses 3, 4 and 5. However, even if EH had not done such work, it was beyond

peradventure that it had other contributions which it could be remunerated for. As I have mentioned above, clause 7 does not state that the 15% commission is referable to and only referable to clauses 3, 4 and 5. It was open to EH to either subsume other forms of work done by EH for RTC's benefit under clauses 3, 4 and 5 or for EH to regard the 15% commission in clause 7 to be referable also to work outside the scope of clauses 3, 4 and 5. Indeed, clauses 3, 4 and 5 in all probability were not meant to set out the minutiae of all the work the Defendants envisaged EH to do for RTC – after all, the shareholders and directors of both EH and RTC were the Defendants themselves and in all likelihood they did not expect the Management Agreement to set out in detail the entire gamut of work EH was contemplated to perform. This mentality is evinced in Lawrence Ang's evidence that a lawyer had not been hired to draft the Management Agreement because after all RTC and Europa were the "same" and there was thus "no need to so particular, spend more money employ outside lawyer to do the comprehensive, very detailed agreement". [note: 20]

133 This brings me to my next point. I have mentioned earlier that expert witnesses had valued EH's work for RTC at 1% and 3%. However, these experts did not value the other less tangible aspects of EH's contributions towards RTC. For instance, Lawrence Ang confirmed that it was EH's idea to bid for the land. A $7 million deposit or 10%, whichever was higher, was to be paid by EH as deposit when they won the bid. When Tan Buck Chye won the bid for the land at $100m, EH needed to get a $60 million loan from HL Bank. The guarantors for the loan were Dennis Foo, Tan Buck Chye, Lawrence Ang, Teriya and William Tan. I accepted Lawrence Ang's evidence that RTC was set up by EH as special purpose vehicle to hold URA land. Thus, RTC was simply a shell company with no assets, no expertise, no staff nor branding. EH's brand name and the goodwill it had was instrumental to the RTC project.

134 In rejoinder, RTC contended that the "Europa" brand name was not leveraged upon to sell the Club memberships nor did the "Europa" brand name appear anywhere in the promotional brochure. While this may be so, it does not mean that EH was not instrumental in boosting the confidence of the banks and other third parties whom they dealt with. I accepted the evidence that the banks were willing to extend the $60 million to EH because of its reputation. If RTC, a shell company then, had applied for such a huge loan, it might have been more difficult to secure such a generous amount.

135 Hence, even if the "Europa" brand name was not leveraged upon to market the memberships, it was clearly pivotal in the formation of the Club. Without EH's brand name and goodwill and the access to ECCR's membership base from which RTC could draw upon for the recruitment of members for the Club, one can safely say that the Club would not even have existed. It was in my view open to the Defendants to factor in such intangible work in determining the amount of commission or whether it was even payable because the Management Agreement never set out precisely the ambit of work the commission would be paid for and EH, in any case, had clearly performed some work and services for RTC pursuant to the Management Agreement.

136 Was the quantum of commission excessive? Lawrence Ang's evidence was that EH was in the practice of collecting management fees from its subsidiaries. 10% to 20% commission was apparently within the range of percentage commission collected from EH's other subsidiaries. Besides, as commercial men, the Defendants were better placed than the court to decide what should be the valuation of all the services rendered by EH to RTC. As I have iterated, the Defendants were not constrained by clauses 3, 4 and 5 in arriving at the 15% commission rate. It was merely assumed by the Plaintiff that such commission was to be only for the work done as set out in these clauses. Realistically speaking however, the work done by EH went over and beyond those set out in the said clauses. Further, interpreting the clauses widely, it could be said that EH had indeed done the work envisaged in these clauses. I note too that it was Lawrence Ang's evidence that the term "management fees" was used loosely to include all types of help EH rendered to its subsidiaries.

137 To belabour the point, the court is not as well placed as commercial men such as the Defendants to ascertain what would be the appropriate amount of remuneration for all of the work done and services provided by EH. I find that the Management Agreement has not been proven to be a sham. EH had indeed adhered to the Management Agreement. Even though RTC pointed out that most of the marketing work had been outsourced to third parties, I am of the view that overall, judging from the aggregate of the work done by EH, it had done work both pursuant to the relevant clauses in the Management Agreement and beyond it. The work done by EH in launching the Club vis-à-vis RTC is difficult to quantify with exactitude but I find that 15% marketing commission is not an extortionate sum in the circumstances. Though RTC's experts valued EH's work at 1% and 3%, they had not taken into consideration the other aspects of the work done for and services provided to RTC by EH as conceded by them. It must be noted that EH cannot reasonably be expected to provide free work and services to RTC simply because such work and services do not fall within the description set out in clauses 3, 4 and 5. The Defendants as directors of EH also have to ensure that EH is fairly remunerated for all the work and services EH has done for RTC, and as far as I am aware, this was the only written contract between EH and RTC under which RTC had made payments to EH. As such, I would not accord much weight to their evidence that only 1% or 3% commission was warranted and would defer to the 15% commission (resulting in a $78m payment to EH) as decided upon by the Defendants.

138 As I have found that the management fees were legitimate expenses, I am not persuaded that they were disguised dividends paid in breach of s 403 of the Companies Act.

Director's remuneration, consultancy fees and purported expenses

139 I turn next to the issue of whether the Defendants had acted in breach of their duties in using RTC's funds to pay themselves disproportionate amounts in directors' remuneration, consultancy fees and purported expenses.

Private accounts

140 It was revealed in court that the Defendants had maintained a set of private accounts for which they were accountable to each other. The Plaintiff's case is that the Defendants systematically drew monies from RTC for themselves through these private accounts by making payments under the private accounts which were not for the purposes of RTC or for its benefit or interests. Thus, the Plaintiff claims that the directors' salaries, Peter Lim's consultancy fees and expenses charged under the Defendants' respective private accounts but paid by RTC were not genuine payments. Instead, according to the Plaintiff, all these payments were withdrawals of monies by the Defendants and were disguised dividends paid in contravention of s 403 of the Companies Act. As a result, the Defendants should be held liable to account for all the monies paid out under the private accounts.

141 Lawrence Ang and William Tan never denied that they had such a system of private accounts. They accepted that the private accounts were a mechanism to ensure parity between the Defendants in terms of the shareholder benefits that they received from RTC. According to Lawrence Ang and William Tan, the monies parked under the private accounts were at all times properly authorised, acknowledged and approved by all the then shareholders and directors of RTC. In any event, those monies parked under the private accounts were in respect of expenses connected to RTC, and not entirely for the Defendants' personal benefit.

142 Peter Lim, too, knew about the system of private accounts. There is more than ample evidence to suggest that it was Chan Lay Hoon, Peter Lim's "trusted lieutenant" (borrowing the epithet used by

the Plaintiff) who moderated the private accounts to ensure that the drawings on these accounts were proportionate to the Defendants' respective beneficial shareholdings in RTC. On cross-examination, Chan Lay Hoon admitted that the director concerned must authorise the placing of any item of expense on that particular director's private account. Peter Lim was also present at meetings where the private accounts were discussed. RTC's records show that he had made several expense claims which were parked under his private account.

143 In contrast, Dennis Foo claimed not to have any knowledge of such private accounts. In my judgment, the evidence however suggests that he knew of such private accounts and knew of the way they operated and of his entitlement under that system. It was common ground between the Plaintiff, Lawrence Ang and William Tan that the system of private accounts in RTC was identical to the system of private accounts employed in the running of EH. Peter Lim, too, acknowledged that the private accounts had existed since 1993 in EH to ensure that shareholders drew monies in accordance with their respective shareholdings. On cross-examination, Dennis Foo's testimony on the private accounts seemed to evolve and thus raised doubts as to his credibility on this issue. He started out by saying that the private accounts in EH and those in RTC were different. He then added that in respect of RTC's private accounts, the Defendants were supposed to reimburse the Plaintiff for the sums parked thereunder. Subsequently, he stated that sometimes the Defendants were not required to reimburse RTC, and he then admitted that he had never reimbursed RTC for sums parked under his private account.

144 For instance, when he was confronted on his written instruction to Chan Lay Hoon to park expenses concerning the President's Star Charity under his private account, he claimed to have been "puzzled" when he saw the written instruction, then explained that what he meant by that instruction was that RTC would pay those expenses first but he would reimburse the company. Yet, he also admitted to not having reimbursed the company at all. He later qualified that the private account "in [his] mind" was an account that was "apart from the operating account of the company" and had "to do with either shareholders or directors" and that that was the practice since the Defendants had collaborated in EH.

145 To my mind, there was no doubt as to the existence of the private accounts operating between the Defendants *inter se*. Dennis Foo did know about the system of private accounts but he did not wish to give trenchant answers for fear of being implicated in the event that the system of private accounts is found to have been instituted in breach of their fiduciary duties to the Plaintiff. In any case, he did give some indication while on the stand that the private account had something to do with "either shareholders or directors". Thus, I did not find that his answers indicated a complete lack of knowledge and consent to the system of private accounts, nor did his evidence negate my finding that there was such a system put in place. The real issue is whether the Defendants are liable to the Plaintiff to account for all the sums that were parked under the private accounts.

146 The Plaintiff seems to suggest that there were two categories of monies parked under the private accounts: (a) salaries paid to Lawrence Ang, William Tan and Dennis and Peter Lim's consultancy fees; and (b) expenses claimed by and paid to the Defendants which were not genuine expenses incurred by RTC. In my view, the expenses claimed by the Defendants under their private accounts should be differentiated into legitimate payments for expenses incurred on behalf of or for the benefit of RTC, and payments which had nothing to do with the RTC.

Directors' remuneration and consultancy fees

147 In its Closing Submissions, the Plaintiff sought the following sums of money paid out as salaries or directors' fees but charged under the private accounts: [note: 21]

Year	Lawrence Ang	William Tan	Dennis Foo
1997	$ 4.3m	$680,000	$680,000
	$35,200 (CPF)	$24,000 (CPF)	$24,000 (CPF)
1998	$600,000	$300,000	$360,000
	$14,400 (CPF)	$12,000 (CPF)	$14,400 (CPF)
1999	NIL		
2000	$90,000	NIL	NIL
Total	**$5,039,600**	**$1,016,000**	**$1,078,400**

The Plaintiff seeks a further sum of $5.04m from Peter Lim in respect of consultancy fees and incentive fees. [note: 22]

148 The Plaintiff alleges that these amounts paid to the Defendants and parked under the private accounts were not payments for the Defendants' services to the company. The Defendants maintain that the payments of remuneration to them were genuine because they did in fact do work for RTC for which they were entitled to remuneration. Lawrence Ang, William Tan and Dennis Foo submitted that they were entitled to remuneration for their assumption of directors' duties and responsibilities. Peter Lim testified that he was entitled to his consultancy fees as these were payment for the consultancy services he had provided to RTC in respect of corporate direction and strategy.

149 It is established law that the mere holding of the office of director, in itself, does not entitle a director to remuneration: *Heap Huat Rubber Company* ([44] *supra*), at [44]. Thus, the company's articles of association usually provide that directors are entitled to some form of remuneration and any remuneration received by a director must be in accordance with the articles of association. The courts have generally been slow to interfere with the quantum of remuneration for directors as this is a commercial decision best left to be worked out under the relevant provisions in the company's articles of association.

150 In *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008), the learned author observed at para 14-14, that:

> The courts have been unwilling to scrutinise directors' remuneration decisions on grounds of excess or waste, refusing even to prescribe that pay must be set by reference to market rates, provided the decision on remuneration is a genuine one and not an attempt, for example, to make distributions to shareholders/directors where there are no distributable profits. This is probably a wise decision on the part of the courts, which might otherwise find themselves saddled with developing a general policy about the remuneration of directors in large companies.

In a case involving impugned remuneration to husband-and-wife director-shareholders in a closely held company, *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 ("*Halt Garage*"), Oliver J stated at 1039:

> [A]ssuming that the sum is bona fide voted to be paid as remuneration, it seems to me that the amount, whether it be mean or generous, must be a matter of management for the company to

> determine in accordance with its constitution which expressly authorises payment for directors' services. Shareholders are required to be honest but … there is no requirement that they must be wise and it is not for the court to manage the company.

151 The directors' remuneration was paid pursuant to resolutions of RTC that were properly passed from 1997 to 2000. This was in accordance with cl 76(A) of RTC's articles of association which read as follows:

> The remuneration of the Directors shall from time to time be determined by the Company in General Meeting. The Directors shall also be paid such travelling hotel and other expenses as may reasonably be incurred by them in the execution of their duties including any such expenses incurred in connection with their attendance at Meetings of the Directors. If by arrangement with the other Directors any Director shall perform or render any special duties or services outside his ordinary duties as a Director, the Directors may pay him special remuneration, in addition to his ordinary remuneration, and such special remuneration may be by way of salary, commission, participation in profits or otherwise as may be arranged.

In *Heap Huat Rubber*, the Court of Appeal dealt with an identical remuneration clause in the articles of association and explained that (at [50]):

> [A]s a general rule, ordinary remuneration would include directors' fees and salaries that are paid to a director in respect of his office. Such payments are to be determined by the company in general meeting. In turn, special remuneration constitutes payments made to a director in respect of "special duties or services outside his ordinary duties as a director". Such a situation might arise, for example, where a director who is also a qualified lawyer assists the company in his capacity as a lawyer; the remuneration he receives in respect of his professional legal services would be special remuneration.

152 Clause 76(A) provides for both ordinary and special remuneration for RTC's directors. The shareholders of RTC had passed resolutions which approved ordinary remuneration for the directors. The board of directors had also agreed on the quantum of remuneration which was reasonable given the work that had been done by each of the Defendants. This latter type of remuneration could be classified as "special remuneration". As the only shareholders and directors of RTC at all material times, the Defendants had acted in accordance with its articles of association in reaching agreements on the quantum of remuneration—whether as ordinary or special remuneration or an amalgamation of both—for themselves as directors of RTC. I note that Margaret Tung herself signed the resolution approving directors' remuneration for 2000 after she became a shareholder in the Plaintiff. I therefore find that the directors' remuneration paid out by RTC to the Defendants was open, transparent and overboard at all times.

153 In its closing submissions, the Plaintiff states that it is absolutely clear from the evidence that the salaries paid by RTC which are parked under the private accounts are not actually payments for their services as directors and thus seeks to claim back those salaries or directors' fees which were charged under the private accounts. I do not accept this contention. The Plaintiff alleged that out of the total amount paid out to each of the Defendants as "salary", only the sum described as "actual" was attributable to their remuneration as directors whereas the sum recorded as "excess to pte [*ie*, private] account" was not. However, to illustrate that submission, the Plaintiff referred to EH salary records which did provide clear delineation between "actual" and "excess to pte account" components of the salary taken each month by the Defendants. The salary records of RTC, from which the Plaintiff derived the sums specifically claimed from the Defendants (at [147] above) did not provide such clear demarcation between "actual" entitlement and any "excess" sums. In fact, it is not

even absolutely clear that the salary records exhibited by the Plaintiff to justify the sums specifically claimed as remuneration in "excess" of what the Defendants were entitled to actually reflected sums of money which were parked under the private accounts.

154 Since the process by which the Defendants' remuneration for their work as directors was approved was transparent, aboveboard and in line with the procedure provided for in cl 76(A), the quantum of their remuneration is not a corporate decision that I am minded to disturb on the ground that it was excessive. There was work done by the Defendants that would warrant the payment of the directors' remuneration. This was not a case in which payments were made to directors of a company in the absence of *any work* or oversight on the part of the directors.

155 In their capacity as directors, Lawrence Ang, William Tan and Dennis Foo had exercised oversight and had ultimate responsibility for the business of RTC. I find that they had indeed put in the effort and hard work in all areas of the Plaintiff's affairs such as overseeing the construction and renovation of the Club, the marketing of membership and the launch of the Club, as well as procuring financing for the Plaintiff's business activities.

156 Peter Lim, whether in his capacity as consultant or *de facto* director, had definitely tried to contribute to substantial tax and interest savings for the Plaintiff by instituting the deferred accounting policy. Amongst other things, he also advised on corporate governance, assisted in appointing independent directors and arranged for loan facilities. Thus, I cannot accept the Plaintiff's claim that Peter Lim's consultancy fee was a sham. Whether the sum of money paid to Peter Lim is seen as consultancy fee or director's remuneration, it cannot be gainsaid that he had contributed substantially to the initial success of RTC's business.

157 Thus, I find that since all the shareholders of RTC had assented properly to the Defendants' remuneration and all the Defendants had contributed in numerous ways to its business, the decision to pay them remuneration was a genuine one. The Plaintiff is not entitled to the remuneration paid under the private accounts to the Defendants for their work as directors simply on the basis that these sums may have been paid out under the private accounts. The Defendants had not acted in breach of their duties, either fiduciary or statutory, to RTC in approving such remuneration for their services to RTC as directors. It would be unreasonable to hold otherwise as that would deprive the Defendants of any recognition or acknowledgement of their contributions to RTC.

Expenses connected to the Plaintiff

158 Apart from the Defendants' remuneration, the Plaintiff also seeks to claim back monies paid out to the Defendants under the private accounts as expenses claimed from it because they were not genuine expenses incurred by, on behalf of, or for the benefit of RTC.

159 The Defendants maintained their stand that like their remuneration, the monies paid under the private accounts as expenses claimed from RTC were at all times properly authorised, acknowledged and approved by all the then shareholders and directors of RTC and there was no harm caused to RTC. In any event, the Defendants submit, the monies parked under the private accounts were not entirely for the Defendants' personal benefit, but were for RTC's benefit.

160 Admittedly, I found this to be one of the more difficult aspects of this case. At face value, it would seem as though the Defendants were merely using RTC as a corporate vehicle to satisfy their own avarice. The picture that the Plaintiff paints is that of the Defendants' blithely stripping of the company of its assets and funds, without contributing any effort toward its success. But taking an objective view of the Defendants' dealings with and within the company, I find that this was not so.

161 It is trite law that the Defendants, as directors, owe a duty as fiduciaries to the company to act honestly and in the best interests of the company. The first question I asked myself was, "Whose interests are the company's interests?" In *Walter Woon on Company Law* (Tan Cheng Han SC, gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) ("*Walter Woon*"), the learned authors write at para 8.23:

> A company is not a monolith consisting of bland interchangeable digits. Rather, it is an entity with many stakeholders. The interests of these stakeholders, while to some degree are aligned, are often at variance between themselves. There are the members, whose personal interests are not subsumed within the corporate structure. There are employees, whose interests are tied up with the prosperity of the company. Then there are the creditors of the company, who generally can look only to the company for the payment of the sums due to them.

162 Certainly, one of the tests used when considering the validity of a commercial transaction is whether the transaction benefited the company as a commercial entity. Thus, when a decision is made to plough profits back into the company rather than pay them out as dividends or bonuses, it reflects a decision to prefer the interests of the company as a commercial entity over the interests of the shareholders and employees as individuals. It does not mean, however, that this is the only possible interest that a company might have.

163 In a capitalist environment which encourages entrepreneurship such as ours, the Court should not view every transaction which does not positively result in profitable returns to the company as a commercial entity with suspicion. Thus, the learned authors of *Walter Woon* recognised at para 8.25 that the "collective interests of the members of the company can also be equated with the interests of the company." In *Greenhalgh v Arderne Cinemas Ltd* [1951] 1 Ch 286 at 291, Evershed MR held (in a unanimous judgment of the Court of Appeal) that:

> In the first place, I think it is now plain that "bona fide for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. The second thing is that *the phrase, "the company as a whole", does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body*. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. [emphasis added]

164 It was never in dispute that RTC was solvent at all material times. It is when a company is insolvent that the interests of its creditors become the dominant factor in what constitutes the benefit of the company as a whole: *W&P Piling Pte Ltd (in liquidation) v Chew Yin What* [2007] 4 SLR(R) 218 at [73]. Thus, the Plaintiff's interests here should be equated with the interests of its shareholders since the Plaintiff has neither shown that the company was at all near becoming insolvent, nor that there are other creditors in the picture whose interests have to be protected in the event that the company becomes insolvent.

165 In *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46 at 51, Eve J held that company funds can only be spent for "purposes reasonably incidental to the carrying on of the company's business" and that:

> [T]he validity of such grants is to be tested, as is shown in all the authorities, by the answers to three pertinent questions: (i.) Is the transaction reasonably incidental to the carrying on of the company's business? (ii.) Is it a bona fide transaction? and (iii.) Is it done for the benefit and to promote the prosperity of the company?

166 The impugned expenses have to be considered with these principles in mind.

(1) From Peter Lim

167 In all, the Plaintiff seeks to claim back $665,478.93 in expenses charged under Peter Lim's private account. This amount was arrived at by deducting his consultancy fees of $5,040,000 from the total amount charged to his private account, $5,705,478.93. [note: 23] It includes expenses that Peter Lim had claimed from RTC such as donations to the Old Rafflesians' Association and the Community Chest, his personal bodyguards' salaries, bonuses and mobile phone charges and payments to third parties like Pan Intel Investigations and Compuworks Pte Ltd ("Compuworks").

168 Expenses such as mobile phone charges are innocuous items which are commonly charged to companies as employees' or directors' benefits.

169 According to Peter Lim, the payments made to Pan Intel Investigations and Compuworks were legitimate expenses incurred for their services rendered to RTC. Pan Intel Investigation was engaged to conduct a security audit at the Club's construction site in September 1997. It provided surveillance services to RTC at the Club worksite by monitoring work site activities to ensure that the contractors were working overnight in order to prevent further delays in the construction of the Club facilities. As RTC's main IT contractor, Compuworks was consulted in relation to software for the "Birthday Cakes" project (involving a software system to track complimentary Swensen's birthday cakes delivered to members on their birthdays before the Club opened), to evaluate the membership card system and provide computer maintenance. Even though Peter Lim's nephew was a shareholder of Compuworks, this was made known to all the shareholders. Since these third parties provided valuable services to RTC, Peter Lim is not liable for these expenses incurred, even though they were paid under his private account.

170 RTC had sought tax deductions for donations made in its name to the Community Chest and the Old Rafflesians' Association. The latter donation was a contribution towards the Raffles Institution Monument which was unveiled at a high profile event attended by Lawrence Ang and Chan Lay Hoon. On behalf of RTC, Lawrence Ang received a token of appreciation from the Old Rafflesians' Association for the donation. This served to raise the profile of the Plaintiff in the eyes of the public. Thus, I find that these expenses were incurred for the benefit of RTC, and not for Peter Lim's personal benefit to the exclusion of RTC.

171 As for the salaries and bonuses paid to staff brought into RTC by Peter Lim, the Plaintiff used these bonuses as illustrations of how additional bonuses were charged to his private account but, inexplicably, did not particularise these bonuses or salaries in Schedule 3D to the Statement of Claim (Amendment No 3) and these are not included in the $665,478.93 worth of expenses claimed under Peter Lim's private account. As these expenses have not been pleaded, the Plaintiff is not entitled to claim them back.

172 Therefore, the Plaintiff is not entitled to claim back any of the expenses that Peter Lim had charged to his private account as he had not acted in breach of his fiduciary duties in so charging those expenses.

(2) From Lawrence Ang and William Tan

173 The Plaintiff seeks to claim back $1,286,546.31 and $71,499.14 worth of expenses charged under Lawrence Ang's and William Tan's private accounts respectively. The following expenses were highlighted in the Plaintiff's closing submissions:

(a) Expenses for the trip to Los Angeles and Disneyland taken by Lawrence Ang's sister; [note: 24]

(b) Travelling expenses for Lawrence Ang's father-in-law; [note: 25]

(c) Medical fees for Ng Hoy Loy; [note: 26]

(d) Medical fees for Ang Lian Seng; [note: 27]

(e) Payments made to Consultant Regional Pte Ltd ("Consultant Regional"); [note: 28]

(e) William Tan's mother's salary; [note: 29] and

(f) Victor Chua's MBA course fees. [note: 30]

174 Some of the expenses can be considered to be employees' benefits. These include the medical fees of Ng Hoy Loy and Ang Lian Seng, and even Victor Chua's MBA course fees. With regard to the MBA course fees, the evidence shows that Lawrence Ang agreed to have them parked under William Tan's private account and not charged directly to the company's account. This did not mean, however, that Victor Chua's fees cannot be reasonably incidental to the business of RTC. In acting in the best interests of the company, it is reasonable for directors to also consider the interests of the employees of the company. It is arguable that with an MBA, Victor Chua might be able to be of even greater value as an employee to the company.

175 The payments to Consultant Regional seem to have formed the bulk of the impugned expenses claimed under Lawrence Ang's private account. On cross-examination, Moh Siang King stated that if "Consultant Regional does the work, and send the invoice to Raffles Town Club, then, of course Raffles Town Club has to pay for it". [note: 31] The Plaintiff does not provide direct evidence to show that Consultant Regional did no work for RTC. Instead, it makes the following observations:

(a) Lawrence Ang's evidence that Consultant Regional gave advice in relation to construction was inconsistent with the invoices that described the work as clerical assistance;

(b) The shareholders of Consultant Regional who were full-time employees of RTC were being paid salaries by RTC as well;

(c) RTC continued to pay fees to Consultant Regional after the Club had opened and the fees increased; and

(d) The last invoice issued by Consultant Regional was in August 2000 when Lawrence Ang's quarrel with Peter Lim started.

176 To my mind, these observations provided scant evidence for the contention that Consultant Regional had done no work for RTC. Lawrence Ang's inconsistent evidence does not negate the work that Consultant Regional had possibly done for RTC. In representations to IRAS made by the Plaintiff under Margaret Tung and Lin Jian Wei's direction, it was clearly stated that Consultant Regional had provided services in relation to the processing of members' applications, monthly payments, generating of monthly statements of accounts and related matters. If shareholders of Consultant Regional were also employees of RTC, it is not surprising that they were being paid salaries by RTC at the same time that payments were being made to Consultant Regional. That RTC continued to pay fees to Consultant Regional after the Club had opened and the fees increased indicated to me that more work was perhaps being done after the Club had opened. If Consultant Regional was generating monthly statements of accounts and rendering other services for RTC, it would not be surprising at all that the operation of the Club would result in more work for Consultant Regional to do, since a higher volume of operational activity would be expected. The last observation regarding the correlation between cessation of payments to Consultant Regional and the purported quarrel between Peter Lim and Lawrence Ang has little probative value, being merely speculative at best. I therefore uphold the validity of the payments to Consultant Regional.

177 Even though William Tan's mother was employed to open envelopes, she was paid $4,000 a month. William Tan admitted that he had asked RTC to give his mother a bit more salary as charity from his side. Since his mother did perform some work for RTC, the amount that the company decides to pay her is not a matter for this court to decide. William Tan's admission to "charity" does not mean that he has acted in breach of his fiduciary duties to the Plaintiff.

178 I shall address other impugned expenses such as the travelling expenses of Lawrence Ang's relatives below.

(3) From Dennis Foo

179 In its Statement of Claim in Schedule 3C, the Plaintiff particularised $46,078.10 worth of expenses charged to Dennis Foo's private account which it seeks to claim back from him. Yet, in its closing submissions, it submits that Dennis Foo did not know and never agreed to the charging of personal expenses to the private accounts and uses this submission to show that the true nature of the private accounts was that the Defendants would be "ultimately responsible" for expenses under the private accounts which are not for RTC's purposes or interests. [note: 32] In the same closing submissions, the Plaintiff did not give the same detailed treatment to the expenses claimed under Dennis Foo's private account as it did with the expenses claimed under the other Defendants' private accounts. It is unclear whether all this means that the Plaintiff is submitting that Dennis Foo has admitted to his liability to reimburse the Plaintiff for all the expenses charged under his private account, or alternatively, that the Plaintiff is not pursuing Dennis Foo for the expenses charged to his private account.

180 Of the expenses particularised in Schedule 3C, $30,000 relates to donations to charitable causes such as Community Chest, Breast Cancer Foundation, Singapore Red Cross Charity Dinner and Presidents' Star Charity Night. The other expenses are for entertainment such as a banquet at RTC. I accept Dennis Foo's explanation that these were all for the Plaintiff's benefit. Such charitable

donations attract tax deductions for the benefit of RTC. According to Dennis Foo, the banquet served to raise the profile of RTC amongst the guests at the banquet who were from the diplomatic corp. Thus, even if it is still the Plaintiff's case that Dennis Foo should be liable for the expenses claimed under his private account, despite his purported lack of knowledge of and agreement to the workings of the private accounts, I find that the Plaintiff is not entitled to claim back the expenses claimed under his private account as they were incurred largely for the benefit and interests of RTC.

Expenses not directly connected to the Plaintiff

181 Having dealt with most of the impugned expenses and found that they were in fact reasonably incidental to the business of RTC, I now consider the expenses that cannot be considered so directly connected to the Plaintiff. These would be for smaller items such as the holiday expenses for Lawrence Ang's sister and father-in-law, and perhaps, for William Tan's mother's salary.

182 To the extent that these expenses are not reasonably incidental to the business of RTC, the Defendants can be said to have acted in breach of their duty to act in the best interests of the company. However, I find that the Defendants, acting in their capacity as shareholders of the company and collectively embodying the interests of the company, had authorised and ratified the charging of these expenses to the company via the private accounts.

183 Even if there was no proper written shareholders' resolution on the ratification or authorisation of such expenses, if all the shareholders with the right to attend and vote at a general meeting had assented to this matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in a general meeting: see *Re Duomatic Ltd* [1969] 2 Ch 365, at 373.

184 In *Tokuhon (Pte) Ltd v Seow Kang Hong and others* [2003] 4 SLR(R) 414, the appellant company had instituted an action against two of its former directors ("Mr and Mrs Seow") for breaches of directors' duties. The appellant , the sole distributor of a brand of plasters from Japan, had three groups of shareholders. Mr and Mrs Seow formed one such group. The shareholders did not have a cordial working relationship and Mrs Seow sent letters to one Michael Chien (who was responsible for the awarding of the distributorship) conveying her intention to withdraw from the appellant and mentioning numerous conflicts among the directors. All her letters were copied to the other directors. Michael Chien subsequently terminated the distributorship. The Court of Appeal held (at [38]) that under "ordinary circumstances", what Mrs Seow did in communicating with Michael Chien would constitute a breach of her fiduciary duties as a director. However, by their previous similar conduct of divulging confidential information to Michael Chien, the other directors and shareholders "demonstrated that each of the partners regarded such conduct as being fair game and acceptable". In the view of the Court of Appeal (at [40]—[41]):

> 40 … It must be emphasised that the three directors represented the interests of all the shareholders of [the appellant]. None of the directors, and thus the three partners, viewed that there was a separate independent interest of the company. In their capacities as shareholders, the directors were advancing the interest of their own families and were talking freely to [Michael] Chien. That was the norm set by the shareholders of the company, though not minuted as such in the minutes of the company. The shareholder-partners had impliedly accepted such conduct.
>
> 41 It is in the light of these very exceptional circumstances that we hold, and thus concur with the trial judge, that in communicating with Chien, Mrs Seow was not acting out of turn and was not in breach of any duty.

185 In *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd and Others* [1983] Ch 258, the English Court of Appeal was concerned with an application for leave by a Liberian company ("the Liberian plaintiff") to bring an action against its English agent for breaches of the agent company's duty of care under the agency agreement in connection with the information and advice it had supplied to the Liberian plaintiff. It also sought to claim against the shareholders of the Liberian plaintiff (which were American, French and Japanese oil companies who had nominated directors of the Liberian plaintiff). The majority of the Court of Appeal held that the Liberian plaintiff existed for its shareholders' benefit and provided they acted *intra vires* and in good faith, the shareholders could manage its affairs as they chose while it was solvent. Lawton LJ reasoned, at 269, that:

> … [W]hen the oil companies acting together required the plaintiff's directors to make decisions or approve what had already been done, what they did or approved *became the plaintiff's acts and were binding on it*… When approving whatever their nominee directors had done, the oil companies were not, as the plaintiff submitted, relinquishing any causes of action which they plaintiff might have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there was no damage. *What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's acts*.
>
> It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its own acts.
>
> [emphasis added]

The other judgment in the majority was delivered by Dillon LJ who stated, at 288:

> An individual trader who is solvent is free to make stupid, but honest commercial decisions in the conduct of his own business. He owes no duty of care to future creditors. The same applies to a partnership of individuals.
>
> A company, as it seems to me, likewise owes no duty of care to future creditors. *The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders*. …
>
> The shareholders, however, owe no such duty to the company. *Indeed, so long as the company is solvent the shareholders are in substance the company*.
>
> [emphasis added]

186 As I have found that all the Defendants had agreed to the system of private accounts with full knowledge of how it was supposed to work, I find that the charging of the impugned expenses to their private accounts for squaring off later was conduct which they had, as shareholders, viewed as "fair game and acceptable" (see [184] above). As the Defendants were the only shareholders of RTC, they collectively represented the interests of the company and the system of private accounts was a convenient way for them to advance their own interests by ensuring parity among the shareholders and minimising conflict due to disagreements as to quantum of expenses to be claimed. As RTC was solvent at all times when the Defendants charged expenses to their private accounts, the Defendants were "in substance the company" and in adopting the acts of charging expenses to their private accounts in agreement with one another as shareholders, they had made those acts the Plaintiff's

acts.

187 Thus, the Plaintiff cannot now complain that the expenses charged were charged in breach of their duties to RTC. As a result, the Plaintiff's claim in respect of the directors' remuneration and expenses must fail.

Disguised dividends

188 The Plaintiff contends that the private accounts were the means through which the Defendants disguised the dividends paid out to themselves as shareholders at times when the Plaintiff had no profits to pay dividends out of. According to the Plaintiff, they were acting in breach of s 403 of the Companies Act which provides:

> Dividends payable from profits only
>
> 403.—(1) No dividend shall be payable to the share-holders of any company except out of profits.
>
> …
>
> (5) In this section, "dividend" includes bonus and payment by way of bonus.

Under s 403(2), it is an offence for any director to pay, or permit to be paid, any dividend in contravention of this section.

189 As the Club only opened in early 2000, RTC could not be treated under accounting standards as having "earned" the entrance fees as income as it had not started providing its members with club facilities. The Plaintiff submits that since it could not have declared the entrance fees received as income in the years 1997 through 1999, the items charged under the private accounts were another way for the Defendants to draw cash out of RTC as disguised dividends in contravention of s 403.

190 The Plaintiff relies on three cases in particular to justify its position that the Defendants have in fact paid out dividends to themselves "dressed up" as directors' remuneration or expenses claimed from the company or management fees. I find, however, that the facts of those cases are far removed from the factual matrix that I am faced with in this case and the principles expounded in those cases can be used to justify my judgment that there has been no payment of "disguised" dividends by the Defendants on the present facts.

191 The first case, *Halt Garage*, involved a liquidator claiming to recover remuneration from the two director-shareholders of a wound-up company on ground of misfeasance. The question in that case was whether the drawings of remuneration by the husband-and-wife sole director-shareholders of the company in liquidation were genuine. Oliver J held that the husband's drawings were genuine awards of remuneration but the wife's drawings were in excess of what would have been a reasonable award of remuneration for holding office as a director and that amounted to a disguised payment of dividends in recognition of her co-proprietorship of the business and was *ultra vires* the company. Oliver J noted that (at 1041):

> It was known from, at the latest, December 1967 onwards, that [the wife] could *never* return to render any services in the actual conduct of the company's business, and she was *never* thereafter called on, *nor was she ever expected, to fulfil any function save that of being a director and carrying out such minimal formal acts as the holding of that office entailed*. … She was incurably ill and living at a distance of several hundred miles from the company's place of

> business. Yet in each of the years 1968-69 and 1969-70 she received a sum of some £1,500 and in the year 1970-71 something over £500. [emphasis added]

It was with those considerations in mind that Oliver J held that the sums paid to her were so out of proportion to any possible value attributable to her holding of office that the court is entitled to treat them as not being genuine payments of remuneration at all but as dressed-up dividends out of capital. On the present facts, having benefited immensely from the Defendants' industry in the launch and running of the Club, it cannot lie in the Plaintiff's mouth that the Defendants' level of contribution to the company was as low as that of the wife in *Halt Garage* who was not rendering any services in the actual conduct of the company's business during the periods for which payments to her as director's remuneration were impugned.

192 In *Halt Garage*, after going through the authorities, Oliver J came to the conclusion (at 1043) that:

> [W]here payments are made under the authority of a general meeting acting pursuant to an express power, the matter falls to be tested by reference to the *genuineness and honesty* of the transaction rather than by reference to *some abstract standard of benefit*. I do not, however, think that bona fides (in the sense of absence of fraudulent intention) and genuineness are necessarily the same thing. … *The real question is, were these payments genuinely director's remuneration? If your intention is to make a gift out of the capital of the company, you do not alter the nature of that by giving it another label and calling it remuneration*. [emphasis added]

I find that the Defendants, acting as directors, did not act with the intention to make a gift out of the capital of the company. As regards their directors' remuneration proper, I agree with Oliver J's judgment that if a director genuinely receives the money as a reward for his directorship, the question whether the payment is beneficial to the company or not cannot alter the capacity in which he receives it: *Halt Garage*, at 1038. Since there is no presumption that directors' remuneration is only payable out of divisible profits, if the sum is bona fide voted to be paid as remuneration, the amount, whether it is "mean or generous" must be a matter of management for the company to determine in accordance with its constitution which expressly authorises payment for directors' services: *Halt Garage*, at 1039. I find that the exercise by the Defendants in their capacity as shareholders of the power to pay remuneration to themselves for their services as directors was a genuine one as the payments were not wholly unreasonable or wholly unjustifiable with reference to the services they had rendered to RTC. Similarly, the management fees paid pursuant to the Management Agreement were genuine payments and not gifts out of capital.

193 In order to have a clearer idea of the type of transactions that the courts have classified as disguised payment of dividends, one need only turn to the other two cases referred to me by the Plaintiff. In *Ridge Securities Ltd v Inland Revenue Commissioners* [1964] 1 WLR 479 ("*Ridge Securities*"), the plaintiff had acquired the shares and debentures of other companies and obtained payments of "interest" considerably greater than the principal sums advanced. Pennycuick J held that the payments on the debentures, though expressed to be "interest", were not in fact interest but represented gratuitous dispositions of those companies' assets otherwise than in furtherance of their objects and were therefore *ultra vires*. In his judgment, he remarked (at 495):

> Indeed, the terms of each debenture indicate on the face of it that the so-called "interest" represented in fact a gratuitous disposition of an enormous sum by the company concerned in favour of [the plaintiff]. On these facts and in the absence of any further material, it seems to me to follow that it was not within the powers of the company to enter into the covenant or to make the payment. A company can only lawfully deal with its assets in furtherance of its objects.

> The corporators may take assets out of the company by way of dividend, or, with leave of the court, by way of reduction of capital, or in a winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however described, and, if they attempt to do so, the disposition is ultra vires the company.

In *Ridge Securities*, it was clear that the "interest" purportedly paid was not at all connected to the debentures because the sums paid as interest were considerably greater than the principal loan secured by the debentures and were payable within a short time interval (*eg*, a few days) after the loan was advanced. In that sense, the debentures were a "sham" because the plaintiff never had the intention for the debentures to act as security for the loan; rather, it was obvious that the plaintiff had every intention to strip those companies of assets. This is distinct from the Defendants' actions in this case: they had every intention for the company to prosper, not to systematically strip it of its assets. In any event, every single item of expense claimed was properly recorded for squaring off amongst the shareholders. Further, in my judgment, most of the expenses claimed under the private accounts were reasonably incidental to the business of RTC and were incurred for its interests and benefits. This is unlike the "interest" that was paid out in *Ridge Securities*, charged at a rate that was totally unconnected to the principal loan, and could not be conceivably related to the business of the borrower-companies.

194 In *Aveling Barford Ltd v Perion Ltd and others* [1989] BCLC 626, the company in question had an accumulated deficit on its profit and loss account of nearly £18m and was "plainly not in a position to make any distributions to shareholders" (per Hoffmann J, at 628). The company sold a piece of property to the defendant for £350,000 even though the property was valued at £650,000 by an independent valuer and at £1.15m by the mortgagee which partially financed the purchase. Within a year the defendant sold the property for more than £1.5m. Both the plaintiff and the defendant were controlled by one Dr Lee who had full knowledge of the various transactions, including the valuations of the property. Looking objectively at the substance of the impugned transaction, Hoffmann J found, at 632, that:

> [T]he sale to [the defendant company] was not a genuine exercise of the company's power under its memorandum to sell its assets. It was a sale at a gross undervalue for the purpose of enabling a profit to be realised by an entity controlled and put forward by its sole beneficial shareholder. This was as much a dressed-up distribution as the payment of excessive interest in *Ridge Securities* or excessive remuneration in *Halt Garage*. The company had at the time no distributable reserves and the sale was therefore ultra vires and incapable of validation by the approval or ratification of the shareholder.

On the present facts, even though technically from an accounting perspective, RTC had no "profit" to pay dividends out of, it did not have an accumulated deficit and could be said to have been in a financial position to pay dividends as the value of its assets far exceeded its liabilities and expenses at the material times. The Plaintiff has also not given any solid evidence that the impugned transactions were worth much less than the amounts it had paid out for those transactions.

195 To my mind, these cases indicate that there is a rather high threshold to be crossed before the courts will view transactions as disguised attempts to distribute dividends. One has to take an objective view of the overall picture. Generally, commercial decisions are best left to the management of the company. If the payments out had little or no connection with the objects of the company or even the purported purpose of the transactions for which those payments were made, then the courts would find reason to suspect that the payments were not reasonable or justifiable and were not made in the best interests of the company. As I have explained above, I find that the directors' remuneration were reasonably paid for their services as directors to RTC and the expenses charged

under the private accounts were largely reasonably incidental to the business of RTC. The expenses that the Plaintiff seek to impugn were thus not disguised attempts to strip the company of its assets or capital. The Defendants had no good reason to seek that result to the detriment of RTC. At all times, the company was a going concern and they had every intention to keep it as such in order to profit from its business in the long run. Therefore, I find that the Defendants had not acted in breach of s 403.

196 In closing this section of the judgment, I note with approval Oliver J's observations in *Halt Garage* at 1033:

> … [C]ounsel for the liquidator has not been able to point to any reported case in which the [*Lee, Behrens & Co*] principle has been applied to the determination and payment of directors' remuneration by a company in general meeting while the company is a going concern, and I was at first rather startled by his submissions, which appeared to me to have surprising and very far-reaching consequences. *If it is really the case that such a payment is ultra vires unless it be, whether viewed subjectively or objectively, for the benefit of the company and to promote its prosperity as a corporate entity, then it must logically be ultra vires from whatever funds the payment is made and whatever be the company's financial position. But it is a commonplace in private family companies, where there are substantial profits available for distribution by way of dividend, for the shareholder directors to distribute those profits by way of directors' remuneration rather than by way of dividend*, *because the latter course has certain fiscal disadvantages*. But such a distribution may, and frequently does, bear very little relation to the true market value of the services rendered by the directors and if one is to look at it from the point of view of the benefit of the company as a corporate entity, then it is wholly unjustifiable, because it deprives the company of funds which might otherwise be used for expansion or investment or contingency reserves.
>
> Yet, unless it is to be said that the *Lee, Behrens & Co* test is to be applied also even to a unanimous exercise of the power of the company in general meeting to distribute profit by way of dividend (which I should hardly have thought was arguable) it is very difficult to see why the payment of directors' remuneration, on whatever scale the company in general meeting chooses, out of funds which could perfectly well be distributed by way of dividend, should be open to attack merely because the shareholders, in their own interests, choose to attach to it the label of directors' remuneration. … *Is it then to be said that subsequently, perhaps years later, the company, by its liquidator or possibly at the instance of a purchaser of the shares, can come along and demand back profits paid out as remuneration with the active assent and concurrence of all the shareholders at the time because their payment was ultra vires?*
>
> [emphasis added]

The Defendants, as directors, had in my view, acted honestly and with full authorisation from the general body of shareholders of RTC. Thus, they had not acted in breach of their fiduciary and statutory duties to the Plaintiff. The payments as directors' remuneration or as expenses claimed were not *ultra vires* and the company cannot, at the instance of the subsequent purchasers of its shares, demand back profits paid out with active assent and concurrence of all the shareholders at the time.

The RTCI loan

197 RTCI (see [38 above) is an investment vehicle set up by the Defendants. It is a wholly-owned subsidiary company of the Plaintiff. It was incorporated in the British Virgin Islands and its

shareholders and directors are Lawrence Ang, William Tan and Dennis Foo. The evidence revealed that between February and April 1997, the Plaintiff made loans totalling $33m to RTCI. The $33m that was withdrawn in 4 tranches to RTCI were sent by RTCI to Kestel Capital Partners (Malaysia) Sdn Bhd, Abadale Investments Ltd and Kestrel Securities Sdn Bhd between March and May 1997. It is undisputed that the principal sum of $33m has been fully returned to the Plaintiff. In fact, after the Plaintiff was converted into a private exempt company on 5 November 1997, Lawrence Ang, William Tan and Dennis Foo took over $12.9m of the principal sum as directors' loan on 30 November 1997. The Plaintiff claims that by their actions, the Defendants have contravened s 162(4) of the Companies Act and have breached their fiduciary duties by causing RTC to contravene s 162(1) of the Companies Act. Thus, the Plaintiff claims that the Defendants are liable to account for the interest they earned from the $33m and which they caused to be transferred out of RTC; alternatively, an account should be undertaken to find out where and how the $33m was applied as the fruits of the $33m belong in trust to the Plaintiff, having been applied by the Defendants in breach of their fiduciary duties.

Sections 162 and 163 of the Companies Act

198 The relevant portions of s 162 provide as follows:

> **Loans to directors**
>
> **162**. —(1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company…
>
> ...
>
> (4) Where a company contravenes this section any director who authorises the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years.

This section prohibits the making of loans by a company to a *director* of the company or of a related company. In this case, the loan of $33m was made by the Plaintiff to RTCI. Since RTCI is a wholly-owned subsidiary of the Plaintiff, under s 6(*b*) of the Companies Act, the two companies are deemed to be related to each other. *Walter Woon* at para 7.122 notes that:

> To avoid the possibility of a company's directors circumventing s 162 by the simple expedient of making loans to a company which they control, s 163 prohibits the making of loans to certain companies or the giving of guarantees or security in respect of such loans.

Thus, even though the loan was made from one company to another company, as opposed to a loan from one company to a *director*, s 163 would prohibit the making of such an *inter-company* loan if the directors of the lending company are interested in 20% or more of the total number of shares in the borrowing company:

> **Prohibition of loans to persons connected with directors of lending company**
>
> **163**. —(1) Subject to this section, it shall not be lawful for a company (other than an exempt private company) —

(a) to make a loan to another company; or

(b) to enter into any guarantee or provide any security in connection with a loan made to another company by a person other than the first-mentioned company,

if a director or directors of the first-mentioned company is or together are interested in 20% or more of the total number of equity shares in the other company (excluding treasury shares).

199 In this case, the directors of the Plaintiff, the lending company, have an interest in more than 20% of the shares in RTCI, within the meaning of s 7(4A) of the Companies Act which states:

Interests in shares

7. —(1) The following subsections have effect for the purposes of Division 4 of Part IV and sections 163, 164 and 165.

…

(4A) Where a body corporate has, or is by the provisions of this section (apart from this subsection) deemed to have, an interest in a share and —

(a) a person is;

(b) the associates of a person are; or

(c) a person and his associates are,

entitled to exercise or control the exercise of not less than 20% of the votes attached to the voting shares in the body corporate, that person shall be deemed to have an interest in that share.

The Plaintiff (a "body corporate") owns 100% of RTCI shares. The Defendants collectively owned 100% of the Plaintiff and were therefore "entitled to exercise or control the exercise of" more than 20% of the voting shares in RTC. Under s 7(4A) they are deemed to have had more than 20% interest in RTCI.

200 However, s 163(4) carves out an exception to the s 163(1) prohibition:

(4) This section shall *not* apply —

(a) to anything done by a company *where the other company (whether that company is incorporated in Singapore or otherwise) is its subsidiary* or holding company or a subsidiary of its holding company; …

[emphasis added]

Therefore, on a plain reading of s 163(4), since RTCI is a wholly-owned subsidiary of RTC, s 163(1) does not apply to a loan made by the Plaintiff to RTCI. On this basis, I find that RTC has not contravened s 162 by making the $33m loan to RTCI. It therefore follows that the Defendants have not breached their fiduciary duties since they have not caused RTC to contravene s 162.

Authorisation by members of RTC

201 At trial, Lawrence Ang candidly admitted that the $33m was invested for the Defendants' personal benefit and not RTC's. Although this was not specifically pleaded by the Plaintiff, to my mind, this seemed like an admission that the Defendants had acted in breach of the rule that a director may not retain a profit made by reason and in the course of his fiduciary relationship with the company. In *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("*Regal (Hastings)*"), the House of Lords held that the defendant directors were liable to account for the profit they had made on the sale of shares that they had subscribed to in a subsidiary company incorporated for the purpose of acquiring two cinema leases. The suit in that case was brought by subsequent purchasers of the plaintiff company which the defendants were directors of, alleging breach of fiduciary duty as the opportunity to make the profit from the sale had come to them in their capacity as fiduciaries of the company.

202 The rule against the making of "secret profit" by a director of a company is subject to the proviso that if such profit or benefit is disclosed by the director to the members of the company and approved by them, he will not be held liable to account for that profit. In *Regal (Hastings)*, Lord Russell of Killowen suggested, at 150, that:

> [The defendants] could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

On the present facts, I accept the Defendants' submission that they, as the shareholders and directors of RTC had authorised the loan to RTCI and were all fully aware of the profits from the investment of the $33m loaned to RTCI. There was some dispute over who had initiated the idea of making the loan to RTCI for the purpose of investments but that dispute over whether it was Peter Lim's or Lawrence Ang's brainchild was irrelevant for the purposes of my decision. Dennis Foo on the other hand submits that the loan was handled by Peter Lim, Chan Lay Hoon and Lawrence Ang and he had no idea as to what was happening. All he knew apparently was that the loan to RTCI was for investment purposes and he had left it to Peter Lim *et al* to prepare the documents. I find that his knowledge that the loan to RTCI was for investment purposes and his acquiescence to that loan was sufficient for the purpose of "protecting" the directors from liability for breach of fiduciary duties. At all times, the members of the company had knowledge of the loan and that the loan was intended for investment purposes. When the first tranche of the loan was made in February 1997, the then shareholders of the Plaintiff, Tan Buck Chye and Teriya had full knowledge of the loan and authorised it. By the time the investments yielded profits, the Defendants as the only shareholders of the Plaintiff had full knowledge of the profits. Even though there was no resolution at a general meeting specifically authorising the distribution of such profits to the Defendants as directors, since all the shareholders with the right to attend and vote at a general meeting had assented to the profits, that assent was as binding as a resolution in general meeting: *Re Duomatic Ltd* at 373.

203 I therefore find that the Defendants had not acted in breach of their fiduciary duties to the company with regards to the RTCI loan and the profits they gained from investment of that principal sum.

The Third Party claims and other claims

Lawrence Ang and William v Margaret Tung and Lin Jian Wei

204 I now turn to the third party proceedings by Lawrence Ang and William Tan against Margaret Tung and Lin Jian Wei (the 1st and 2nd third parties respectively) where it was alleged, *inter alia*, that -

(a) Margaret Tung and Lin Jian Wei had breached cl 7 of the "Agreement in respect of the Sale and Purchase of Shares in Raffles Town Club Pte Ltd" ("RTC S&PA") dated 6 June 2001;

(b) Margaret Tung and Lin Jian Wei had breached Recital (F) and cl 4.3 of a deed ("the Deed") dated 18 February 2002. According to Lawrence Ang and William Tan, both clauses discharge them from their entire obligations and liabilities under several agreements relating to RTC and the RTC shares (the "Discharged Agreements"). This meant that Margaret Tung and Lin Jian Wei had waived their rights under the Discharged Agreements;

(c) Margaret Tung and Lin Jian Wei had acted in bad faith and/or unconscionably in causing, directing and/or assisting RTC to commence the present suit;

(d) Margaret Tung and Lin Jian Wei had conspired with each other and/or together with RTC with the sole or predominant intention or by unlawful means to cause injury, loss or damage to Lawrence Ang and William Tan by commencing the present suit against them; and

(e) By bringing the present suit, Margaret Tung and Lin Jian Wei were using RTC to unjustly enrich themselves.

205 Margaret Tung and Lin Jian Wei made a submission of no case to answer. It is also pertinent to note that as the only directors and shareholders of RTC, Margaret Tung and Lin Jian Wei chose not to give evidence on behalf of RTC in the main action.

Clause 7 of the RTC S&PA

206 Clause 7 of the RTC S&PA provides as follows:

7. NO REPRESENTATIONS/UNDERTAKING

(A) The Purchasers hereby irrevocably acknowledge and agree with the Vendors that (save as provided In Clause 6 above):-

(i) no representations, warranties or undertakings are made as to the Company and/or the Sale Shares and all and any such representations, warranties and undertakings (whether express or implied) are hereby excluded by the Vendors; and

(ii) notwithstanding anything contained In this Agreement, in no circumstances shall any of the Vendors be liable to any of the Purchasers as a result of or in connection with this Agreement (whether in contract, tort (including negligence or breach of statutory duty) or otherwise howsoever, and whatever the cause thereof) for any loss of profits, business, contracts, revenues, or anticipated savings, or for any special, indirect or consequential damage of any nature whatsoever.

The operation of this Clause shall survive the termination of this Agreement.

(B) Without prejudice to sub-Clause (A) above, the Purchasers hereby irrevocably acknowledge and agree with the Vendors that the Purchasers shall have no right of recourse and/or claim whatsoever against the Vendors In respect of any diminution in the value of the Sale Shares and/or claims, damages, losses, expenses and/or costs incurred or suffered by the Purchasers in connection with this Agreement and/or the Sale Shares, whether such diminution and/or claims, damages, losses, expenses and/or costs is attributable to cause(s) occurring prior to, on or after

completion, including, without limitation, any diminution and/or claims, damages, losses, expenses and/or costs as a result of any Claim made prior to, on or after completion attributable to cause(s) occurring prior to, on or after completion.

(C) The Purchasers undertake to the Vendors not to commence any action/proceedings or assist any third party to commence or maintain or proceed with any action/proceedings against the Vendors in relation to the Company and/or the Sale Shares.

207 Lawrence Ang's and William Tan's position was that under cl 7, Margaret Tung and Lin Jian Wei had undertaken that they would not hold Lawrence Ang and William Tan liable for any losses in connection with or as a result of the RTC S&PA, nor would they have any recourse against Lawrence Ang and William Tan in respect of *inter alia*, any claims, damages, losses suffered by Margaret Tung and Lin Jian Wei in connection with RTC S&PA and/or RTC shares. Since the RTC S&PA was valid and alive both in law and in fact, by directing, causing and/or assisting RTC to commence the present suit, Margaret Tung and Lin Jian Wei had breached cl 7.

208 In turn, Margaret Tung and Lin Jian Wei asserted, *inter alia*, that cl 7 of the RTC S&PA was void by virtue of s 172(1) of the Companies Act, which states:

> Any provision, whether in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void.

They submitted that Lawrence Ang's and William Tan's construction of cl 7 of the RTC S&PA would have the effect of precluding Margaret Tung and Lin Jian Wei from causing RTC to claim against Lawrence Ang and William Tan for their breaches of duties. This would in turn have the effect of exempting Lawrence Ang and William Tan as directors from their liability. Clause 7 was therefore void by virtue of s 172(1).

209 I disagree that pursuant to s 172(1) of the Companies Act, any provision, be it in the articles, contract or otherwise, purporting to indemnify a director against any liability for negligence, default, breach of duty or breach of trust was void and hence unenforceable. The prohibition in s 172(1) applies only to indemnities given *by the company concerned*, *ie*, RTC, and not those given by third parties.

210 In the English case of *Burgoine and another v London Borough of Waltham Forest and another* [1997] BCC 347 ("*Burgoine*"), Neuberger J explained why this was so (at 358-359):

> I have reached the conclusion that the plaintiffs' contention on this point is correct, and that s 310 [*in pari materia* with section 172(1) of the Companies Act] *only applies to indemnities given by the company concerned (i.e. in this case, the company)*. First, s. 310(1) appears primarily to be concerned with a 'provision … exempting any officer'. Given that the sort of claims contemplated by s. 310 are claims brought by the company, it could only be the company which granted any such exemption. In those circumstances, I consider that it would require clearer words before provision relating to indemnification applied to persons other than the company. Secondly, the phrase 'whether contained in a company's articles or in any contract with the company or otherwise', while somewhat cumbersome, seems to me to be directing attention to an arrangement with the company, and not with anyone else. Thirdly, the words 'or otherwise' do not, I think, naturally mean, at least in the context of s. 310(1) , 'or anyone else'; to my mind, the words 'or otherwise' are directed more towards covering an arrangement with the company

> which may not amount to a contract, but which nonetheless might give rise to an argument that the company had agreed to exempt the director, or to indemnify him, in respect of the matters referred to at the end of s. 310(1) : an example of this might be some sort of an arrangement with the company amounting to an estoppel…
>
> In effect, I consider that the words 'or otherwise' in s. 310(1) are to be construed *eiusdem generis* with the preceding words 'whether contained in a company's articles or in any contract with the company'. After all, the company's articles of association are, at least in a sense, contractual provisions between the company and its members. In those circumstances, it can be said with force that there is a genus, namely an arrangement between the company and its officers, which restricts what might otherwise be said to be a very wide meaning of the words 'or otherwise'.
>
> [emphasis added]

Section 310(1) of the UK Companies Act 1985 states:

> This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise, for exempting any officer of the company or any person (whether an officer or not) employed by the company as auditor from, or indemnifying him against. any liability which auditors by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company.

Section 310(2) further provided, "Except as provided by the following subsection, any such provision is void."

211 Accordingly, Margaret Tung's and Lin Jian Wei's argument that cl 7 was void was not tenable because RTC was not a party to the RTC S&PA, and cl 7 was in fact an indemnity given by Margaret Tung and Lin Jian Wei in their personal capacities (and not by RTC). Clause 7 did not fall within the scope of s 172(1) and was accordingly not void.

212 Be that as it may, even though s 172(1) did not apply, with the effect that cl 7 remained valid, it was still not open to Lawrence Ang and William Tan to rely on cl 7 as the Deed had superseded the RTC S&PA. Under Recital (F) of the Deed, Margaret Tung, Lin Jian Wei, Lawrence Ang and William Tan agreed to:

> *[M]utually release and discharge each other from their respective rights and obligations under* the Loan Facility, First RTC Agreement, *June Option Agreement [ie the RTC S&PA]* and Second RTC Agreement ("Discharged Agreements") subject to the terms and conditions of this Deed. [emphasis added]

This was also the effect of cl 4.3 of the Deed:

> Other than obligations and liabilities arising from this Deed (in particular, [Margaret Tung's and Lin Jian Wei's] obligations and liabilities under Clause 2 above), *each party hereto irrevocably releases and discharges absolutely each of the other parties hereto from its/his entire obligations and liabilities of whatsoever nature or cause, howsoever arisen from, related or connected to, or under the Discharged Agreements with effect from the date of this Deed and each party hereto hereby waives its rights in respect of any claims or actions it may have (other than claims or actions arising under this Deed), of whatsoever nature, howsoever*

framed, in law or in equity, against each of the other parties hereto under the Discharged Agreements with effect from the date of this Deed Provided that there shall be no release and discharge nor waiver of rights in respect of claims or actions that [Margaret Tung and Lin Jian Wei] may have against [Lawrence Ang or William Tan] in respect of any defect in the rights, title interest in the RTC shares purchased by [Margaret Tung and Lin Jian Wei] pursuant to the First RTC Agreement and the Second RTC Agreement. [emphasis added]

Recital (F) read with Recital (D) of the preamble of the Deed defined "Discharged Agreements" to include the RTC S&PA. Hence, Lawrence Ang's and William Tan's claim against Margaret Tung and Lin Jian Wei turned, in part, on the effect of Recital (F) and cl 4.3 of the Deed, which I now turn to.

Recital (F) and cl 4.3of the Deed

213 On 18 February 2002 after Margaret Tung and Lin Jian Wei had acquired a 100% stake in RTC, the Deed was entered into and executed by Margaret Tung, Lin Jian Wei, Lawrence Ang and William Tan with the intention that each would have no claims against the rest in respect of RTC and/or the RTC Shares. Hence, Recital F and cl 4.3 were included in the Deed.

214 Lawrence Ang and William Tan argued that pursuant to Recital (F) and cl 4.3 of the Deed, Margaret Tung and Lin Jian Wei had waived all their rights in respect of any claims or actions which they may have against Lawrence Ang and William Tan in relation to RTC or the RTC Shares purchased by Margaret Tung and Lin Jian Wei, save for any defect in title or rights to the RTC shares.

215 However, I note that the scope of cl 4.3 is confined to claims or actions that Margaret Tung, Lin Jian Wei, Lawrence Ang and William Tan may have against each other *under the Discharged Agreements*. The present suit and the attendant claims brought by RTC against Lawrence Ang and William Tan, however, were not claims under these Discharged Agreements. Neither did they arise out of or are connected with the Discharged Agreements; none of the actions against Lawrence Ang and William Tan concern, however remotely, the sale and purchase of RTC shares. As such, I agree with Margaret Tung and Lin Jian Wei that in causing or directing RTC to commence the present suit against Lawrence Ang and William Tan, Margaret Tung and Lin Jian Wei had not breached cl 4.3 of the Deed. As for Lawrence Ang's and William Tan's argument that the Discharged Agreements, which included the RTC S&PA, dealt with claims which Margaret Tung and Lin Jian Wei may have had against Lawrence Ang and William Tan not only in relation to the RTC Shares but also in relation to RTC as well, this is misguided. The RTC S&PA is primarily concerned with the sale of RTC shares to Margaret Tung and Lin Jian Wei. As such, references to claims in relation to RTC ought to be read with the subject matter and overall purpose of the RTC S&PA in mind.

Bad faith and unconscionable conduct

216 Lawrence Ang and William Tan alleged that Margaret Tung and Lin Jian Wei had acted in bad faith and/or unconscionably in causing, directing and/or assisting RTC to commence the present suit. *Inter alia*, they argued that Margaret Tung and Lin Jian Wei had knowledge of the alleged breaches of the Defendants and even ratified them, that they had depleted RTC's assets for their own benefit, and that they had essentially obtained RTC for "free". In response, Margaret Tung and Lin Jian Wei argued that allegations of bad faith and unconscionable conduct *simpliciter* do not give rise to any reasonable cause of action.

217 In my view, the law is not clear as to whether there is a broader doctrine of unconscionability which may act as an independent cause of action. In *Chua Chian Ya v Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)* [2010] 1 SLR(R) 607 ("*Chua Chian Ya*"), Andrew

Phang JA made it clear that his endorsement of Parker J's distinction between the common law jurisdiction to declare a contract unenforceable as a restraint of trade and the equitable jurisdiction of the court to grant relief in certain circumstances against unfair and unconscionable bargains in *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229 did not entail the adoption of a doctrine of unconscionability:

> It is important… to emphasise that this does not entail the adoption of a broader doctrine of unconscionability - the legal status of which is still in a state of flux in the Commonwealth in general and in Singapore in particular... [at [24]]

He then said that on the facts of *Chua Chian Ya*, it was unnecessary to consider whether there is, or ought to be, a broader doctrine of unconscionability. Instead, that case did not involve the broader doctrine of unconscionability but focused instead on some other matter (*viz*, the court's common law jurisdiction to declare a contract unenforceable as a restraint of trade).

218 In the present matter, I think it unnecessary to make a finding of whether there had been bad faith on Margaret Tung and Lin Jian Wei's part in bringing this action as I am of the view that neither "bad faith" nor "unconscionability" can constitute a cause of action. These terms merely describe the "character" of a transaction or an action, but cannot suffice to become a cause of action in itself. For a cause of action to exist, there must be sufficient facts upon which a claimant can ask the courts for relief. That Margaret Tung and Lin Jian Wei may have acted in bad faith does not avail William Tan and Lawrence Ang of any legal remedy.

219 In any case, the concept of "bad faith" in the present context is hard to delineate as with the concept of "unconscionability". In fact, a New Zealand judge once remarked of the latter that he would prefer "the herald of equity to be wearing more distinctive clothing (*per* Tipping J in *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 at 325). To use these amorphous concepts which are available in equity as "swords" rather than "shields" would be to throw the state of law into confusion.

Conspiracy

220 It is Lawrence Ang's and William Tan's case that Margaret Tung and Lin Jian Wei had by unlawful means and/or with the sole or predominant intention of injuring Lawrence Ang and William Tan, conspired and combined wrongfully together with RTC to commence the current claim against them. This is notwithstanding the completion of the sale and purchase of the shares in RTC in accordance with, *inter alia*, the terms of the RTC S&PA and the Deed.

221 Lawrence Ang averred in his affidavit of evidence-in-chief that:

> Consistent with Lin's reassurances that he would not cause any harm to me, [Margaret] Tung and Lin [Jianwei] also caused RTC to defend the members' suit without including me as a third party in those proceedings. I verily believe that if [Margaret] Tung and Lin [Jianwei] really believed that I was liable to RTC for any of the claims made by RTC in the present proceedings, they would have caused RTC to commence third party proceedings against me in the members' suit.
>
> I verily believe that [Margaret] Tung and Lin [Jianwei] are using RTC to sue me as they are unable to do so personally since this will result in a breach of the various agreements entered into by [Margaret] Tung and Lin [Jianwei] and myself in 2001. I have deposed to these agreements earlier.

222 Margaret Tung and Lin Jian Wei submit that the commencement of the present suit against Lawrence Ang and William Tan is not an unlawful act, and that the sole and pre-dominant purpose of RTC in commencing this action was not to injure Lawrence Ang and William Tan but to recover the loss and damage caused by them.

223 In *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80, Prakash J summarised the elements that must be satisfied to prove both conspiracy by unlawful means and conspiracy by lawful means, at [23]:

> 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 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.

224 Limb (b) is of particular import here. In instituting the suit, Margaret Tung and Lin Jian Wei had not committed an unlawful act. The breaches of the Deed were incidental to the institution of the suit, but they would not make the mounting of this suit unlawful. Lawrence Ang and William Tan have to prove that the predominant purpose of the conspirators, Margaret Tung and Lin Jian Wei, was to cause damage or injury to Lawrence Ang and William Tan. I do not think that has been proven here. On the face of it, the Plaintiff's purpose of bringing this suit is, at its best, to recover the loss and damage allegedly caused by the Defendants, and at its worst, to unjustly enrich Margaret Tung and Lin Jian Wei (the shareholders of the Plaintiff) should the Defendants be found liable to RTC for the various alleged breaches. In either case, any injury caused to Lawrence Ang and William Tan is incidental to the bringing of this suit; it is a stretch to say that there is a conspiracy to injure them.

Unjust Enrichment

225 Lawrence Ang and William Tan submit that the elements for a claim of unjust enrichment are :

(a) Margaret Tung and Lin Jian Wei have obtained an enrichment or a gain;

(b) There is an 'unjust' factor indicating that the enrichment is unjustified and ought to be reversed; and

(c) The gain was at the expense of Lawrence Ang and William Tan.

They submit that since Margaret Tung and Lin Jian Wei are one and the same with RTC both in fact and in law, as such Margaret Tung and Lin Jian Wei would have obtained an enrichment or gain in the form of any damages payable by Lawrence Ang and William Tan to RTC, as Margaret Tung and Lin Jian Wei are the only shareholders and directors of RTC, a proprietary club.

226 This claim is contingent upon RTC being successful in the present action. As I have found

against RTC, issues of unjust enrichment do not arise.

Peter Lim v Margaret Tung and Lin Jian Wei

227 Peter Lim has contended that RTC, Margaret Tung and Lin Jian Wei conspired with the predominant intention to injure him so as to enrich themselves unjustly. As with Lawrence Ang's and William Tan's conspiracy claim against Margaret Tung and Lin Jian Wei, I find that evidence is lacking to show that Margaret Tung and Lin Jian Wei had the intention to injure Peter Lim. This was simply incidental to the suit.

Peter Lim and Dennis Foo v Lawrence Ang & William Tan

228 In a Deed of Settlement ("the Deed of Settlement") dated 19 April 2001 which was entered into by the Defendants, it was agreed at cl 2.4 that:

> (a) Each party agrees that subject to and on Closing, it shall release, waive or otherwise hold harmless the other Parties from all actions, rights, choses in actions, remedies, claims, proceedings and demands whatsoever and howsoever arising which it has or may have against the other Parties in respect of all subject matters of and/or allegations made in the Suits inclusive of costs and interest.
>
> (c) Save for the RTC Debt, EH Debt, Sullivan Debt and Goldhurst Debt, to be novated on closing, it is hereby agreed and acknowledged that:
>
> > (i) subject to Closing, [Lawrence Ang and William Tan] shall (and shall procure that RTC and EH and their respective subsidiaries and associated companies shall), and [Dennis Foo] and [Peter Lim] shall, release and waive any and all claims, rights, actions, remedies and demands they may have (whatsoever and howsoever arising) in respect of any loans or alleged loans by RTC or EH or any of their respective subsidiary or associated companies to [Peter Lim] and/or [Dennis Foo], and by [Peter Lim] and/or [Dennis Foo] to RTC, EH, Sullivan, Goldhurst or any of their respective subsidiary or associated companies, as the case may be;
> >
> > (ii)(aa) [Lawrence Ang and William Tan] shall hold [Peter Lim] and [Dennis Foo] harmless and shall indemnify them for all amounts, expenses, losses and damages which they may incur or suffer if claims and actions are made or brought against them in breach of sub-clause (i) above; and
> >
> > (ii)(bb) [Peter Lim] and [Dennis Foo] shall hold [Lawrence Ang and William Tan] harmless and shall indemnify them for all amounts, expenses, losses and damages which they may incur or suffer if claims and actions are made or brought against them in breach of sub-clause (i) above.

Further, cl 5.3 provided:

> Notwithstanding Clause 2.4 but subject to Closing, *[Lawrence Ang and William Tan] jointly and severally covenant and agree that they shall not bring or make any claim, action or proceedings against, and (a) shall procure RTC*, EH and their respective subsidiary companies (including successors and assigns) (collectively known as "the Companies") *not to do so*, and (b) shall not procure, instigate or approach ABR and its subsidiary companies (including successors and assigns) (collectively known herein as the "ABR Companies"), to do so, the following, save insofar as [Lawrence Ang and William Tan] would be required by law as a director of any of the ABR

Companies to act otherwise,:

1. [Peter Lim]

2. [Dennis Foo]

…

in respect of any acts or omissions by such persons (whether by themselves, individually or together with any other person) in their capacity as officers or directors of the Companies and the ABR Companies … and as regards [Peter Lim] insofar as it is alleged by [Lawrence Ang and William Tan] that he is a shadow director, officer or consultant or otherwise in any other capacity, in relation to…

PROVIDED ALWAYS THAT this provision shall not apply:

> *(a)in respect of any claim by the Companies and ABR Companies in respect of any fraudulent or dishonest act or in connection with any offence committed by the abovenamed persons;* or
>
> (b) to prohibit, in the event of legal proceedings brought against the Raffles Town Club, EH, RTC, [Lawrence Ang] and/or [William Tan] (i) by any member or ex-member of the Raffles Town Club, the Development Bank of Singapore Ltd, United Overseas Bank Ltd, Standard Chartered Bank and/or Ogilvy & Mather arising from or in relation to the membership launch or drive of the Raffles Town Club; and (ii) by Tan Buck Chye and/or Teriya Nganthavee in connection with matters arising within the period from May 1996 to June 1997 in relation to the affairs of EH and RTC, from joining [Peter Lim], [Dennis Foo] or Chan Lay Hoon as a party to such legal proceedings.

AND PROVIDED FURTHER ALWAYS THAT nothing in this Clause 5.3 shall be taken as requiring any act, thing or omission which contravenes, or is restricted or limited or prohibited in any way whatsoever under any applicable law.

[emphasis added]

229 Peter Lim argued that the commencement and continuation of the present suit by the Plaintiff gave rise to continuing breaches of the Deed of Settlement which thus obliged Lawrence Ang and William Tan to indemnify him for all losses, damages and expenses he may suffer. He relied on cl 2.4 and cl 5.3 for this argument. Dennis Foo contended that by virtue of cl 2.4, Lawrence Ang and William Tan had also agreed to indemnify him if claims were made on loans which had been novated to Lawrence Ang. He said that Lawrence Ang and William Tan had covenanted not to bring or make any claim against him, and that they would, *inter alia*, procure RTC not to make any claim against him in respect of any act or omission which had been committed in his capacity as RTC's director. This covenant was breached as RTC had commenced this suit against him.

230 Lawrence Ang and William Tan's position however was that cl 2.4(c) was inapplicable as RTC had not commenced the present action against Peter Lim or Dennis Foo for loans made by RTC or EH to either of them. Further, Lawrence Ang and William Tan submitted that their obligations under cl 2.4(c) only applied for as long as they were the shareholders/directors/in control of RTC and EH. Since they had both ceased to be involved with RTC by June 2001, they were discharged from their obligations in respect of the Deed.

231 I decided in favour of Lawrence Ang and William Tan for two reasons. First, the present suit does not fall within cl 2.4(c). Clause 2.4(c)(i) only applies to loans made by RTC or EH or any of their respective subsidiary or associated companies as lender to "[Peter Lim] and/or the Vendors (*inter alia*, Dennis Foo)" as borrower, and vice versa. However, the loans in dispute were made by RTC to RTCI, the latter not falling within the stated categories of borrowers in cl 2.4(c), rather than to Peter Lim and/or Dennis Foo. In other words, RTC's present action against Peter Lim and Dennis Foo does not involve any loans made by RTC to either of them.

232 Second, while cl 5.3 prohibits Lawrence Ang and William Tan from bringing or making claims against Peter Lim and Dennis Foo and obliges them (Lawrence Ang and William Tan) to procure, *inter alia*, RTC not to make any claim against Peter Lim and Dennis Foo, cl 5.3 does not apply where the Plaintiff's claim is in respect of "fraudulent or dishonest act or in connection with any offence committed by" Peter Lim and Dennis Foo (see proviso (a) to cl 5.3, at [228] above). As I have established earlier, RTC's claims against Peter Lim and Dennis Foo does include allegations of fraud and dishonest behaviour As such, and by virtue of proviso (a), Peter Lim and Dennis Foo cannot rely on cl 5.3. I noted that Peter Lim had argued that the Plaintiff would be unable to establish the ingredients of a conspiracy and therefore its claim amounted to, at worst, a claim for breaches of duty, and not dishonesty, fraud or any criminal offence. Dennis Foo had also argued that since he had not committed any fraudulent or dishonest acts, accordingly, proviso (a) ought not to apply. However, the wording of proviso (a), read with the rest of cl 5.3 merely requires *allegations* of fraud and dishonesty, and not that actual fraud and dishonesty be made out, before proviso (a) may be invoked. The opening of cl 5.3 provides that Lawrence Ang and William Tan "*shall not bring or make any* claim, action or proceeding against", *inter alia*, Peter Lim and Dennis Foo, and proviso (a) then provides that cl 5.3 would not apply "in respect of any claim by [RTC]… in respect of any fraudulent or dishonest act".

Lawrence Ang and William Tan v Peter Lim and Dennis Foo (counterclaim)

233 Lawrence Ang and William Tan claimed contribution or indemnity from Peter Lim and Dennis Foo in respect of all aspects of RTC's claim. They alleged, *inter alia*, that Peter Lim was the controlling mind and will and driving force behind the businesses of EH and was a beneficial shareholder of RTC and EH, and had taken loans and dividends from RTC and EH. They also alleged, *inter alia*, that Dennis Foo was RTC's and EH's registered shareholder and director, that he was beholden to Peter Lim at all material times and that he was Peter Lim's servant and/or agent, and that he colluded or collaborated with Peter Lim in respect of RTC's and EH's business affairs.

234 Peter Lim's counter-argument was that Lawrence Ang and William Tan had breached the Deed of Settlement by raising this counterclaim and were thus liable to him in damages. Lawrence Ang and William Tan countered that it was Peter Lim and Dennis Foo who had first commenced third party proceedings against them; Lawrence Ang and William Tan had not commenced the suit in breach of clause 2.4(c) of the Deed of Settlement. But even if they had been in breach of clause 2.4(c), Peter Lim and Dennis Foo would similarly have breached the same.

235 As for Dennis Foo, he said that there was no evidence to support the allegation that he was indeed Peter Lim's agent or that he had colluded with Peter Lim. In fact, he said that the evidence suggested that it was Lawrence Ang who had various dealings with Peter Lim to his exclusion, and that as RTC's largest shareholder Lawrence Ang was in control of RTC. Dennis Foo also argued that even if there was a conspiracy and he a party to it, Lawrence Ang and William Tan cannot claim contribution or indemnity from him as their co-conspirator as the law does not enforce illegal agreements under the maxim *ex turpi causa non oritur*. Neither does the law allow Lawrence Ang and William Tan to retain part of the wrongfully acquired benefit.

236 Since I have found that RTC has not made out its claims against Lawrence Ang and William Tan, and Lawrence Ang's and William Tan's counterclaims are contingent upon RTC's success in the main suit, the issue of indemnity and/or contribution does not arise and is hence moot.

Issue of claims being time-barred

237 I should add that the parties had raised arguments and counter-arguments to the effect that their opponents' claims were time-barred. It would have been clear by now that I found these contentions unmeritorious but for the sake of completeness, I am briefly addressing them in this section.

238 Lawrence Ang and William Tan both contended that the Plaintiff's claims in respect of (a) the management fees, (b) the directors' remuneration or expenses and (c) the RTCI loan, were time-barred according to s 24A(3) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act"). Section 24A states:

> 24A. —(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).
>
> (2) An action to which this section applies, where the damages claimed consist of or include damages in respect of personal injuries to the plaintiff or any other person, shall not be brought after the expiration of —
>
> (a) 3 years from the date on which the cause of action accrued; or
>
> (b) 3 years from the earliest date on which the plaintiff has the knowledge required for bringing an action for damages in respect of the relevant injury, if that period expires later than the period mentioned in paragraph (*a*).
>
> (3) An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —
>
> (a) 6 years from the date on which the cause of action accrued; or
>
> (b) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (a).

239 Lawrence Ang and William Tan contended that because the last payment of the management fees occurred in November 1999, the cause of action would have arisen then. Assuming the damage was patent, they argue that the time period of 6 years would start running from November 1999. They further submitted that even if the damage had been latent so that s 24(3)(b) was applicable instead, the Plaintiff through Margaret Tung and Lin Jian Wei (when the latter purchased the second 50% of the Plaintiff) would have had knowledge or at the very least, suspicion or reasonable belief of the payment of the management fees at the time. Thus, the Plaintiff had only 3 years from June 2001 to bring the claim.

240 In rejoinder, the Plaintiff argued that the Defendants had not established, as required under Section 24A(3)(*b*) of the Limitation Act, that Margaret Tung and Lin Jian Wei had the "*knowledge*

required for bringing an action for damages in respect of the relevant damage" at least 3 years before 2006, which was when RTC commenced the action. The Plaintiff contended that the fact that Margaret Tung and Lin Jian Wei were aware of the management fees payments in 2001/2002 did not mean that they were aware at that time that the Defendants had, in purported breach of their duties, caused the Plaintiff, RTC to pay the management fees under an allegedly sham Management Agreement. The burden of proof, it contends, lies on the Defendants to establish when Margaret Tung and Lin Jian Wei had the knowledge required for bringing the action against the Defendants.

241 I concur with the Plaintiff in this regard. The Plaintiff also relied in the alternative on s 22(1) of the Limitation Act, where it is provided that:

> No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

242 The Plaintiff's claim under the Management Agreement falls within limbs (a) and (b) of s 22(1) of the Limitation Act. First, the Plaintiff's claim under the Management Agreement included a claim against the Defendants for fraudulent breach of trust under s 22(1)(a) of the Limitation Act. [note: 33] Also, the reliefs sought by the Plaintiff under the Management Agreement claim included the recovery from the trustee (the Defendants) of trust property (the S$78 million misapplied by the Defendants) under Section 22(1)(b) of the Limitation Act (see prayer (2) of the SOC). Finally, the relief sought by the Plaintiff under the Management Agreement claim also included the recovery of the proceeds of the trust property (the S$78 million) in the possession of the trustee (the Defendants) or previously received by the trustee and converted to his use under s 22(1)(*b*) of the Limitation Act. In the premises, pursuant to s 22(1) of the Limitation Act, no limitation period would apply to RTC's claim under the Management Agreement.

243 As for the alleged time bar in relation to the directors' remuneration and the private expenses, Lawrence Ang, William Tan and Peter Lim had contended that the claims were time-barred under s 6 and/or s 24A of the Limitation Act. The Plaintiff's claim was premised upon the Defendants' alleged breach of fiduciary duties in "misapplying RTC's property in making payments of directors' remuneration and consultancy fees to themselves under the Private Accounts". If liable, the Defendants would be constructive trustees of the Plaintiff's monies. I agree with the Plaintiff's submission that its claim for the recovery of the directors' remuneration and consultancy fees that were paid to them falls within the ambit of Section 22(1)(b) of the Limitation Act and is not time-barred. Similarly, no limitation period applies to the Plaintiff's claim against the Defendants for the recovery of the expenses claimed by the Defendants under the Private Accounts.

244 There is another reason why the claim is not time barred. The directors' remuneration, consultancy fees and expenses paid under the Private Accounts were alleged to be disguised or dressed-up dividends and paid in contravention of s 403 of the Companies Act. Pursuant to s 29(1) of the Limitation Act, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could in reasonable diligence have discovered it. The earliest RTC could have sued was in mid-2001, when the Third Parties took over RTC from the Defendants. This means that the 6-year limitation period would run from mid-2001 at the earliest.

245 Lawrence Ang and William Tan sought to argue that RTC's claim in relation to the loan of $33 million was time-barred by virtue of s 24A(3) of the Limitation Act. The Plaintiff countered that s 22(1)(b) of the Limitation Act applied. I agreed. The said provision provides that no period of limitation shall apply to an action by a beneficiary under a trust, being an action to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

246 Peter Lim and Dennis Foo argued that RTC's claim in respect of the acceptance of some 19,000 members as part of RTC's founder membership launch is time-barred as a matter of law. Lawrence Ang and William Tan did not raise any argument in this regard. I agreed with the Plaintiff that its cause of action in breach of fiduciary duty would allow it to invoke s 24A(3) of the Limitation Act.

Conclusion

247 In the premises, I dismiss the Plaintiff's claim in its entirety, including its claim of conspiracy which I have found to be wholly unmeritorious. As has been iterated in my judgment, the interests of the company were synonymous with the interests of the Defendants. They had wanted the company to do well for itself as that would ultimately even if incidentally, benefit them. To suggest that they had acted with impunity or recklessly for their personal benefit even when they knew that a lawsuit was likely is not conceivable to me. I also dismiss the Defendants' counterclaims. I will hear the parties on costs if these cannot be agreed.

[note: 1] Notes of Evidence, 16 February 2009, pp 74:15-75:15

[note: 2] Notes of Evidence, 17 February 2009, pp 101:14-25 and 102:1-2; 104:11-13; and pp 107:20-25 and 108:1.

[note: 3] Notes of Evidence, 17 February 2009, pp 97:25 and 98:1-8

[note: 4] Statement of Claim (Amendment No 3) ("SOC"), para 5

[note: 5] SOC, para 16

[note: 6] SOC, para 14(v)

[note: 7] Notes of Evidence, 17 November 2008, pp 76:18

[note: 8] Notes of Evidence, 20 March 2009, pp.31:10-33:5

[note: 9] Notes of Evidence, 31 October 2008, pp 57:2 - 58:6

[note: 10] SOC, para 13A(iii)

[note: 11] Plaintiff's Bundle of Documents, vol. 35, p 10349

[note: 12] Plaintiff's Bundle of Documents, Vol. 35, p 10352

[note: 13] Notes of Evidence, 17 September 2008, pp 78 and 79

[note: 14] Plaintiff's Closing Submissions, vol. 2, para 484

[note: 15] Plaintiff's Closing Submissions, vol 2 at para 675

[note: 16] Notes of Evidence, 5 February 2009, pp 45:24 – 26:25

[note: 17] Notes of Evidence, 10 October 2008, pp 113-114

[note: 18] Notes of Evidence, 10 October 2008, p 142

[note: 19] Notes of Evidence, 10 October 2008, pp 131:8-132:11

[note: 20] Notes of Evidence, 20 February 2009, p 36

[note: 21] Plaintiff's Closing Submissions vol 3, para 1133

[note: 22] Plaintiff's Closing Submissions vol 3, para 1178

[note: 23] Plaintiff's Closing Submissions, vol 3, para 1196

[note: 24] Plaintiff's Closing Submissions, vol 3 para 1209

[note: 25] Plaintiff's Closing Submissions, vol 3 para 1210

[note: 26] Plaintiff's Closing Submissions, vol 3 para 1211

[note: 27] Plaintiff's Closing Submissions, vol 3 para 1212

[note: 28] Plaintiff's Closing Submissions, vol 3 para 1220

[note: 29] Plaintiff's Closing Submissions, vol 3 para 1231

[note: 30] Plaintiff's Closing Submissions, vol 3 para 1236

[note: 31] Notes of Evidence, 19 September 2008, pp 121-123

[note: 32] Plaintiff's Closing Submissions, vol 3 para 1248

[note: 33] SOC, paras 11 and 15 and Prayer (2)

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