Easter Term
[2022] UKPC 14
Privy Council Appeal No 0008 of 2020

JUDGMENT

Kathryn Ma Wai Fong (Appellant) *v* Wong Kie Yik and 2 others (Respondents) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Briggs
Lady Arden
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
9 May 2022

Heard on 7 and 8 December 2021

Appellant
Jonathan Crow QC
Hermann Boeddinghaus QC
Eleanor Holland
James Noble
(Instructed by Latham & Watkins (London) LLP)

1st and 2nd Respondents (Wong Kie Yik and Wong Kie Chie)
David Alexander QC
Ryan Perkins
Aisling Dwyer
Scott Tolliss
Aline Mooney
(Instructed by BDB Pitmans LLP (London))

3rd Respondent (Successful Trend Investments Corporation ("STIC"))
Adam Goodison
Oliver Clifton
Stuart D'Addona
Robert Gregory
(Instructed by BDB Pitmans LLP (London))

LADY ROSE:

1. INTRODUCTION

1. This appeal arises from a dispute between the claimant and the First and Second Respondents each of whom now holds one of the three shares issued by the Third Respondent, Successful Trend Investments Corporation ("STIC"). The First and Second Respondents, Wong Kie Yik and Wong Kie Chie, are brothers and this judgment refers to them as WKY and WKC. The claimant, Ms Ma, is the widow of Wong Kie Nai ("WKN") who was the brother of WKY and WKC and who died in March 2013.

2. STIC is incorporated in the British Virgin Islands but is part of a larger corporate group established in Malaysia. The group ("the WTK Group") was founded by the father of the three brothers, Datuk Wong Tuong Kwang ("Wong Tuong Kwang"). From August 2004 until April 2013, STIC's sole asset was a block of 55m non-voting convertible preference shares ("CPS") issued by the principal company in the WTK Group called WTK Realty Sdn Bhd ("WTK Realty").

3. In March 2013, shortly after the death of WKN, WKY and WKC caused STIC to exercise its option to convert those preference shares into 2,750,000 ordinary voting shares in WTK Realty ("the Conversion"). This claim has proceeded on the basis that the effect of the Conversion was to change the balance of voting power in WTK Realty in favour of WKY and WKC. Before the Conversion, Ms Ma, as holder of her late husband's direct shareholding in WTK Realty could expect to combine her own votes with those of her son's shareholding in WTK Realty so as to exercise a majority of the shareholder votes in WTK Realty. After the Conversion, WKY and WKC could expect to combine their own direct shareholdings in WTK Realty with the new votes held by STIC which they effectively controlled because they together held two of the three shares in STIC. They could thereafter outvote Ms Ma and her son at any shareholder meeting of WTK Realty.

4. Ms Ma has brought these proceedings claiming that the conduct of WKY and WKC in causing STIC to convert the CPS in WTK Realty was conduct in their capacity as majority shareholders in STIC which was unfairly prejudicial to her as the minority shareholder. She brings her claim under section 184I of the British Virgin Islands Business Companies Act 2004 ("the BCA 2004").

5. Ms Ma puts her claim of unfair prejudice on a number of different bases. Her primary case is that the power to approve the Conversion conferred by STIC's constitution on WKY and WKC as majority shareholders was subject to equitable constraints which prevented them from approving any such resolution to convert unless all the shareholders were unanimous in wanting STIC to exercise that option. It was therefore, she says, unfairly prejudicial for WKY and WKC to ignore those equitable considerations in converting the CPS when she did not agree to it. Ms Ma also claims that the Conversion was instigated by WKY and WKC in their capacity as *de facto* directors of STIC. It was a breach by them of their fiduciary duties as such, because the Conversion was carried out for an improper purpose, namely to deprive her of voting control of WTK Realty. Ms Ma seeks an order winding up STIC.

6. The judge at first instance, Justice Adderley (Ag) sitting in the High Court of Justice, Virgin Islands (Commercial Division), dismissed all aspects of Ms Ma's claim in a judgment handed down on 14 December 2017. Despite dismissing the claim, he ordered that WKY and WKC buy Ms Ma's single share in STIC at a price to be determined at a trial on quantum. Ms Ma appealed against the judgment on a wide range of grounds. The respondents did not appeal against the buy-out order. The Court of Appeal dismissed Ms Ma's appeal and upheld the order in the terms made by the judge. Ms Ma now appeals to the Board.

2. THE FACTS IN MORE DETAIL

7. The WTK Group was founded by Wong Tuong Kwang. The WTK Group's main operations are in Malaysia, with businesses dealing primarily in forest ownership and management, timber logging and harvesting, oil palm production and construction. The WTK Group's businesses diversified over time and now include hotel services and insurance and shipping services. Wong Tuong Kwang and his wife Datin Tiong Liang Ting had three sons, the eldest being WKY, then WKN and the youngest WKC. They also had three daughters who did not, the Board was told, play any part in the family business. Ms Ma and WKN were married in 1970 and have two children, Neil and Mimi.

8. The judge described WTK Realty as a family holding company. It was incorporated in Malaysia in 1981. Wong Tuong Kwang and his eldest son WKY were the first directors and shareholders of WTK Realty and WKN was its managing director from 1986 having been the manager since 1981. WKC and WKY also worked in the WTK Group after finishing their studies. WKC has lived in Australia since 1984 looking after the family business interests there and WKY has managed the group's timber concessions and logging business.

9. Wong Tuong Kwang suffered a severe stroke in 1993 but was able to remain active in the management of the group. In May 2004, he became seriously ill and he died in November 2004. After his death, WKN became managing director of most of the companies in the WTK Group including WTK Realty. WKN became ill in March 2011 and WKY took over the *de facto* management of the group. WKN died in March 2013.

10. The proportions of the voting shares held in WTK Realty over the years have been as follows. From its formation in 1981 until 2002 each of the three brothers held 29% of the shares and Wong Tuong Kwang held 13%. In August 2004, shortly before he died, Wong Tuong Kwang signed a blank share transfer form which WKN completed, transferring thereby 1,252,000 shares of Wong Tuong Kwang's shares to WKN. In 2007, after Wong Tuong Kwang's death, WKN caused WTK Realty to issue 4m shares to himself. He later transferred 800,000 of his shares to his son Neil. The 5.252m shares which WKN added to his holding in WTK Realty diluted the voting power of WKY and WKC to 23% each whilst WKN and his son Neil together held 54%. WKC has challenged the validity of those two share transactions in proceedings in Malaysia. Judgments have been handed down in those two actions but are under appeal. If those judgments are upheld and the share transactions set aside, that would neutralise the effect of the Conversion because WKN and his son would never have had majority control over WTK Realty.

11. STIC was set up in November 1996, that is a few years after Wong Tuong Kwang suffered his stroke but whilst he was still in charge of the WTK Group. There are three ordinary voting shares in STIC. Until recently they were held by Gainsville Ltd which is the trustee under three trusts in favour of the three brothers each trust formerly holding one share in STIC. The sole *de jure* director of STIC from 1 May 2003 to 28 March 2014 was Mr Lo Fui Kiun ("Mr Lo").

12. In July 2004, STIC resolved to subscribe for 55m CPS in WTK Realty with a par value of RM0.01 under a subscription agreement between the two companies. The CPS were issued in August 2004 and held a preferential right to dividends and a right to a return on capital in the event of an insolvency but they conferred no voting rights. One of the factual disputes between the parties in these proceedings is whether STIC ever in fact paid the RM550,000 subscription price for the CPS.

13. According to the terms of issue contained in a schedule to the subscription agreement, the CPS could be converted at any time into ordinary voting shares in WTK Realty at a rate of 20 CPS to one ordinary share with the ordinary share having a par value of RM1. On 25 March 2013, STIC resolved to convert the 55m CPS to 2,750,000 ordinary voting shares to be paid for at a par value of RM1. The Conversion was completed on 8 April 2013. The consideration was to be paid partly in cash of RM2.2m

and partly by treating the RM550,000 originally paid for the CPS as part of the consideration for the new ordinary shares. Ms Ma has also contended in these proceedings that the RM2.2m was never paid by STIC.

14. After the Conversion WKY's and WKC's direct shareholdings in WTK Realty made up 19.40% each but they also, through making up the majority in STIC effectively controlled STIC's voting shares which were 14.40% of the total. They therefore controlled 53.20% of the voting shares in WTK Realty. Ms Ma and her son Neil continued to hold their voting shares in WTK Realty but these now represented only 46.80% of the votes in WTK Realty.

15. In May 2014, after WKN had died, Gainsville conveyed one share to each of Ms Ma, WKY and WKC so that they are now equal legal and beneficial owners of STIC.

16. These proceedings are one claim in a wider series of disputes between Ms Ma on the one side and WKY and WKC on the other, including several claims brought in Malaysia. In the course of proceedings in the Malaysian courts, a winding-up order has been made in respect of WTK Realty on Ms Ma's application. That order is subject to an appeal.

3. THE PROCEEDINGS SO FAR

17. Ms Ma launched these proceedings in May 2015 claiming on behalf of the estate as well as in her personal capacity as beneficiary. Section 184I of the BCA 2004 (inserted in 2005) provides as follows:

> "**Prejudiced members**
>
> 184I(1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity, may apply to the Court for an order under this section.
>
> (2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make

such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders -

(a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;

(b) requiring the company or any other person to pay compensation to the member;

(c) regulating the future conduct of the company's affairs;

(d) amending the memorandum or articles of the company;

(e) appointing a receiver of the company;

(f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;

(g) directing the rectification of the records of the company; and

(h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

(3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings in which the application is made."

18. The trial, limited to liability, took place before Justice Adderley (Ag) over seven days in October and November 2017. One of the issues at first instance and before the

Court of Appeal was whether Ms Ma's claim as pleaded in her Re-Amended Statement of Claim was a single claim for relief for unfair prejudice under section 184I or whether some of the allegations pleaded formed free-standing claims under different statutory provisions. The trial judge, upheld by the Court of Appeal, decided that her claim was a single claim for relief under section 184I, albeit that a number of different instances of unfairly prejudicial conduct were alleged. There is no appeal to the Board from that decision. Further, the judge rejected Ms Ma's application to amend her pleaded case to add a free-standing application to wind up the company on just and equitable grounds under section 162 of the Insolvency Act 2003. That decision was also upheld by the Court of Appeal and again there is no appeal against that before the Board.

19. The judge's conclusions on the credibility of the witnesses who gave evidence at trial are challenged by Ms Ma in this appeal. Ms Ma was the sole witness in support of her claim at the trial. Justice Adderley noted that her ability to give direct evidence about events was limited because she admitted that until WKN died, she knew very little about STIC or how it was run. The judge was able to compare her evidence with what emerged from the contemporaneous documents and with what she had said when giving evidence on some of the same issues in Malaysian proceedings. Evidence for the respondents was given at trial by WKC. The judge found the explanations that WKC had given "credible within the context of the contemporaneous documents". The most contentious evidence at the trial was that given by Janice Ting. Ms Ting is a chartered accountant and was the Chief Financial Officer of WTK Realty at the relevant time. Her evidence was key to, amongst other things, the factual dispute about the real purpose behind WKY's and WKC's decision to cause STIC to convert the CPS into ordinary voting shares in WTK Realty.

20. The judge also noted that some potential witnesses had not been called, in particular WKY and Neil, who is the son of WKN and Ms Ma. He declined to draw adverse inferences from the absence of these witnesses: para 153.

21. There were two important factual disputes which Justice Adderley had to resolve. The first was whether STIC or the WTK Group had been operated by the brothers as a family quasi-partnership giving rise to the equitable considerations on which Ms Ma relied for her claim.

22. Ms Ma alleged that there had been an unwritten agreement or understanding between the three brothers as equal shareholders in STIC that they would not cause STIC to convert the CPS without the consent of all three. It was alleged further that this agreement - referred to as the Shareholders Agreement - was understood to enure to the benefit of the beneficiaries of the brothers' respective estates on death so that the brothers should not have caused the Conversion without her consent. The judge found

that no such Shareholders Agreement or common understanding ever existed between the brothers in relation to the conversion of the CPS.

23. Ms Ma next asserted that an agreement or understanding had emerged as a result of a meeting on 6 December 2012 attended by the three brothers, Ms Ting, Neil and WKN's lawyer, when WKN was already gravely ill ("the Family Meeting"). Ms Ma's case was that it was agreed or understood by the brothers and Neil as a result of that meeting that the CPS would not be converted into ordinary shares without their unanimous consent ("the Family Agreement"). The judge noted that Ms Ma could not give direct evidence as to what occurred and Neil was not called to give evidence at the trial. He accepted the evidence of Ms Ting and WKC who had both been at the Family Meeting that no such understanding had emerged.

24. The third basis was the allegation that STIC, or the WTK Group more generally, had been operated as a quasi-partnership and as a family business. The judge rejected this case. He cited the well-known passage from the judgment of Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092 about the circumstances in which equitable considerations can arise which can make it unfair for the majority shareholders in a company to rely on their strict legal powers when acting in a way which adversely affects the minority. He referred also to the judgment of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*") as to when the relationship between shareholders involves "something more" than the rights set out in the company's memorandum and articles of association and to the case of *Saul D Harrison & Sons plc* [1995] 1 BCLC 14 where Lord Hoffmann held that the test for unfairness in an unfair prejudice claim is an objective one.

25. Justice Adderley summarised his factual findings in relation to this part of Ms Ma's claim as follows:

> "171(5) STIC was not operated as a quasi-partnership and there was no common understanding, consensus or agreement between the three Brothers as to how matters in relation to STIC would continue after the three Brothers' deaths. Further, following the death of WKN STIC did not operate as a quasi-partnership between the claimant on the one hand, and WKY and WKC on the other hand.
>
> (6) The claimant's prior consultation about, approval of or consent to the resolution to convert the CPS was not required and there was no Family Agreement, Shareholders

> Agreement or quasi-partnership in existence which altered that position.
>
> (7) In the absence of a quasi-partnership between the three Brothers and/or a quasi-partnership between the Claimant on the one hand and WKY and WKC on the other hand, there is no basis for a claim of breakdown of mutual trust and confidence between the quasi-partners."

26. He held therefore that there were no equitable considerations that overlay Ms Ma's legal entitlements as a minority shareholder in STIC. She was not entitled to prevent the Conversion. On the same basis he rejected Ms Ma's claims that she was entitled to more information about the company than had been provided to her in accordance with STIC's constitution.

27. Having rejected the unfair prejudice claim based on equitable considerations, the judge also rejected Ms Ma's claim of unfair prejudice based on her contention that the way the Conversion had been implemented amounted to a contravention of two statutory provisions. The first was section 175 of the BCA 2004. That provides that a company cannot dispose of more than 50% of its assets otherwise than in the usual or regular course of its business without having the transaction approved by the shareholders. The second was section 59 of the Malaysian Companies Act 1965 which provides that shares must not be issued by a company at a discount without the approval of the shareholders, confirmed by an order of the court. The judge held that there had been no contravention of either statutory provision.

28. The second main factual dispute was the primary purpose for which WKY and WKC caused STIC to implement the Conversion. Ms Ma's case was that the primary purpose was to change the voting balance in WTK Realty in their favour. This was an improper purpose to advance WKY's and WKC's personal interests by increasing their voting control over WTK Realty before Ms Ma could be registered as the holder of her late husband's shares. WKY's and WKC's case has always been that the purpose of the Conversion was to increase the share capital of WTK Realty in order to comply with conditions in an offer of credit facilities from AmBank (M) Bhd ("AmBank"). Their case was that WTK Realty needed to replace its credit facilities which were about to expire. The only available offer of credit was from AmBank which required an increase in WTK's share capital of RM 2.5m. They said that the Conversion had been the best way to fulfil that condition.

29. The judge accepted Ms Ting's evidence on this point and held that the Conversion facilitated WTK Realty's compliance with the conditions set by AmBank regarding its proposed financing facilities to WTK Realty. He said also "Although there is no evidence that consideration was given to the interest of STIC, the Conversion benefited all the beneficial owners of STIC who were also shareholders of WTK Realty": para 171(8).

30. Finally, the judge rejected Ms Ma's contentions that:

a. STIC had lost its substratum once the CPS had been converted because the company's sole function had been to hold the CPS; and

b. that she could succeed on the basis that she was justified in her loss of trust and confidence in the management of STIC.

31. Under the heading "Conclusion" the judge dismissed the claim but went on:

> "178. It is undeniable, however, that the two sides of the family are not getting along and from the evidence it is highly unlikely that they will be able to work together in the future. Having regard to all of the facts it would be unfair for the court to insist that the two families work together. It is pellucid that the just and equitable order to make is one under section 184I(2)(a) of the BCA, namely that WKY and WKC acquire and the claimant sell to them her shares in the Company. I hereby make that order."

32. Ms Ma appealed against the judge's order relying on 24 grounds of appeal, many of which challenged the judge's findings of fact and his conclusions as to the credibility of the witnesses. The judgment of the Court of Appeal (The Hon Mr Paul Webster JA (Ag), The Hon Mr Rolston Nelson SC, JA (Ag) and The Hon Mr Douglas Mendes SC JA (Ag)) was handed down on 27 March 2019.

33. The Court of Appeal analysed in detail the case law describing an appellate court's approach to findings of fact by a trial judge. They set out a passage from the judgment of Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582, 587. This refers to the advantage that a judge has in seeing and hearing the witnesses whereas an appellate court is limited to the printed evidence. They referred to two cases on which Mr Crow QC, who has appeared for Ms Ma throughout the

proceedings, relied as showing examples of where appellate courts have overturned findings. They noted that Mr Alexander QC appearing for the respondents did not take issue with the legal principles which Mr Crow had extracted from the cases.

34. The Board will need to consider the judgment of the Court of Appeal in more detail below - the Court largely dismissed Ms Ma's criticisms of the trial judge's conclusions and upheld the judge's order.

4. THE GROUNDS OF APPEAL

35. There are 10 grounds of appeal raised by Ms Ma before the Board but they can be grouped conveniently under six headings as follows:

(a) Equitable considerations constraining the decision to convert the CPS:

Ground 1. The Court of Appeal erred because it should have concluded that STIC was a quasi-partnership in the form of a family company founded on mutual trust and confidence and that there had been an irretrievable family breakdown between Ms Ma and WKY and WKC.

Ground 3. The Court of Appeal should have concluded that the Conversion was in breach of an agreement or understanding that it would not be done without the unanimous consent of the shareholders including Ms Ma.

Ground 7. The Court of Appeal should have concluded that Ms Ma was entitled to relief under section 184I because the Conversion contributed to the justifiable loss of trust and confidence by Ms Ma in WKY and WKC.

Ground 10. The Court of Appeal failed to recognise that the appropriate relief was a winding-up order rather than the buy-out order that the judge had made. The Court should have ordered the winding up of STIC, alternatively should have set aside the Conversion or directed a re-trial.

(b) The primary purpose of the Conversion of the CPS:

Ground 4. The Court of Appeal erred in upholding the judge's finding that the Conversion was undertaken for proper management purposes.

Ground 9. The Court of Appeal erred in failing to address Ms Ma's criticisms of the judge's assessment of the witness evidence.

(c) Section 59 of the Malaysian Companies Act 1965:

Ground 6. The Court of Appeal erred in deciding that there had been no issue of shares at a discount and hence no breach of section 59 of the Malaysian Companies Act 1965 and accordingly that Ms Ma was entitled to relief under section 184I.

(d) Section 175 of the BCA 2004:

Ground 5. The Court of Appeal should have decided that the Conversion was in breach of section 175 of the BCA 2004 and accordingly that Ms Ma was entitled to relief under section 184I.

(e) Loss of substratum:

Ground 2. The Court of Appeal should have concluded that STIC had been deprived completely of its substratum such that it was unfairly prejudicial for the majority to insist on the continuation of the association.

(f) Provision of information and non-payment of dividends:

Ground 8. The Court of Appeal should have concluded that there was unfair prejudice in that STIC had failed to pay dividends to the estate and had withheld information from Ms Ma to which she was entitled on behalf of the estate.

(a) Equitable considerations constraining the decision to convert the CPS: Grounds 1, 3, 7 and 10

36. The first issue in this appeal is whether the Court of Appeal erred in upholding the decision of Justice Adderley that there were no equitable considerations which constrained WKY and WKC from exercising their power as majority shareholders in STIC to cause STIC to convert the CPS into ordinary shares in WTK Realty.

(i) The Shareholders Agreement

37. Justice Adderley concluded on the facts that there had been no Shareholders Agreement between the three brothers whilst WKN was alive. The Court of Appeal held that there was no evidence of such an implied agreement; only the bald statements of Ms Ma who had not been involved in STIC. There was clear evidence to the contrary from WKC who denied that any such agreement existed at any time.

38. The Board agrees with the Court of Appeal's assessment that there was no basis to interfere with the judge's finding. Ms Ma did not present any documentary evidence in support of the existence of the Shareholders Agreement. Her own evidence was that she knew very little about STIC before her husband's death but that she had heard that there was a relationship between the three brothers. The judge records at para 75 that in cross-examination, Ms Ma could not say when, where or at what time the agreement she alleged was made.

39. The judge and the Court of Appeal considered that Ms Ma's case on this point was based on her misunderstanding of the significance of the fact that Gainsville held all three of the brothers' shares in STIC. She seemed to think that this was evidence of an agreement between the brothers because the trustee had to agree to any matter before it proceeded. The judge said: "She did not appear to understand the difference between beneficial ownership and legal ownership and seemed to think that because Gainsville held the shares on trust for the three Brothers this constituted the written agreement for them to work together": para 83.

40. This point is repeated in Ms Ma's case before the Board with the assertion that "it is entirely probable" that Gainsville would not have agreed to be trustee for each of the trusts unless it was on the basis that each beneficiary would instruct the trustee to

vote the share in the same way. As the Court of Appeal noted at para 67, no legal authority or evidential basis is put forward to support this suggestion and the judge cannot be criticised for rejecting it.

(ii) The Family Agreement

41. As regards the judge's finding that there had been no Family Agreement emerging from the meeting of 6 December 2012 there was, again, no basis on which the judge could have found that such an agreement had arisen. Ms Ma had not been present at the Family Meeting. Neil had been present at the meeting but did not give evidence at the trial. Ms Ting and WKC who had both been present at the meeting gave evidence that the judge was entitled to accept that no such agreement or understanding had been reached.

42. Ms Ma in her written case repeats a point that the Court of Appeal accepted as a valid criticism of the judge's approach. That was that Justice Adderley had overstated Ms Ma's case when he referred to her pleaded allegations as to the existence of the Family Agreement. But the Court of Appeal addressed this and rightly rejected Mr Crow's submission that it undermined the judge's assessment that Ms Ma was not a credible witness or that WKC's evidence was credible: para 75.

43. Ms Ma submits in her written case to the Board that the judge disregarded "the critical significance of an admission made by WKC in the course of cross-examination". It is said that WKC admitted that an understanding was reached at the Family Meeting that neither side would do anything to alter the value of their respective holdings significantly while discussions on splitting the family assets continued. Plainly, Ms Ma submits, this was "uncontroverted evidence" that they had agreed at the Family Meeting that the CPS would not be converted. There was thus no answer to Ms Ma's complaint that the Conversion was in breach of that agreement and unfairly prejudicial.

44. What is this admission on which Ms Ma relies as uncontroverted evidence of the Family Agreement? It comprises a short passage of the transcript of Day 3 when WKC was being cross examined by Mr Crow about the Family Meeting on 6 December 2012. WKC was asked about the discussion that took place at the meeting about separating the assets of the brothers and having the assets valued. The following exchange took place:

"Q. … My suggestion to you is that if you parted, having agreed to explore a separation of your interests, it must have been understood that while that process was going on, you would not do, none you would do anything that would significantly change the value of the assets that you are then going away to have valued?

A. I don't understand your question.

Q. If you were discussing a separation, you would need to have the assets you each held valued correct?

A. (unclear)

Q. And if you were looking to value the assets that each of you held, it must have been understood that none of you would do anything significantly to change the value of those assets while that process of valuation was going ahead?

A. Yes

Q. Thank you."

45. Ms Ma's submission assumes that the assets that were to be valued and to which WKC's answer refers are the brothers' shareholdings in WTK Realty. But that does not appear to be the case. The judge evaluating what he could properly conclude from that exchange in the witness box would no doubt have had in mind Ms Ting's written evidence about the content of the discussion at the Family Meeting. She describes in her witness statement what she proposed to the brothers at the meeting on her own initiative as regards the possible separation of the group's assets.

"79. I further suggested that WKY and WKC consider taking over the public listed company, ie, WTK Holdings Berhad, and that Neil Wong consider taking over the privately owned plantation companies in the WTK Group. My rationale for this suggestion was that WKN had previously informed me in person that Neil Wong did not like the constraints and rules

that govern a public listed company and that he was interested in the plantation companies.

…

81. Neil Wong asked me how they could resolve the difference in value between the publicly listed WTK Holdings Berhad and the privately owned companies operating the timber business. My suggestion was as follows:

> (i) that the valuation company, VPC Alliance (Sarawak) Sdn Bhd ('VPC'), be appointed to carry out the valuation of the plantation lands since VPC had previously done valuations on plantation lands belonging to the WTK Group;
>
> (ii) that Messrs Ernst & Young be appointed to value WTK Holdings Berhad's shares given Messrs Ernst & Young were (and remain) the auditors of the WTK Group; and
>
> (iii) that a valuation be conducted on the plantation lands and the WTK Holdings Berhad shares, as a start, because those assets were the easiest to value.

I also offered my opinion to Neil Wong that I did not expect WKY and WKC to be difficult with him in relation to any difference in value between the public listed company and the privately owned plantation companies.

82. I made this suggestion as I believed that the proposed valuation exercise, once completed, would enable the 3 Brothers and Neil Wong to ascertain whether the proposed separation of assets was workable and whether an agreement could be reached for the proposed separation of assets. The valuation exercise was important, because as well as the shares in the private and publicly listed companies, there were other assets, such as timber concessions, properties, land and buildings, including sawmills, plywood

> mills, oil mills, barges, plants and machinery, to be identified and valued."

46. When Ms Ting was cross examined by Mr Crow about the Family Meeting, it was put to her that she had suggested splitting the family companies from the shares in the listed company. She was not cross examined about the written evidence set out above.

47. Her evidence on the content of the discussion at the Family Meeting was supported by the written statement of WKY. He said that the discussion was prompted by Neil's lawyer saying that he needed information regarding the location of the assets of the WTK Group to enable him to consolidate the assets of WKN's family. This was to assist him in designing a trust to protect WKN's assets from potential claims against his estate when WKN died: see para 95 of WKY's statement. WKC's written evidence also supported that of Ms Ting and was to the effect that the discussion concerned primarily the valuation of the physical assets of the WTK Group's business.

48. Once the short passage from WKC's cross-examination relied on by Ms Ma is seen in its proper context, it becomes clear that the valuation exercise which WKC was being asked about in the witness box related, at least so far as he was concerned, primarily to valuing the timber plantations and the publicly listed shares in the holding company. It was nothing to do with the value of the brothers' respective shareholdings in WTK Realty in terms of voting power attached to those holdings. It is impossible to accept that the judge erred in not interpreting WKC's "admission" that no one should do anything to affect the value of the assets being discussed as being uncontroverted evidence of a Family Agreement not to convert the CPS.

49. There is no basis for criticising the judge's finding that there was no Shareholder Agreement or Family Agreement that gave rise to any equitable constraint on WKY's and WKC's ability as majority shareholders in STIC to cause the Conversion to take place. Ground 3 of the appeal must therefore be rejected.

(iii) The significance of STIC being part of a family business

50. The Board turns now to the question of whether equitable considerations arose from the nature of the family business. On this point, the parties tended to elide the nature of STIC with the nature of WTK Realty or the WTK Group as a whole.

51. Mr Crow submitted that Ms Ma's appeal on this point was not a challenge to the findings of primary fact but only to the judge's evaluation of undisputed facts. He referred to the many occasions on which the witnesses had referred to the WTK Group being a "family" group. The Board proceeds on the basis that the WTK Group was founded by Wong Tuong Kwang to generate and then hold the family's wealth for later generations. It was undoubtedly the case that the management of the group included some of Wong Tuong Kwang's children and the Board accepts that they and at least some of their family members expected to work for and to benefit from the WTK Group's business. The Board was told that some, though not all members of the younger generation including Ms Ma's and WKN's children Neil and Mimi, have, in their turn, started working in the businesses operated by the WTK Group.

52. The Board also bears in mind that, as Lord Wilberforce said in *Ebrahimi*, the categories of cases in which equitable considerations arise are not closed and they are not limited to situations of quasi-partnership (pp 374-375):

> "[T]here has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances."

53. Ms Ma is also right to say that the management of STIC was conducted on an informal basis without written shareholder agreements or management contracts.

54. The question is, however, what significance these points bear for Ms Ma's case. The significance asserted by Ms Ma appears to be two-fold. First, it is said to be relevant to the existence of equitable constraints on the powers of the majority to instigate the Conversion without her consent. Secondly, it is said that because this is a family company, the irretrievable breakdown of trust and confidence between the current family members is sufficient to justify the grant of relief under section 184I.

55. Does the fact that this was a family or dynastic company generate the equitable considerations on which Ms Ma relies? It is important to consider more precisely what Ms Ma pleads is the effect of the family nature of the business. She alleges that "the Brothers had at all material times been operating as quasi-partners with a view that the arrangement would continue to subsist for the benefit of the beneficiaries of the Brothers' respective estates upon death." Further, Ms Ma pleaded in her Re-Amended Statement of Claim that on WKN's death she (as executrix of the estate and/or in her

personal capacity as a beneficiary of the estate) and WKY and WKC became quasi-partners of STIC. She asserts that:

> "As a result, the claimant had a legitimate expectation that, among other things, she would be entitled to participate in the management of [STIC] and be consulted on all major business decisions in relation to it, and that her shareholding in WTK Realty would remain intact."

56. The Board concludes that the evidence that the parties all regarded STIC or the WTK Group more generally as a family business is not enough to establish as a matter of fact that they all expected to be equally involved in the management and to pass that involvement to their heirs. Looking at what one might infer from the history of STIC and WTK Realty, the three brothers had not been equally involved in the management of WTK Realty before or after their father's death; they had focused on different parts of the Group's business. As to the position when WKN died, there was nothing that happened to support Ms Ma's contention that the family nature of the business meant that there was an understanding that a family member's spouse or estate would step into their shoes when they died so as to become involved in the business in their stead. When Wong Tuong Kwang died, his widow did not take over the business, WKN did. Nor did Wong Tuong Kwang's widow inherit his shares in WTK Realty, they were passed to his sons. The family tree that we were shown shows that there are family members who are not involved in the business. The evidence does not therefore support a finding that, as a matter of fact, the family nature of the WTK Group business gave rise to a legitimate expectation on the part of the widow of a family member that she will have a role in making future decisions in the company whether in that capacity or as personal representative of the estate.

57. Mr Crow referred the Board to a number of cases in which family companies have been considered in the context of unfair prejudice petitions or winding-up petitions brought by one member of a feuding family against the other members. These do not support any contention that equitable considerations of the kind Ms Ma asserts arise as a matter of law from the involvement of family members in a business or from the use of the business to hold the family's wealth and to transfer that wealth to later generations.

58. Mr Crow provided the Board with a decision of McMahon J in the Alberta Court Queen's Bench division *Gallelli Estate v Bill Gallelli Investments Ltd* (11 February 1994 Doc Calgary 9301-14042). That case concerned a business which had been owned by parents and their son who were the only directors and shareholders and who had shared the management of the company's assets. The son died and his widow applied

on behalf of the estate to wind up the company on the grounds of the parents' oppressive behaviour. Shortly after the son's death the parents had entered into an agreement to sell the company's assets but had not pursued the sale. The judge held that that did not amount to oppressive conduct. Nor was her exclusion from the board of directors oppressive or unfairly prejudicial since she "has not shown the skills, experience or inclination which would make her presence on the Board beneficial to the company": para 25. McMahon J therefore rejected the unfair prejudice claim.

59. Turning to the petition for winding up on just and equitable grounds, McMahon J said:

> "28. The family enterprise which is the subject of this application was founded upon the personal relationships of mother, father and son. It operated as a family concern with little regard for the formalities of the corporate structure. Responsibilities were shared according to talents; the profits were shared equally without regard to shareholdings, all in the mutual confidence that all three persons would do their share. In these circumstances the just and equitable principle may be brought into play.
>
> 29. Each case is unique and in this case one of the family shareholders has died leaving his shares to his widow. Therein lies the source of the current personal conflict. However I see no reason why the devolution of the shares should prevent the application of the just and equitable principle and I do not consider it further."

60. He rejected the claim based on mismanagement as there was no evidence that the company was being mismanaged. There was no deadlock or impasse since the parents were able to continue with their responsibilities as before. However, the evidence showed that the son had drawn funds from the company for his and his wife's living expenses and this had been done with the knowledge and consent of the parents. After his death, no money had been paid to her and that was, McMahon J held, inconsistent with past practice and was undoubtedly unfair: para 38. He therefore made a detailed, bespoke order requiring amongst other things a monthly payment to be made by the company to the applicant.

61. That case is a useful illustration of the kinds of equitable considerations that might well arise in a family company, whether or not it could be described as a quasi-

partnership. Where, with the knowledge and consent of all the shareholders, a practice grows up of family members making drawings on the company in amounts that do not reflect their shareholding or their work for the business, it may well be that that practice constrains the majority from reverting on the death of that member to the strict entitlements provided for in the company's constitution. But *Gallelli* does not establish any principle on which Ms Ma can rely in the present circumstances. McMahon J firmly rejected any suggestion that the widow was entitled to be involved in the management of the company or that her feud with her parents-in-law of itself formed the basis of a justified loss of confidence by her in the parents' continued management of the company giving rise to any claim on her part.

62. Looking at the issue as a matter of principle, the head of the family may set up a family business in the hope and expectation that the business will provide some form of work and income for later family members whatever their level of competence or lack of it (within reason). That does not mean that a family member with no experience or proven aptitude is entitled as a matter of equity to step straight into a role vacated by their spouse or parent and assert that they can effectively exercise a veto over the company's important decisions.

63. The Board therefore rejects the submission that either as a matter of fact or of law, the family or dynastic nature of STIC or WTK Realty gave rise to the equitable constraint on which Ms Ma relies. Ground 1 of Ms Ma's appeal therefore fails.

64. Ground 7 raises the question whether irretrievable breakdown of the family relationship is sufficient to justify the grant of relief. Mr Crow argued that *Chow Kwok Chuen v Chow Kwok Chi and another* [2008] SGCA 37; [2008] 4 SLR(R) 362 ("*Chuen v Chi*") provides a close analogy with the position here. In that case the appellant (Chuen) and respondent (Chi) were brothers who with a third brother (Ching) were co-directors of three family companies set up by their late father to hold the assets he had accumulated over the years. The brothers' relationship became acrimonious resulting in a three way impasse in which no two of them could agree about the companies' operations. Their disagreements also prevented the estate of their late father being wound up. Chi applied for the companies to be wound up on just and equitable grounds. The judge at first instance made the winding-up order.

65. On appeal, the Court of Appeal in *Chuen v Chi* noted that it was accepted by all parties that the companies were **not** quasi-partnerships: para 20. The respondents argued that it was sufficient that there was a practical deadlock. The Court agreed with the judge that there was real deadlock amongst the three brother directors and that the management of the companies was at a stalemate. The Court of Appeal quoted from Lord Wilberforce's judgment in *Ebrahimi* and then considered how what was said

in that case about quasi-partnerships applied to family companies which are not quasi-partnerships:

> "31. We have at para 19 above pointed out that a person who joins a company should accept and work within the framework set out in its memorandum and articles of association. The reason an incorporated partnership is treated somewhat differently is because of the express or implicit understanding among the partners before incorporation as to how the new company is to be run or managed and equity will not allow a person who is a party to that understanding to renege on that understanding. Compare that situation with that of a company formed by a patriarch for the family: it would be clearly the expectation of the patriarch that the children would cooperate, work the company and make it grow for the common good of themselves and their descendants. When a child receives shares in such a company from the patriarch, either during the latter's lifetime or under his will, the child is not really entering into the company of his or her own free will. So the rationale alluded to at para 19 above does not apply to such a scenario. Quite naturally he or she should aim to work harmoniously with his or her siblings in managing the company and in fulfilling the hopes of the patriarch, and in turn to prosper the company. Co-operation and mutual trust among sibling shareholders or directors are central to such a family company and their absence is as critical as in a quasi-partnership, and would accordingly warrant its winding up. Where such a company is at a deadlock because the siblings cannot see eye to eye, it is difficult to perceive why it is necessary to insist that unless a company is set up in the way which was done in *Yenidje* (para 21 supra) and *Ebrahimi*, resort to the just and equitable jurisdiction of the court to order a winding up should not be available. …"

66. The Court of Appeal went on to describe why the companies shared certain characteristics with quasi-partnerships:

> "34. Although the Companies were not quasi-partnerships, it was clear that mutual trust and confidence among the brothers was the cornerstone of the entire set-up. We agree

> with the Judge that the Companies and their directors' relationships shared certain characteristics with quasi-partnerships: not only were the shares of the Companies closely held and not easily transferable to outside parties, and not only did the directors hold their positions due to ties of blood rather than to business acumen or commercial considerations, but the parties really had not on their own accord voluntarily entered into legal relations with one another to promote some common business interest. Instead, they inherited or were endowed their shares and directorships by their parents, based on the latter's understanding or aspiration of furthering the family's interests cohesively. What is in issue now is whether the stalemate in the present circumstances so frustrates the basis of a family company that it justifies a winding-up order. To begin with, there is no dispute that the Companies were vehicles to accumulate wealth rather than profit-driven business ventures. All the directors and shareholders are members of the same family whom the late patriarch expected to get along and uphold the family name and legacy. Thus mutual trust and confidence were inherently essential to Mr Chow's objective in incorporating the Companies."

67. The Board does not see that *Chuen v Chi* assists Ms Ma here, even assuming that the facts establish that the WTK Group had the same features as the companies at issue in that case. That case was a winding up application rather than a claim for relief on the basis of unfair prejudice. The most it shows is that if WKN, WKY and WKC had reached a similar impasse in the management of STIC then, even though STIC was not operated as a quasi-partnership of the kind discussed in *Ebrahimi*, the court may properly have granted a winding-up petition on just and equitable grounds. The court may have concluded that the continuation of the business was predicated on the brothers working harmoniously to make it grow for the common good for the benefit of their descendants.

68. The case does not, however, establish that one of those descendants can insist on the winding up of a family company which is able to continue to operate effectively on the basis of the agreement of the remaining majority family members. The Board agrees with the Court of Appeal's statement at para 170 of their judgment in the present proceedings that the cases about family companies relied on by Ms Ma do not establish an equitable principle that such a company must be wound up when there is

a break down in trust and confidence between the family members. Ground 7 of the appeal also therefore fails.

69. Mr Crow pointed to the fact that, in the conclusion of his judgment, Justice Adderley said that since it was highly unlikely that the two sides of the family would be able to work together, it would be unfair for the court to insist on them doing so. He therefore made an order for the buy-out of Ms Ma's shares. It appears to be accepted by all the parties that the judge's jurisdiction to make that order was, to put it at its lowest, very doubtful given that he had dismissed Ms Ma's claim. This was, Mr Crow submitted, symptomatic of the fundamental confusion in the judgment as a whole.

70. The Board rejects the submission that the Court of Appeal should have concluded from the making of the buy-out order that the judge had in fact found that there had been unfair prejudice within the meaning of section 184I, despite all his clear findings to the contrary. There was, as already explained, no free standing application for the winding up of STIC on just and equitable grounds. The judge's buy-out order stands because neither party appears to have objected to its inclusion when the judge made the order and the respondents did not cross-appeal to challenge it because they are content to proceed on that basis. It does not show any confusion on the part of the judge as to the factual or legal reasons for rejecting Ms Ma's claim. Ground 10 of Ms Ma's appeal should also be dismissed.

(b) The primary purpose of the Conversion of the CPS: Grounds 4 and 9

71. A key part of Ms Ma's case was that in instructing the *de jure* director of STIC, Mr Lo, to exercise STIC's option to convert the CPS into ordinary shares, WKY and WKC as *de facto* directors of STIC had exercised their powers for an improper purpose. That purpose was to dilute the combined shareholding of Ms Ma and Neil in WTK Realty by in effect adding the additional 14.4% voting rights then held by STIC to WKY's and WKC's votes conferred by their existing direct holdings in WTK Realty.

72. This was said to be a breach of their fiduciary duty and of section 121 of the BCA 2004. That section provides that a director shall exercise his powers as a director for a proper purpose. The Court of Appeal noted that section 121 is geared towards controlling the conduct of the directors rather than shareholders. But the finding by Justice Adderley that WKY and WKC were *de facto* directors of STIC had not been appealed by the respondents. The Court of Appeal therefore proceeded on the basis that WKC and WKY were *de facto* directors and that their conduct as such could amount to oppressive behaviour for the purposes of section 184I. The Board will

proceed on the same assumption. It was common ground that Mr Lo, the *de jure* director of STIC, acted on the instructions of the respondents: para 97.

73. Ms Ma relied on the well-known decision in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821. In that case where new shares had been issued at the instigation of the directors to change the balance of power in the company, it was held that the issue was an improper exercise of their powers. In that case there had been a legitimate secondary purpose for the issue, but the Board held that that did not take away from the primary but improper purpose.

74. The main evidence about the circumstances leading up to the conversion of STIC's CPS was given by Ms Ting, who was the CFO of WTK Realty and hence responsible for arranging credit facilities for WTK Realty and various other companies within the WTK group.

75. There is no doubt that WTK Realty's credit facilities with HSBC Bank Malaysia Berhad for RM15m and from Standard Chartered Bank in the sum of RM4m were due to expire on 31 December 2012. The existing providers sought to impose increased environmental standards on the operation of the WTK Group's business as a condition for renewing the facilities. The Group was unwilling to accept those conditions. Ms Ting was therefore instructed to seek alternative financing. The judge found that she approached two banks, one with which the group already had a facility and one, AmBank, which had provided credit nine years previously. Ms Ting said in evidence that she had chased the former but had no response but she was able to pursue matters with AmBank. AmBank was prepared to make the loan but on condition that WTK Realty increased its total issued and paid up share capital by RM2.5m.

76. Ms Ting then had to advise the Board on the best way to effect this increase in capital to fulfil the condition set by AmBank. The judge found that she initially told them that the conversion of the CPS would not require any additional cash but that she corrected this on receipt of advice from WTK Realty's Malaysian solicitors. WTK Realty approved the acceptance of the loan at a meeting of its board of directors on 22 March 2013 and the allotment of the 2,750,000 ordinary shares in WTK Realty was resolved upon at an extraordinary general meeting of WTK Realty on 6 April 2013. The AmBank facility came into effect on 17 May 2013, a month before the expiry of the extended deadline for the HSBC and SCB facilities.

77. Ms Ma's allegation as to improper purpose rested on a general attack on Ms Ting's credibility as a witness and on more specific points in particular as to the timing of the Conversion and as to the choice of the Conversion as the means for increasing

the capital to meet the condition attached to the AmBank loan. It was argued that there was in fact no urgency about putting new credit facilities in place since it appeared that WTK Realty was cash rich and had not needed to draw on the SCB overdraft. Ms Ting was also criticised for failing to explore other sources of finance or other ways of meeting the increased capital requirement of AmBank.

78. Justice Adderley described Mr Crow's cross-examination of Ms Ting as "skilful and thorough". It was put to Ms Ting that she had behaved dishonestly towards AmBank and that her evidence to the court was deliberately dishonest. Although the judge accepted that some of her evidence was open to criticism, the judge rejected the submission that Ms Ting was dishonest:

> "151. Despite her apparent intransigence in the first half hour or so of her evidence and certain discrepancies in her evidence, having observed her demeanour carefully, examined the contemporaneous documents, and observed her and listened to her answers to the suggestions put to her by Mr Crow QC, in my judgment she was essentially a truthful witness, and was credible on the material issues. Many of the suggestions put to her after a series of questions on a particular topic were non sequiturs to the questions which had preceded the suggestions. Although alternative interpretations could be placed on the events that unfolded, it was not sufficient, in my judgment, to shift the balance in the claimant's favour, or to shake my view of Janice as a credible witness on the points in issue."

79. On the particular issue of the purpose of the Conversion the judge held that in cross-examination Ms Ting "gave an adequate and credible explanation of why the working capital lacuna of WTK Realty which would result from the withdrawal of the funding of HSBC and SCB, was urgent in her view as the CFO". Further, as to WKC's evidence, the judge found the explanations that WKC had given "credible within the context of the contemporaneous documents". In his summary of findings at the end of his judgment, Justice Adderley held that:

> "171(1) The ultimate or predominant reason for the conversion of the CPS was to replace the credit facilities of WTK Realty which were about to expire, and which facilities were only finalized the month before a deadline which had been extended by six months. The conversion of the CPS was

> not to force a dilution in the percentage shareholding of Ms Ma and her side of the family namely Neil."

He held therefore that the resolution to convert the CPS, and ultimately the Conversion, were authorised by STIC for a proper purpose as together they facilitated WTK Realty's compliance with conditions of the offer from AmBank regarding its proposed financing facilities to WTK Realty.

80. The Court of Appeal dealt with the improper purpose allegation at paras 88 onwards of their judgment. They also regarded this issue as turning on a straightforward factual dispute about whether the purpose was, as Ms Ting said, to meet the additional capital requirements imposed by AmBank or whether the real or primary purpose was, as Ms Ma said, to give the respondents the majority voting power in WTK Realty. The Court noted that Ms Ma argued that the borrowing was unnecessary and was not urgent but they declined to "step into the commercial arena" and second guess the business decisions of the board of WTK Realty.

81. The Court of Appeal referred to a 94 page document that had been prepared for the appeal by Ms Ma's legal team, referred to as the "Highlighted Document". This document comprised Ms Ma's closing submissions at trial, but with many passages highlighted as said to contain points that the judge had ignored. The respondents had annotated this highlighted document in green boxes with their responses showing where the judge had in fact taken the point into account or where there was evidence contradicting the assertion. Ms Ma's team then annotated those annotations in yellow boxes. Having reviewed the Highlighted Document, the court reaffirmed the principle that, particularly in a complex commercial dispute, a judge is not expected to comment on each and every submission made by counsel: *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, para 19.

82. The court, at para 63, expressed its conclusions on the Highlighted Document as follows:

> "Many of the appellant's highlighted comments are criticisms and/or disagreements with the Judge's findings, and not indications that he did not deal with the issues in the judgment. For example, much was made of the judge's findings relating to the credibility of the witnesses. The appellant obviously disagreed with those findings but that is not a good reason for saying that the judge did not deal with

> a witness' credibility. The judge gave ample reasons why he preferred the evidence of WKC and Janice to that of Ms Ma."

83. The court said that it was clear that the judge had considered the evidence of both sides and found as a primary fact that the dominant reason for the Conversion was the need for financing. There was no basis for the court to interfere with that.

84. Mr Crow accepts that Ground 4 of Ms Ma's appeal to the Board is a challenge to concurrent findings of fact in the courts below. But he submits that this is one of the rare cases where the judge has failed to take advantage of his ability to assess the witnesses. It is also therefore convenient to address Ground 9 in this section of the judgment.

85. There are two strands of case law that are relevant here. The first strand is those cases, discussed by the Court of Appeal, which describe generally the role of appellate courts in determining challenges to findings of fact made by a trial judge who has heard and seen the oral testimony of the factual witnesses. The judge assesses the relative credibility of those witnesses and then goes on to make findings of fact which he or she arrives at partly from the evidence of those witnesses whose evidence is preferred as being more credible, partly from the contemporaneous documents and partly from an assessment of what is most likely to have happened as a matter of common sense or commercial reality.

86. The second strand is the more particular practice of the Board in considering challenges to concurrent findings of fact of the two lower courts that have already considered the case. That position is well-established by decisions such as *Devi v Roy* [1946] AC 508. The practice of the Board is not to interfere with concurrent findings of pure fact unless there has been some miscarriage of justice or violation of some principle of law or procedure. In *Devi v Roy* Lord Thankerton referred at the outset of their Lordships' judgment to the practice of the Board being "to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice".

87. Lord Thankerton then considered the cases which had discussed the kinds of special circumstances that might justify a departure. This had always been expressed in ways that show that it is a high hurdle for an appellant to overcome. For example, Lord Herschell delivering the judgment of the Board in *Allen v The Quebec Warehouse Co* (1886) 12 App Cas 101, 104, said that it must be "shewn with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts" (see p 514 of Lord Thankerton's judgment). In *Robins v National*

Trust Co Ltd [1927] AC 515, 518 Lord Dunedin delivering the judgment of the Board had stressed that the term "miscarriage of justice" did not include "what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important". Rather the term meant, according to Lord Dunedin "such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all".

88. Lord Thankerton then set out a number of cases where the Board had departed from the decisions of the lower courts. In then reformulating the practice, he adopted perhaps the most stringent wording he had quoted from the earlier cases, that used by Lord Dunedin in *Robins*. Lord Thankerton said at p 521 of the report of *Devi v Roy*:

> "That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if the proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.
>
> …
>
> That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."

89. Mr Crow relies on the more recent decision of the Board in *Central Bank of Ecuador v Conticorp SA (Bahamas)* [2015] UKPC 11; [2016] 1 BCLC 26 ("*Bank of Ecuador*"). The claim there was based on an allegation that the respondents were all involved in dishonestly assisting breaches of trust. The trial judge Justice Adderley and the Court of Appeal had rejected the allegations of dishonesty. The Board reached a

contrary conclusion. Lord Mance recognised that the appellant faced a heavy onus: para 4. He explained the need for this caution as fourfold: (i) the Board's settled practice to decline to interfere with concurrent findings of fact save in very limited circumstances; (ii) the advantage that a trial judge has over an appellate court in having seen and heard the witnesses; (iii) the importance of avoiding the huge cost and diversion of judicial resources in duplicating the trial process at the appellate level; and (iv) the particular caution needed when considering issues of credibility or probity of conduct. However, he went on to say that these principles do not mean that an appellate court is never justified, indeed required, to intervene. The principles also assume that the judge has taken proper advantage of having heard and seen the witnesses and has tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.

90. The decision in *Bank of Ecuador* is thus an example of the exceptional case envisaged by Lord Thankerton and the other judges who have stressed the importance of the Board's practice. It should not be regarded by prospective appellants as a watering down of the principles in *Devi v Roy* as confirmed in many later cases.

91. The Board must therefore consider whether Ms Ma's submissions indicate that this is another similarly exceptional case. Mr Crow proffered to the Board the same Highlighted Document that was examined by the Court of Appeal and that was said to show how the judge had ignored evidence. Ms Ma's written case to the Board in this appeal is peppered with complaints that the judge and the Court of Appeal "failed to appreciate" or "failed properly to take into account" or "disregarded" or "failed properly to apply its mind to" or "failed properly to address" or "failed to give proper weight to" or "overlooked" very many aspects of the evidence or arguments presented to the judge at trial. There appears to have been no attempt to distinguish between on the one hand instances where the judge clearly has appreciated, taken into account, addressed and given weight to Ms Ma's evidence and submissions but decided to reject them for the reasons he has given and on the other hand in identifying any instances that show that the judge really has failed to perform his judicial task. This is not a helpful approach to adopt in an appeal of this kind to the Board.

92. Is this a case where one can see that the judge failed to take advantage of his ability to see and assess the witnesses or that he ignored crucial evidence relied on by Ms Ma? There is nothing in Ms Ma's submissions that establish that it is.

93. One must start with the judge's own assessment of Ms Ting's credibility. In many cases, as happened here, the judge must arrive at findings of fact based on flawed evidence from both sides. As every trial judge knows, the oral evidence given in the witness box may be affected by nervousness or an impairment of some kind or

may be coloured by subsequent events that have caused the witness genuinely to misremember or unwittingly to exaggerate what happened. The judge's assessment of Ms Ting was that having regard to the contemporaneous documents, her account of what happened was honest and credible, despite some misgivings he had about some of her evidence. There was nothing inherently implausible about Ms Ting's explanation, given that it was undoubtedly the case that (i) the existing financing in place for WTK Realty was about to expire; (ii) the existing banks were imposing environmental standards as a condition for refinancing that the Group was not prepared to accept; (iii) AmBank insisted on additional capital being injected into WTK Realty; and (iv) the Conversion was one way to effect the increase in capital given the existence of the CPS with a pre-agreed conversion ratio. Nevertheless, there are a number of elements of the evidence that Ms Ma relies on as undermining the judge's conclusion as to the purpose of the Conversion.

94. First Mr Crow complains that the judge and the Court of Appeal "disregarded the fact that WKY, WKC and Janice Ting had misled AmBank". They knew that the Conversion would increase the capital to RM19.15m rather than a larger amount, RM19.45m, that AmBank had stipulated. It is alleged that they "took the deliberate decision" not to inform the bank of this. This should, it is submitted, have led the judge to reject their evidence and the Court of Appeal failed to recognise this.

95. But this incident was not disregarded. On the contrary, the judge specifically dealt with this incident at para 136. He recorded that "Much ado was made of it by counsel for the claimant as an indication of Janice's dishonesty, but after discovery of the fact on 30 June, it was explained to the bank by telephone and after written communication AmBank accepted the adjusted capitalization by letter dated 30 July 2013." No doubt Ms Ma is still convinced that the judge was naively mistaken in not seeing this incident as evidence of a dishonest and self-serving plot on the part of Ms Ting. That is not a proper ground of appeal once the judge has addressed the point and concluded on the basis of his assessment of the totality of the evidence that there was nothing sinister in this mistake.

96. The second example is that Mr Crow says that WKC "admitted in cross-examination" that he had helped WKY to overturn Ms Ma's majority because it was his wish to restore WTK Realty's voting power to what he conceived was their rightful balance. This is one of the bases on which Ms Ma then alleges that the judge simply got this case wrong by disregarding evidence, including the respondents' own admissions. Again, an analysis of the evidence before the judge demonstrates that this criticism has no basis. The passage quoted in the written case from the evidence as amounting to WKC's admission is as follows:

> "Q: … You agreed to help [WKY] overturn the majority control that [WKN's] family had, didn't you?
>
> A: Only one, the people present to be returned to original status quo.
>
> Q: That's another way of saying you wanted to overturn the majority control that [WKN's] family held, isn't it?
>
> A: I don't know."

97. It is always difficult for the Board, or any appellate court, to recreate from a transcript of evidence the meaning and significance of an answer by the witness which the cross-examiner seizes upon as an important admission but which the judge realises was no such thing. In responding "I don't know" was the witness confused by the question, or was he tired or flustered or was he being deliberately obstructive or evasive or playing for time? The judge has heard the run of the evidence rather than being asked, as the Board is being asked here, to look at a few lines of transcript taken out of context from several days of evidence. The judge is also aware of the documentary evidence including the witness's written statements standing as their evidence in chief that may cast important light on the answers.

98. In the present case, the judge made a careful assessment of WKC's evidence:

> "113. Although [WKC] had moments of lucidity I made a note to myself during the hearing that he did not appear to be engaged at times, frequently answering 'I don't know', 'I don't understand', 'I was told by the CFO' 'WKY sent it to me to sign, he had signed it so I signed it'. Some of his conduct, especially in accounting matters is understandable because WKY was a qualified accountant and he trusted him. At one stage WKC said 'I trusted WKY instinctively'.
>
> 114. It appeared that he frequently relied on advice rather than exercising his own independent judgment as a director particularly when it came to accounts which he admitted he was not very good at. However, on matters for which he did not rely on advice he was quite clear: …"

99. The judge's reference to WKC's moments of lucidity is clarified by the Court of Appeal's statement that WKC suffers from Parkinson's disease. The snippet of evidence set out in Ms Ma's case should also be seen in context and Ms Ma quite properly provides the source for the quotation in her written case. The cross-examination of WKC about the AmBank financing and the purpose of the Conversion covered 33 pages of transcript from the morning session on Day 3 of the trial. Mr Crow took WKC through the terms of AmBank facility and the minutes of the WTK Realty board meeting on 19 March 2013 in great detail. It was put to WKC that the renewal of the facility was merely a device which he agreed with WKY to use to reverse the majority shareholding on which Neil was relying to assert his entitlement to be managing director of WTK Realty:

> "Q. So what you and he agreed to do after that was to work out as many different ways as you could, for overturning the majority control that KN's side of the family held, didn't you?
>
> A. Disagree.
>
> Q. Sorry?
>
> A. Disagree.
>
> Q. You disagree. *You agreed to help KY overturn the majority control that KN's family had didn't you?*
>
> A. *Only one, the people present to be returned to original status quo.*
>
> Q. *That's another way saying you wanted to overturn the majority control that KN's family held, isn't it?*
>
> A. *I don't know*.
>
> Q. One of the ways you thought for overturning KN's majority's control was to convert the preference shares that STIC held into voting shares, wasn't it?

A. Disagree."

100. Thus, on either side of the extract on which Ms Ma relies which I have italicised above, WKC rejected the case put to him. In the remaining pages of WKC's cross-examination on this topic there are at least ten occasions on which it was put directly to WKC that his conduct in relation to the refinancing demonstrated that the AmBank loan was merely a device to implement a pre-arranged plan to change the voting balance in WTK Realty. He clearly denies on each occasion that that was the case, see for example Day 3 p 54, p 59, p 61, and p 64. It is not possible therefore to say that the Court of Appeal should have concluded that the judge erred in failing to have regard to an admission by WKC that that had been his plan or that this was "uncontroverted evidence".

101. The third example is that Ms Ma asserts in her written submissions that the Court of Appeal disregarded the question of motive. To the contrary, the judge was well aware that a key factual dispute rested on the alleged desire of WKY and WKC to achieve a majority of the voting power of WTK Realty. There was a further point also addressed by the judge namely whether Ms Ting had her own, separate, motive for wanting to ensure that WKY and WKC obtained majority control of WTK Realty. The Court of Appeal described in para 104 that it was put to Ms Ting that in March 2013, Neil wrote to the company demanding the dismissal of Ms Ting as chief financial officer. His request for the removal of Ms Ting was considered by the board of WTK Realty at a meeting in March 2013 and rejected. The meeting also considered Neil's attempt to take over the position of managing director of the company from WKY. It was put to Ms Ting that she had recommended the Conversion to the board of WTK Realty because that way, the respondents would remain in control of the WTK Group. They were more likely to keep her in her position in the Group than if Ms Ma and Neil - who were very hostile to her - took charge through WKN's majority interest. The judge rejected that point and the Court of Appeal agreed with him.

102. These questions of motive were at the forefront of the case on improper purpose and were dealt with by the judge and by the Court of Appeal. Ms Ma is no doubt still convinced by the points she put forward as to the timing of the Conversion and that the obvious inference is that the motive was improper. But the judge fulfilled his judicial task of considering the conflicting evidence and coming to a properly reasoned finding that this was not the case. There is no basis for saying that the judge or the Court "disregarded the question of motive" as Ms Ma asserts.

103. There are other instances too where the material on which Ms Ma's submission is said to rest provides, on examination, no support at all to her case. Ms Ma complains that the judge wrongly believed that the case turned on documents alone. The Board

does not accept this criticism. On the contrary the judge was correct in stating that the credibility of the witness evidence should be assessed against what appeared from the contemporaneous documents: paras 94 to 96. That is an elementary part of the judicial fact-finding role. One of the paragraphs from the judgment which Ms Ma relies on in support of this criticism in fact shows precisely the opposite. At para 171 the judge states that he had based his findings of fact on the totality of the evidence including the oral testimony and the documentary evidence. That passage cannot be said to support a contention that the judge erroneously believed that this was a case that turned on the documents alone.

104. The Board therefore considers that there are no grounds for impugning the judge's factual finding as to the primary purpose of the Conversion. Grounds 4 and 9 of the appeal should therefore be dismissed.

105. That does not, however, dispose of Ms Ma's reliance in her unfair prejudice claim on the allegation that WKY and WKC were in breach of the fiduciary duties that they clearly owed to STIC as *de facto* directors to act in the best interests of that company. The interests of STIC may or may not have been aligned with the best interests of WTK Realty and the wider group. There is no finding by Justice Adderley that WKY or WKC gave any separate consideration to whether it was in STIC's interests to cooperate by means of the Conversion in increasing the share capital of WTK Realty in order to secure the refinancing as Ms Ting requested.

106. The test to be applied where directors have failed to turn their minds to whether a proposed transaction is in the best interests of the company was considered by the BVI Court of Appeal in *Antow Holdings Ltd v Best Nation Investments and others* (unreported BVICMAP2017/0010 judgment of 21 September 2018). Pereira CJ noted that the core fiduciary duty of a director to act honestly and in good faith as encapsulated in section 120 of the BCA 2004 is largely, though by no means entirely, a subjective one and that the courts have adopted a non-interventionist attitude when reviewing business decisions: para 23. Where, however, there has been a failure by a director to consider the separate interests of their company, the test then becomes an objective one. Citing *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62, Pereira CJ in *Antow* described the test as whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. In *Antow* and indeed in *Charterbridge* the facts were similar to those pertaining to STIC and WTK Realty in that the directors had looked to the benefit of the group as a whole without giving separate consideration to the benefit of the particular company within the group. As Pennycuick J had emphasised in *Charterbridge*, each company within the corporate group is a separate legal entity and the directors are not

entitled to sacrifice the interests of that company for the benefit of the group. But it does not follow that the absence of separate consideration ipso facto means that the directors were in breach of their duty.

107. In the Board's view, the test set out in *Charterbridge* and *Antow* is the correct test to apply in the present case: the court should have examined the decision to convert the CPS objectively and decided whether WKY and WKC, acting honestly, could reasonably have believed that the Conversion was in the best interests of STIC in all the circumstances.

108. Addressing that question, the Board must first identify the purpose of the power that WKY and WKC as *de facto* directors exercised, namely the power to instigate the Conversion. It can be characterised as a power to preserve or maintain the value of the investment that STIC held in WTK Realty. Adderley J did not explore in his judgment whether there might have been other ways for WTK Realty to increase its capital without STIC having to fund the Conversion. However, it is clear that the existence of alternative means of increasing capital was explored fully at trial. The judge records at para 133 of his judgment that Mr Crow tested Ms Ting's evidence on the basis that the refinancing was not urgent and that Ms Ting did not approach a sufficient number of banks before choosing AmBank and thereby accepting the need to increase WTK Realty's capital. WKC was also cross examined at length about what steps Ms Ting had taken to find alternative forms of finance. This line of questioning was directed at the allegation that there had been a pre-determined plan to use the AmBank offer as a pretext to perform the Conversion. The judge must have rejected this since he found not only that Ms Ting was honest but that the motive for the Conversion was indeed the provision of the refinance. Further, it was put to Ms Ting that she had been dishonest in advising the Board of WTK Realty that the Conversion would not require any cash from STIC because she thought there was an inter-company balance that could be used to provide the money. The judge accepted this was a mistake and not the result of dishonesty on her part. The judge also recorded that another company (Centre View Ltd) later provided the money needed to pay for the ordinary shares to which STIC subscribed so that although presumably there is an accounting debt between STIC and Centre View, there was nothing to suggest that there would be any difficulty for STIC in funding the price of the ordinary shares.

109. The reasoning of the judge on this point at para 171(8) that "Although there is no evidence that consideration was given to the interest of STIC, the Conversion benefited all the beneficial owners of STIC who were also shareholders of WTK Realty" was a little compressed. But he was, in the Board's judgment, entitled to conclude on the facts that in this case STIC's interests were objectively aligned with those of WTK Realty and that WKY and WKC acted reasonably in causing STIC to convert the CPS. The

issues as to whether the refinancing was really needed and as to alternative means of increasing capital were dealt with in the context of WKY's and WKC's motivation. The judge decided in that context that the AmBank financing was genuinely required and that the Conversion was the best way to achieve it. The value of STIC's shareholding in WTK Realty was therefore maintained and preserved by the Conversion and if WKC and WKY had turned their minds to the best interests of STIC, as they should have done, they would reasonably have decided to convert the CPS. There was therefore no breach of their fiduciary duty to STIC.

110. Mr Lo, the sole *de jure* director of STIC, was not a party to the proceedings and there was no evidence before the judge as to why he resolved on 25 March 2013 to convert the CPS. But assuming in Ms Ma's favour that Mr Lo also failed to consider the interests of STIC separately from the interests of WTK Realty or the WTK Group, similar reasoning can be applied in assessing his actions to conclude that there was no breach of fiduciary duty.

111. Finally on this point, the Board has considered whether the directors' conduct might be prejudicial in favouring WKY and WKC as shareholders of STIC over the interests of Ms Ma even if it did not amount to a breach of their fiduciary duty. As we have held, there was no requirement that Ms Ma should approve the Conversion and her interests as a shareholder of a company whose sole asset was a holding in WTK Realty was that WTK Realty should be refinanced as needed.

(c) Section 59 of the Malaysian Companies Act 1965: Ground 6

112. Section 59(1) of the Malaysian Companies Act 1965 provides:

> "(1) Subject to this section, a company may issue shares at a discount of a class already issued if - …
>
> > (a) the issue of the shares at a discount is authorized by resolution passed in general meeting of the company, and is confirmed by order of the court; …
>
> (2) The court, if having regard to all the circumstances of the case it thinks proper to do so, may make an order

confirming the issue on such terms and conditions as it thinks fit.

…

(7) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act."

113. Ms Ma's oral submissions on this point were made to the Board by Mr Boeddinghaus. Ms Ma alleges in Ground 6 of her appeal that the 2,750,000 ordinary shares in WTK Realty which were issued at a par value of RM1 to STIC when the CPS were converted were issued at a discount. It was common ground that there had been no authorisation of an issue of shares at a discount at the general meeting of WTK Realty and no authorisation by the court. She alleged that the Conversion was therefore carried out in breach of section 59 and amounted to conduct that was unfairly prejudicial within the meaning of section 184I of the BCA 2004.

114. The basis for this element of her case was two-fold. Ms Ma alleged that neither the original RM550,000 for the CPS in 2004 nor the balance of RM2,250,00 in 2013 had actually been paid by STIC to WTK Realty. Justice Adderley found as a fact that both sums had been paid by or on behalf of STIC and the Court of Appeal upheld those factual findings: see para 115 of the Court of Appeal judgment.

115. Ms Ma's alternative case was that even if those sums had been paid, the ordinary shares had still been issued to STIC at a discount. This was because it was not legitimate to apply the RM550,000 paid for the CPS in 2004 to the consideration subsequently due for the ordinary shares. On this alternative argument, the parties provided expert evidence on Malaysian company law to the court. Ms Ma relied on the evidence of P Gananathan Pathmanathan whose opinion was that the RM550,000 paid on subscription to the CPS could not be taken into consideration towards the par value of the ordinary shares because the payment once made was treated as part of the share capital of the company.

116. The respondents' expert, Mr Gopal Sreenevasan expressed the opinion that the RM550,000 could be credited to the subscription price for the ordinary shares because there was a distinction between a loss of capital and a loss of shares. His view was that converting the CPS therefore resulted in the surrender and extinguishment of the CPS, meaning that WTK Realty's capital was not reduced because those shares were

replaced by the ordinary shares. Accordingly, a conversion of the CPS did not mean that the paid up capital was also correspondingly reduced. Mr Sreenevasan said that if the RM550,000 were not treated as part payment for the replacement shares, there would have to be a credit for RM550,000 in the balance sheet of WTK Realty which could not be ascribed to any shares. That would result in the paid up capital being in excess of the shares issued.

117. Justice Adderley stated briefly that he preferred the opinion of Mr Sreenevasan: see para 144 of his judgment. The Court of Appeal accepted Ms Ma's criticism that the judge had erred in failing to give reasons for this conclusion: para 118 of their judgment. The Court of Appeal therefore reviewed the experts' reports, the transcript of their oral evidence in the lower court and counsel's submissions and decided in the exercise of their discretion to make their own finding. They also concluded that the respondents' expert's opinion should be preferred. This meant that the original RM550,000 could be put towards the consideration for the 2,750,000 ordinary shares; those shares had not been issued by WTK Realty to STIC at a discount; there had been no reduction of the share capital of Realty and no contravention of section 59.

118. The Court of Appeal held further at para 132 that a breach of section 59 did not nullify the transaction. The consequence stipulated in section 59(7) is that the officers of WTK Realty would be liable to punishment in criminal proceedings. This would not amount to unfairly prejudicial conduct to Ms Ma in her capacity as minority shareholder of STIC.

119. Ms Ma appeals to the Board against the rejection of this part of her claim. As to whether the two payments were in fact made, she argues that the judge was wrong to find as a fact either that the RM550,000 had been paid in 2004 or that the RM2.2m was paid in 2013. The judge had fallen into error in simply assuming that the sum contracted for had been paid, because there was no credible witness evidence that any payment was made. The purported documentary evidence relied on had been subjected to a detailed critique by Ms Ma and neither the judge nor the Court of Appeal had grappled with these points.

120. The Board considers that the factual question whether or not the RM550,000 and RM2.2m were paid is precisely the kind of question which falls within the category of concurrent findings of fact with which the Board should not interfere. The points that Mr Boeddinghaus makes before the Board were points that were put to the witnesses at the trial and were made in submission to Adderley J. The judge rejected these points and found that there was sufficient evidence before him to conclude that the payments had been made. Those points were put again to the Court of Appeal and no doubt Ms Ma is unhappy with the Court of Appeal's rejection of them. That does

not entitle her, in Lord Mance's words in *Central Bank of Ecuador*, to require the Board to duplicate the trial process and the work of the lower appellate court unless it is clear that something very serious has gone wrong. There is nothing to suggest that it has.

121. The judge was entitled to accept Ms Ting's evidence as regards the payments. He was also entitled to interpret WTK Realty's audited financial statements provided to the court in the way he did. It was clear on the evidence that the sum of RM2,283,576 had been received by WTK Realty on 8 April 2013 from the other company, Centre View Ltd, and was treated by everyone as being payment for the Conversion. There is no basis for the Board to revisit the judge's acceptance that that in fact constituted the consideration for the shares. In so far as the Conversion required the company to capitalise its reserves to pay the difference in the par value between the CPS and the ordinary shares, it seems improbable that the shareholders would not have agreed to this.

122. Turning to the legal issue about the use of the RM550,000 as part of the consideration for the ordinary shares, the Board does not need to determine which of the expert witnesses was correct. The Court of Appeal was right to hold that even if this was a breach of section 59, that would not amount to unfairly prejudicial conduct to Ms Ma in her capacity as a shareholder in STIC. Ms Ma submits there was potential prejudice to her as a shareholder of STIC because Mr Pathmanathan's oral evidence was that if the conditions under section 59 were not met, then the effect of that was that STIC would not be entitled to those shares. The judge, Ms Ma says, ignored this evidence. The Board has considered the passages in Mr Pathmanathan's evidence relied on at the later stages of his cross-examination. Although he makes this assertion, Mr Pathmanathan later accepted in cross-examination that he had not referred to the civil consequences of a breach of section 59 in his report nor had he expressed the opinion that the issue of the shares could be set aside. Further, it does not appear that either expert was invited to speculate as to the likely response of the Malaysian court under section 59(2) which empowers the court to confirm the issue.

123. The Board therefore rejects Ground 6 of Ms Ma's appeal relying on the alleged breach of section 59 as unfairly prejudicial conduct.

(d) Section 175 of the BCA 2004: Ground 5

124. Ms Ma also contends in Ground 5 of her appeal that the conversion of the CPS contravened section 175 of the BCA 2004. That section applies where there is a disposition by a company of more than 50% in value of its assets which is not made in

the usual or regular course of the business carried on by the company. Such a disposition must not only be approved by the directors but also authorised by a resolution of members of the company. Ms Ma submitted that the CPS clearly constituted more than 50% of STIC's assets. The Conversion was the only transaction of its kind carried out by STIC and so could not be in the usual or regular course of STIC's business. It was therefore an unlawful transaction and as such amounted to unfairly prejudicial conduct on the part of WKY and WKC.

125. The judge held that there had been no contravention of section 175 because the exercise by STIC of its contractual right to convert the shares did not amount to a disposition for the purposes of the provision. Further, WKY and WKC, as the majority beneficial owners of STIC had approved the conversion by giving Mr Lo the instruction to carry it out: see paras 160 to 162 of Justice Adderley's judgment. The Court of Appeal agreed: para 136.

126. The Board accepts that a disregard of the requirements of the BCA 2004 could in certain circumstances be capable of being unfairly prejudicial conduct for the purposes of section 184I. But on the facts of this case, the Board does not have to determine the legal question whether the Conversion amounted to a "disposition" within the meaning of section 175 or whether a one-off transaction carried out by a holding company can be described as made in the usual or regular course of that company's business. It is clear, as the judge said, that WKY and WKC approved the Conversion. The Board has already determined that there were no equitable considerations arising that precluded them from doing so as the majority shareholders in STIC. The fact that they failed to put in place a formal resolution of the members at a general shareholder meeting of STIC does not amount to unfairly prejudicial conduct in these circumstances, regardless of whether it was a breach of section 175.

(e) Loss of substratum: Ground 2

127. Ms Ma argues in Ground 2 of her appeal that the sole function of STIC was to hold the CPS and that once these had been converted, that function had disappeared. That, she argued, justified an order winding up the company. The judge and the Court of Appeal rejected this argument. They held that STIC's memorandum of association was general in scope and not limited to holding the CPS. After the conversion STIC still performed the function of holding the ordinary shares in WTK Realty: see para 175 of Adderley J's judgment and para 137 of the Court of Appeal's judgment.

128. STIC was acquired as an off-the-shelf company and although it was used for a limited purpose it retained the widely drawn objects commonly found in the constitution of such off-the-shelf companies. On this point the Board sees some force in Mr Crow's submission that when the court is considering the exercise of the powers under section 184I in relation to such a company, the focus should be on that limited purpose rather than the general objectives. However, there is no justification for limiting the substratum of STIC to holding CPS in WTK Realty rather than performing a wider role of holding the brothers' equity interest in WTK Realty both before and after the Conversion. The Board therefore holds that the judge and the Court of Appeal were right to reject this complaint.

(f) Provision of information and non-payment of dividends: Ground 8

129. Finally, Ground 8 of Ms Ma's appeal contends that the Court of Appeal should have concluded that there was unfair prejudice in the failure to pay dividends to the estate and in the withholding of information from Ms Ma.

130. On both these points, the Board's finding that there were no equitable considerations modifying the legal requirements for the provision of information and the payment of dividends means that this complaint must be rejected. The evidence showed that Ms Ma had been supplied with the information required by law and by STIC's constitution: see the conclusion in para 171(10) of Justice Adderley's judgment. The judge also concluded that the estate's share of the value of the dividends received by STIC was too small for any withholding to amount to unfairly prejudicial conduct: para 163. The Board sees no basis for interfering with those conclusions. Ground 8 should also therefore be dismissed.

5. CONCLUSION

131. In the light of the above reasoning, the Board will humbly advise Her Majesty to dismiss Ms Ma's appeal.