EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 2015/0052

Between:

KATHRYN MA WAI FONG

Claimant

and

[1] WONG KIE YIK
[2] WONG KIE CHIE
[3] SUCCESSFUL TREND INVESTMENTS CORPORATION

Defendants

Appearances:

Mr. Jonathan Crow QC and Mr. Hermann Boeddinghaus for the Claimant
Mr. David Alexander QC, and with him Mr Simon Hall of Maples and Calder, for the First and Second Defendants
Mr. Oliver Clifton of Walkers for the Third Defendant

2017: October 16,17,18,19, 25, 26;
November 6;
December 14.

JUDGMENT

[1] **ADDERLEY J:** This is a decision determining whether the defendants are liable and, if so, what remedies the claimant should be awarded consequent on such liability. By order dated 29 May 2017 Wallbank J ordered a split trial. This judgment makes determination on the liability and remedies. Quantum will be assessed at the second stage.

[2] The third defendant Successful Trend Investments Corporation ("STIC" or the "Company") is a BVI company and the first and second defendants were at all material times two out of its three shareholders. Claimant and Defendant are referred to with all lower case letters.

[3] The claimant Kathryn Ma Wai Fong ("Ms Ma") sued on her own behalf as beneficiary, and also as personal representative, executrix and trustee of the estate of the late Wong Kie Nai ("WKN"). She alleges oppression, unfair prejudice, and unfair discrimination by STIC through its *de facto* directors, the first and second defendants, against her in her capacity as a member of STIC in breach of section 184I of the BVI Business Companies Act ("BCA"). That section provides:

> **"(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,"**

Background

[4] Datuk Wong Tuong Kwang ("WTK") was the founder of a large group of companies (the "WTK Group").

[5] 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. However, the WTK Group's businesses have diversified over time and now include veneer and plywood manufacturing, land holding and property and real estate development, frozen food and cold storage facilities, aluminium foil products and packaging materials, hotel services and insurance and shipping services.

[6] WTK Realty Sdn Bhd ("WTK Realty") is the flagship company of the WTK Group. It is a family holding company. It was incorporated in Malaysia in 1981, with WTK and his oldest son, the first defendant, Wong Kie Yik ("WKY") being its co-founders/promoters and its first directors and shareholders. WKN was at all material times the Managing Director of WTK Realty.

[7] WTK and his wife Datin Tiong Liang Ting, had six children – three sons, WKY, WKN (now deceased) and Wong Kie Chie (the second defendant, "WKC") (together referred to as "the three Brothers") and three daughters. The three Brothers were all involved in the WTK Group whereas the daughters never had any involvement in the management of the family business.

[8] For most of their lives, WKN and WKY lived in Sibu, Malaysia where the WTK Group is headquartered, and WKC has lived in Australia since 1984. WKN was the first son to join the family business when WKY and WKC were still abroad furthering their studies.

[9] In 1962, WKY went to the United Kingdom (the "UK") to take an accountancy course at the London College of Commerce. After he graduated, he remained in the UK for three years to gain practical experience and to qualify as a chartered certified accountant with the Association of Chartered Certified Accountants. He returned to Sibu in 1971 and has lived there ever since. On his return from the UK, he joined the family business in Sibu. He was put in charge of Song Logging Sdn Bhd, which was set up by WTK and which, at that time, held the biggest timber concession in the WTK Group.

[10] WKC, the youngest brother, also joined the family business in Sibu after he finished his studies in Australia. However, WKC relocated to Australia in 1984 in order to look after the family's businesses/interests there. WKC became a permanent resident of Australia in 1984.

[11] In 1981, WKN became the Manager of WTK Realty and, in 1986, the Managing Director.

[12] In 1993, WTK underwent a bypass surgery and although he survived, he suffered a stroke three days later. As a result, he lost the ability to speak but remained mentally alert and required continued treatment. His health began to deteriorate over time and in May 2004, he became very ill and was hospitalised. WTK passed away in hospital in November 2004.

[13] WKN became Managing Director of most of the companies in the WTK Group, including WTK Realty, until March 2011, when he left Sibu for Australia to seek medical treatment for cancer. After WKN's departure, WKY took over the *de facto* management of WTK Realty and various companies in the WTK Group. WKN never returned to Sibu and passed away in Australia on 11 March 2013.

[14] STIC was incorporated on 18 November 1996 under the laws of the BVI. According to the Claimant the company was incorporated for the purpose of improving the tax efficiency of the family's interest in WTK Realty, and to procure financing for WTK Realty. However, according to WKY and WKC it was WKN's idea to form the Company to hold a special category of convertible preference shares ("CPS") with a par value of RM 0.01 each in WTK Realty, which CPS were issued to the Company sometime on or about 30 August 2004, on which date Article 3A of WTK Realty's Articles of Association was adopted. WKY and WKC agreed to WKN's idea to incorporate the Company and to issue the CPS to STIC upon the terms determined by him. Upon its incorporation, the Company also formed part of the WTK Group of companies.

[15] WKN was married to Ms Ma and together they had two children, Wong Hou Lianq Neil Wong ("Neil") and Wong Hou Wai Mimi ("Mimi"). Ms Ma and her children have lived in Sydney, Australia since 2003.

The Claim

[16] The claim arises out of decisions taken by WKY and WKC as the controlling shareholders of STIC to convert the sole asset of STIC, the CPS in WTK Realty, from preference shares in WTK Realty to ordinary shares ("the Conversion") which had the effect of diluting the shareholding of the members and in Ms Ma's case taking the majority voting control away from the beneficiaries of WKN (namely Ms Ma and her son Neil) as set out in the table below.

Before conversion of the CPS

WKY 3,716,000	22.66%
WKC 3,716,000	22.66%
Total:	**45.32%**
Deceased/Claimant (on behalf of the Estate) 8,168,000	49.80%
Neil 800,000	4.88 %
Total:	**54.68%**

After conversion of the CPS

WKY 3,716,000	19.40%
WKC 3,716,000	19.40%
STIC 2,750,000	14.40%
Total:	**53.20%**
Claimant (on behalf of the Estate) 8,168,000	42.60 %
Neil 800,000	4.20%
Total:	**46.80%**

That is the epicentre of the claim but there are numerous claims surrounding that.

[17] The claimant based her claim on four grounds the substratum of which was the conversion of the CPS and the way and circumstances in which it was done. It was encapsulated under the following heads:

(1) Unfair Prejudice: The Conversion (together with various other instances of misconduct outlined below) was unfairly prejudicial to her interests as a shareholder, contrary to s.184I (1) of the BCA. As such, she is entitled to have the Estate's shares in STIC bought out at fair value.

(2) Improper Purpose: The Conversion was put into effect by WKY and WKC, not in the commercial interests of STIC, but in order to enhance their *de facto* control over WTK Realty. It accordingly involved a breach of their fiduciary duties to STIC, contrary to s.121 of the BCA. As such the conversion should be set aside, either under the general law or pursuant to s.184I (1) and (2) of the BCA.

(3) Breach of s.175 of the BCA: The Conversion involved a 'transfer', 'exchange' or disposition of more than 50% of its assets; the CPS was its only asset. Under s.175 the 'transfer', 'exchange' or disposition of more than 50% of a company's assets required the approval of a shareholders' resolution unless this statutory provision was overridden by the provisions of the Articles or the Memorandum of Association of the company. It was common ground that no shareholders resolution was obtained at the time of the Conversion.

(4) Breakdown of quasi-partnership: STIC was always intended to be a quasi-partnership in the form of a family company. The family relationship of mutual trust and cooperation on which it was founded has irretrievably broken down. In the circumstances it is just and equitable that it should be wound up under s 162(1)(b) of the BVI Insolvency Act 2003.

[18] Ms Ma also claims that since the Conversion she has not received any dividends to which she is entitled and STIC has failed to provide her with information on the company despite repeated requests.

The Pleadings

[19] The main claims were set out at paragraphs 11, 24, 32, 35A, 36, 37, 41, 43, 47 and 48(a) and 50A of the Re-Amended Statement of Claim. Supporting statements were set out in the witness statement of Ms Ma. The paragraphs referred to are set out below:

> "11. It was agreed between the Brothers at the time alternatively understood between them that the Company would not exercise its rights to convert the CPS without the consent of all three Brothers ("the Shareholder's Agreement"). The Shareholder's Agreement is such that it enures and was understood to enure for the benefit of the beneficiaries of the Brothers' respective estates upon death. Due to the mutual trust and confidence which existed between the Brothers and previous dealings between them, the Shareholders' Agreement was not put into writing...
>
> 24. In the premises, by the conclusion of the Family Meeting it was by implication agreed or understood by the Brothers and Neil that the CPS would not be converted into ordinary shares in the absence of their unanimous agreement (as part and parcel of any future separation agreement or by reason of any agreement not to pursue the idea further.) (the Family Agreement). Due to the mutual trust and confidence which existed among the parties at the time, the above Family Agreement was not put in writing...
>
> 32. The conversion of 55 million CPS valued at RM0.01 each into 2,750,000 ordinary shares of RM1.00 each was in breach of the Shareholders' Agreement and the Family Agreement, as well as in breach of section 59 of the Malaysian Companies Act, 1965 ("the Malaysian Act"), as the conversion has resulted in the issuance of ordinary shares of RM1.00 each in WTK Realty at a discounted price of RM1.00 alternatively RM0.80 alternatively RM0.20 below the par value of RM1.00 per ordinary share...
>
> 35A. The conversion of the CPS into ordinary shares in WTK Realty was also in breach of section 175 of the BCA, in that the said conversion constituted a transfer, exchange or other disposition of more than fifty percent in value of the assets of the Company not made in the usual or regular course of the business, but was not authorised by a resolution of the Company's members as required by section 175,As a consequence, the Resolution purportedly passed on 25 March 2013 and the

> conversion of the CPS into ordinary shares are each voidable and should be set aside....
>
> 36. In passing the Resolution, [WKY] and [WKC], acting together with FK Lo, were in breach of the Shareholders' Agreement, the Family Agreement, the BCA and the Malaysian Act. [WKY]'s and [WKC]'s conduct is self-serving with the ultimate and/or predominant aim of diluting the Estate's and Neil's combined shareholding and/or voting rights in WTK Realty, whilst at the same time seeking to increase their combined shareholding and/or voting rights in, and/or control over, WTK Realty through their combined shareholding and that of STIC (of which [WKY] and [WKC] together own two-thirds of the beneficial interest and have exercised *de facto* control since the deceased's death...".

[20] In paragraphs 37 and 41 Ms Ma pleaded that a quasi-partnership existed between the Brothers which was intended to be passed on to their respective estates on their death and she claimed on this basis a legitimate expectation to be consulted after WKN's death.

[21] In paragraph 43 she pleaded that despite numerous requests as one of the beneficial owners of the company she has only been given limited information from WKY's and WKC's lawyers.

> "47. In procuring and/or permitting the Resolution to be passed and the conversion of the CPS into ordinary shares in WTK Realty to take place, the conduct of [WKY] and [WKC] constitutes a breach of the Shareholder's Agreement, the Family Agreement, section 175 of the BCA and /or section 59 of the Malaysian Act, and has caused [Ms Ma] (as executrix of the Estate and/or in her personal capacity as beneficiary of the Estate) to suffer prejudice, in that (i) the Resolution has caused dilution of the Estate's and Neil's combined holding of voting shares in WTK Realty from a majority of 54.68% to 46.8%, depriving them of the Estate's and Neil's combined holding of shares in WTK Realty from whatever their lawful shareholding prior to the Resolution may be found to have been, and/or (iii) the effect of the Resolution is that it has increased [WKY] and [WKC]'s control over WTK Realty."

[22] In paragraph 48(a) she pleaded that the relationship between her and WKY and WKC had irretrievably broken down.

[23] In paragraph 50A she pleaded that because of the foregoing WKY and WKC were in breach of section 121 of the BCA to use their powers as directors for a proper purpose and not to act, or agree to the Company acting, in a manner that contravened the BCA or the memorandum and articles of the Company. As such, the Resolution and the Conversion of the CPS into ordinary shares involved a contravention of the BCA within the meaning of section 184B of the BCA. Section 184B gives the power to the court on application by a member or director of the company to restrain such conduct and to give consequential relief.

[24] The main remedies sought arising from those claims included, *inter alia*, a declaration that the resolution dated 25 March 2013 approving the Conversion was unlawful and void, alternatively it was voidable and an order setting it aside, further or alternatively an order that WKY and WKC buy out the Estate's interest in STIC without discount at a value to be assessed, alternatively, an order that a liquidator be appointed over STIC under section 159(1) of the Insolvency Act 2003 on the "just and equitable" ground specified in section 162(1) thereof.

[25] The nature of the claims set out in the paragraphs of the pleadings mentioned come into focus by reviewing the specific denials in the Re-Amended Defence of WKY and WKC set out as follows:

a. No Shareholder's Agreement or any common understanding, consensus or agreement existed between the Brothers in relation to the Conversion and the terms and conditions for same.

b. No Family Agreement was ever reached between the Brothers and Neil that the CPS would not be converted into ordinary shares of WTK Realty in the absence of unanimous agreement. Further, there was no proposal or any discussion by the parties at the meeting between the Brothers and Neil on 6 December 2012 that any separation of the assets of the Brothers' families, if agreed upon, would be in accordance with the respective shareholdings of the Brothers and Neil in WTK Realty.

c. STIC was not operated as a quasi-partnership and there was no common understanding, consensus or agreement between the Brothers as to how matters in relation to STIC would continue after the Brothers' deaths. Further, following the deceased's WKN's demise, STIC did not operate as a quasi-partnership between the claimant on the one hand, and WKY and WKC on the other hand.

d. The Resolution and the subsequent Conversion were authorized by STIC and were in the best interests of the beneficial owners of STIC and, therefore, STIC.

e. The Claimant's prior consultation about, approval of or consent to the Resolution was not required and there was no Family Agreement, Shareholders' Agreement or quasi-partnership in existence which altered that position.

f. The Estate's indirect interest in WTK Realty (as a result of its shareholding in STIC) was not adversely affected by the Conversion.

g. Therefore the claims of unfair prejudice, unfair discrimination and/or oppression and the Claimant's entitlement to relief, whether as claimed or otherwise, were denied.

h. Further, in the absence of a quasi-partnership between the 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.

i. The Resolution, and ultimately the Conversion, were for a proper purpose as together they facilitated WTK Realty's compliance with conditions of the offer from AmBank (as discussed below) regarding its proposed financing facilities to WTK Realty, which benefited the shareholders of STIC who were also shareholders of WTK Realty.

Is the remedy of winding up available under the procedure used?

[26] Near the end of the case Mr Crow QC sought to amend the Amended Claim Form by adding to the heading the following underlined words "IN THE MATTER OF SECTIONS 184B AND 184I OF THE BVI BUSINESS COMPANIES ACT 2004 AND IN THE MATTER OF SECTIONS 159(1) AND 162(1)(b) OF THE INSOLVENCY ACT 2003".

[27] He also wished to add paragraph (ii) to the body:

> "(ii) section 162 of the Insolvency Act 2003 on the basis that it is just and equitable that a liquidator of the Company should be appointed under section 159(1) thereof; and (iii) section 184B of the BCA on the basis that the Company and/or its director or directors have engaged in conduct that contravenes section 121 and/or section 175 of the BCA and/or the memorandum or articles of the Company."

[28] A similar application was made to amend the Re Amended Statement of Claim by adding the same words to the heading and to the body and to make certain small consequential amendments as paragraph 50B the following (under the new heading (Winding-up on the just and equitable ground):

> "50B. In the alternative, in all the premises it is just and equitable that a liquidator of the Company should be appointed under section 159(1) of the Insolvency Act 2003, pursuant to section 162(1)(b) thereof."

[29] Ostensibly these proposed amendments were to make it clear that Ms Ma was making an independent claim under the Insolvency Act in addition to or as an alternative to her claim under section 184I.

[30] Both Mr Alexander QC on behalf of WKY and WKC and Mr Clifton on behalf of STIC objected. As I understood Mr Clifton's objection it was on procedural grounds which I hope I set out below correctly.

[31] There are only two gateways to obtain a winding up "on just and equitable grounds". One is by way of section 184I of the BCA; the other is by application under section 159(1) of the Insolvency Act 2003 for relief under section 162(1)(b).

[32] The procedures are different. An application under the BCA is by way of a claim form; an application under the Insolvency Act is by way of an Originating Application as a fixed date claim form. An application under the Insolvency Act provides for the judge to case manage the application and to give *inter alia* advertising directions under section 165(1) of the Act. A member's application is subject to dismissal if it is not advertised (section 165). The advertisement under the Insolvency Act makes sense because it tells the world that the claimant is seeking to wind up the company whereas in an application by claim form liquidation is only one of a number of possibilities.

[33] If Mr Clifton is right, a person wishing to avail himself of remedies under both gateways must, it seems to me, take out proceedings under both.

[34] This is apparently what happened in **Wang Zhongyong and Ors v Union Zone Management Limited and Ors** BVIHCMAP2013/0024 which formed part of the authorities. Farara QC JA (Ag.) writing for the panel observed that the appellants had commenced an action by claim form under 184I of the BCA, and had independently applied under section 159(1) of the Insolvency Act for the appointment of liquidators of Union Zone on the just and equitable ground pursuant to section 162(1)(b).

[35] As pointed out by Mr Clifton, because of the mandatory provisions in the Insolvency Act that would have to be foregone, it is no answer that if a party launches only one action under section 184I of the BCA and fails, he can then claim liquidation under section 162(1) (b) of the Insolvency Act by asking the court to waive the requirements and treat the case as having been brought under the

Insolvency Act, merely by the alternative pleading "or alternatively a winding up order under section 162(1)(b) of the Insolvency Act" as in this case.

[36] That is what the claimant sought to achieve here by the proposed amendment.

[37] Mr Crow QC is of the view that the Civil Procedure Rules gives the power to the court to waive non-compliance with the rules. While the court does indeed have power to waive certain requirements it will not so lightly waive the mandatory requirements of the Insolvency Act, especially when it was always open to the Claimant to simultaneously take the insolvency route as well. That route, because of the in-built protections in the Insolvency Act, would give other shareholders an opportunity to choose a non-winding up option by buy out or otherwise. For example, as pointed out by Mr Alexander QC, prejudice would have been caused to the defendants who would have thereby been deprived of at least one defence under the Insolvency Act of having the right to make a pre-emptive buyout offer to the Claimant.

[38] In the UK, **The Companies (Unfair Prejudice Applications) Proceedings Rules 2009** requires that a claim for winding up a company on the just and equitable principles must be presented by a petition. This has in-built protections as well. Most notably, at the first hearing on the fixed date claim form the judge or master in ordering a case management conference may order advertisement of the petition.

[39] Under English law if a claimant does not proceed by petition the claim will be struck out. Contrary to what has been contended by the claimant, there is authority for the proposition that failure to proceed by petition is not a defect in procedure that can be remedied under the CPR. In **Bamber v Eaton** (2007) BCC 877) Pumfrey J observed:

> "The only provision to which I was directed is that of CPR 3.10, which provides as follows:-

"3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction -

"(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

"(b) the court may make an order to remedy the error."

i. It seems to me, as a matter of construction, that the words "error of procedure" relate here to errors in the procedure established by the Civil Procedure Rules themselves. It does not seem to me that the words are apt to relate to requirements imposed by statute other than the statutes underlying the Civil Procedure Rules perhaps, but in any event not to apply to s. 459(1) of the 1985 Act. Failure to use the prescribed route to commence proceedings in relation to unfair prejudice does not seem to me to be merely an error of procedure. It seems to me to be a failure to use the mechanism provided for the purpose. I am, therefore, quite satisfied that CPR 3.10 does not give me jurisdiction to dispense with the requirements of s. 459(1)."

[40] This seems to support the submissions made by Mr Clifton.

[41] It seems to me that Mr Clifton is right. When a claimant seeks as one of the remedies provided by s184I the winding up of the company on the just and equitable ground, he should simultaneously launch a separate action under the Insolvency Act so that other persons may be protected. Otherwise the very Act which is designed to ensure fairness to the complainant/member may become a source of unfairness to others.

[42] For the above reasons and others I agree with Mr Clifton and Mr Alexander QC, and exercise my discretion to refuse the amendments.

The Law Relating To Improper Purpose

[43] Perhaps the leading authority on the test to apply in order to determine whether directors have acted with a proper purpose is the judgment of the Privy Council in **Howard Smith Ltd v Ampol Petroleum** [1974] AC 821, [1974] 1 All ER 1126, [1974] 2 WLR 689. The Supreme Court of New South Wales had struck down an

allotment and issue of shares by directors on the ground that, although motivated by their perception that the best interests of the company would thereby be served, the directors had been motivated by a desire to dilute the shareholding of persons opposed to a possible takeover bid, rather than a desire to augment the company's capital, even though it needed more capital. Giving the judgment of the Judicial Committee (which dismissed the appeal), Lord Wilberforce said this, at pp. 835-836:

> "To define in advance the exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated. No more, in their Lordships' view, can this be done by the use of a phrase – such as 'bona fide in the interests of the company as a whole', or 'for some corporate purpose'. Such phrases, if they do anything more than restate the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity, cases where the directors are acting sectionally, or partially: i.e. improperly favouring one section of the shareholders against another.
>
> In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.
>
> The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment. "(*Mills v. Mills,* 60 C.L.R. 150, 185-186, *per* Dixon J.)
>
> The mainstream of authority, in their Lordships' opinion, supports this approach."

[44] And at page 837 C Lord Wilberforce continued:

> "...So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned: *Fraser v. Whalley*, 2 Hem. & M. 10; *Punt v. Symons & Co. Ltd.* [1903] 2 Ch. 506; *Piercy v. S. Mills & Co. Ltd.* [1920] 1 Ch. 177 ("merely for the purpose of defeating the wishes of the existing majority of shareholders") and *Hogg v. Cramphorn Ltd.* [1967] Ch. 254. In the leading Australian case of *Mills v. Mills*, 60 C.L.R. 150, it was accepted in the High Court that if the purpose of issuing shares was solely to alter the voting power the issue would be invalid. And, though the reported decisions, naturally enough, are expressed in terms of their own facts, there are clear considerations of principle which support the trend they establish. The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management. Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office (*Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame* [1906] 2 Ch. 34), so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers."

[45] It should be noted that in **Howard Smith** the judge made a finding of fact that the purpose of the new issue was simply and solely to dilute the majority voting power held by Ampol and Bulkships (see p 837C).

The Law Relating To A Complaint Under S 184I

[46] The recent law in England has undergone two changes in relation to this cause of action. In s. 210 of the 1948 Companies Act the cause of action was that the actions of the company were "oppressive". This lead to what was considered ambiguity, and so the law was amended by s.75 of the 1980 Companies Act by adding the cause of action "unfairly prejudicial". The 1985 UK Act contains both

"unfairly prejudicial" and "unfairly discriminatory". The BCA has combined all three grounds from all of the various UK Acts.

[47] A member is entitled to complain to the court under s. 184I(1) of the BCA 2004 which states:

> **"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 in that capacity, may apply to the court for an order under this section"**
>
> **"member" in relation to a company is defined as ... "a shareholder or a personal representative of a shareholder." (s.184A)**
>
> **"shareholder" in relation to a company, means "a person whose name is entered in the register of members as the holder of one or more shares or fractional shares, in the company."** (s. 78)

[48] This is clearly based on s.459 of the 1985 UK Companies Act which reads as follows:

> "(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
> (2) The provisions of this Part apply to a person who is not a member of the company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly."

[49] In **O'Neill v Phillips** [1999] 1 WLR 1092, HL, Lord Hoffmann, with whom the other members of the House of Lords agreed, explained the criterion of fairness set out in s.459 (at 1098D-1099A):

> "In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *Saul D. Harrison & Sons Plc* [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based on rational principles ...
>
> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
>
> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. Those principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will

> be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

Locus Standi

[50] Notwithstanding the four questions which I posed near the beginning of the trial, I think Ms Ma does have standing. I had not yet decided when I asked the questions. The four questions were as follows:

(1) Being a threshold issue, can the Court raise the question of jurisdiction ("Question 1");

(2) If so, in relation to the conversion of the CPS, whether or not the conduct of the Defendants complained of was done to Ms Ma qua member ("Question 2");

(3) If she did not experience the conduct qua member, whether she has any locus standi to complain under Section 184I (1) of the BCA ("Question 3"); and

(4) If she has no locus standi on that part of the case, how, if any, does it affect the other parts of her case ("Question 4").

[51] In my judgment she had locus standi by virtue of the definition of "member". At the time she launched the action she was the personal representative of a member, WKN, and the personal representative of a member is by definition of s 78 of the BCA a member. She sues on her own behalf and as personal representative. In as much as the provision in the BCA is clearly modelled on the UK Act, in my judgment, the definition of shareholder was intended to have the same effect as s 459(2) of the 1985 UK Act which allows personal representatives to whom shares have been transferred or transmitted by operation of law to sue under the section. In addition, shares were transferred to Ms Ma from the trustee since 4 May 2014.

[52] Mr Alexander QC embraced the possibility and argued with the help of numerous authorities that Ms Ma does not have locus standi and that for that reason this

claim should be dismissed. In the pleadings there was also an oblique reference to Ms Ma not having a right to complain but it doesn't appear to have originally been a major plank of the defence. If Ms Ma does not have locus standi by virtue of the definition of "member" in the BCA, then, of course, the claim should be dismissed summarily. What follows, therefore, is in case Ms Ma does have standing.

[53] On the authorities a member can complain of actions which "have been", so it can cover acts which took place before she was a member, "are being or likely to be", which includes acts the effect of which are continuing; "oppressive" meaning "burdensome, harsh and wrong" (per the House of Lords in **Scottish Co-Op Wholesale Society v Meyer** [1959] A.C 324), "unfairly discriminatory" that is to say discriminatory but also unfair, or "unfairly prejudicial" that is to say prejudicial but unfairly so. And so actions can be discriminatory if fair, or prejudicial if fair as long as they are not unfair. By definition all "oppressive" actions are likely to be unfair.

[54] The actions relate to "the conduct of the affairs of the company", or "any acts" or "acts of the company". As a company acts through its directors or its members in general meeting, the latter means acts of the company in general meeting or acts of the directors, and "any acts" must mean any acts in purported management of the company.

[55] The acts must be oppressive or unfair to the member in his/her capacity as a member. In his capacity as a member he is entitled to certain rights set out in the Articles and Memorandum of Association of the company, and if the relation of the parties has what Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd** [1973] AC 360 called the "something more" then those rights are superimposed by equitable considerations. Lord Wilberforce at page 379F stated that the "something more" would typically include:

> "(i) an association formed or continued on the basis of a personal relationship , involving mutual confidence-this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some...of the shareholders shall participate in the conduct of the business and, (iii) restriction upon the transfer of the members interest in the company-so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere..."

One result of the imposition of equitable considerations is that parties would not be able to enforce their strict legal rights.

[56] The interests that the courts may be prepared to protect in unfair prejudice petitions are commonly referred to as legitimate expectations. It has been held, for example, that members have a legitimate expectation that a company will be managed lawfully, which in this context means in accordance with the Articles or duties of the directors, and also operate within the law.

[57] The test for unfairness is an objective one: it is not concerned with the wrongdoer's purpose or motive. As such, it is unnecessary to prove that the defendant acted in bad faith or was aware or intended that the conduct in question was unfair. Rather, the question is whether a reasonable bystander would regard the conduct as having unfairly prejudiced the claimant's interests. See **Re R A Noble & Sons (Clothing) Ltd** [1983] BCLC 273, at 290–291, where Nourse J (as he then was) cited with approval the following:

> "The test of unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests".

[58] The test in **Noble** should be applied in the context of Lord Hoffmann's comments in **Saul D. Harrison & Sons Plc** [1995] 1 B.C.L.C. 14, 17-20 where he said this (at 17f-18a):

> " [Counsel] who appeared for the petitioner ... said that the only test of unfairness was whether a reasonable bystander would think that the conduct in question was unfair. This is correct, so far as it goes, and has some support in the cases. Its merit is to emphasise that the court is applying an objective standard of fairness. But I do not think that it is the most illuminating way of putting the matter. For one thing, the standard of fairness must necessarily be laid down by the court. In explaining how the court sets about deciding what is fair in the context of company management, I do not think that it helps a great deal to add the reasonable company watcher to the already substantial cast of imaginary characters which the law uses to personify its standards of justice in different situations. An appeal to the views of an imaginary third party makes the concept seem more vague than it really is. It is more useful to examine the factors which the law actually takes into account in setting the standard.
>
> In deciding what is fair or unfair for the purposes of s459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association"

[59] In this sense, unfair prejudice is to be contrasted with the doctrine of improper purpose. However, when assessing what is equitable a petitioner will normally need to prove the existence of agreements, promises, or understandings, reached among the shareholders at the time the company was established or subsequently and reliance on any such informal understandings.

[60] Reliance on agreement at the time a company is established is likely to be more easily established by the fact that someone chooses to invest money/ effort in the creation of a new business on those understandings. Subsequent reliance may be harder to prove.

[61] The principles to be applied in considering s.184I were considered by Wallbank J of this court in **CH Trustees SA v Omega Services Group Ltd** BVIHC (COM) 0037 of 2015 and he summarized them (para [123]) as follows:

> "What these principles broadly distil to is that a petition will be struck out or dismissed unless:
>
> (a) A petitioner can show that there has been a breach of his contractual rights; or
> (b) He can show that there has been a breach of a quasi-partnership agreement; or
> (c) He can show that the directors have exercised their powers for an ulterior purpose".

[62] Unfairness can take many forms. Apart from the examples already mentioned above, three are relevant claims in these proceedings:

[63] Withholding information: A shareholder in a quasi-partnership, such as a family company, is entitled to be treated openly and in a spirit of cooperation and mutual trust, and as such can expect to be provided with financial information, even if the legislation does not confer a legally enforceable right to such information. As a result, a shareholder in such a company can complain of unfairness if he is not provided with relevant information. See **Oak Investment Partners XII Ltd Partnership v. Boughtwood** [2010] 2 BCLC 459 at §119: "In this case there was no dispute that the Oak/Boughtwood relationship in their corporate arrangements was of a quasi-partnership nature ... [The trial judge was] correct to assess the extent to which the quasi-partnership relationship between Oak and Mr Boughtwood served to impose mutual duties of good faith, trust, disclosure and co-operation on them in the context of the strategic operations of the group" (emphasis added).

[64] Non-payment of dividends: This can constitute unfairly prejudicial conduct, unless a decision not to pay dividends is taken in accordance with any applicable equitable considerations, and in good faith and for a proper purpose. See **Saul D Harrison** [1995] 1 B.C.L.C. 14, 18b-g and **Re a Company (No.00370 of 1987), ex parte Glossop** [1988] 1 WLR 1068, at 1075D to 1077A.

[65] Justifiable loss of confidence in management: Where a director has acted in breach of duty, this may lead to a justifiable loss of confidence on the part of another participant and a breakdown in relations, such that the other participant is entitled to relief under s. 184I, even where no economic loss is caused to the company. An example might be where the controlling shareholders keep directors in office who are demonstrably incompetent.

The Evidence

(1) Ms Ma

[66] After reference to her witness statement Mr Alexander QC first took Ms Ma through the accounts of WTK Realty for each year from 2005 to 2012 pointing out and obtaining her agreement that STIC appears to have been paid a dividend of RM 27,500 per annum. He also sought and obtained her agreement that at the rate of 4.2 "RM" to US$1 the profit for 2012 was RM 64,651,299 and the total equity was RM 1,092,557,809 or approximately US$250 Million.

[67] She admitted that until 2014 she had never been involved with the company and didn't know what its borrowing needs were.

[68] Her attention was drawn to three declarations of trust dated 30 December 2009 each by the trustee Gainsville Limited respectively in favour of WKN, WKY and WKC, the three Brothers, for 1 share each in STIC. It was put to her that in as

much as she is the executor of WKN she could always be outvoted by the other 2 brothers. She denied this and said that all the trustees had to agree.

[69] She was taken through the Articles and Memorandum of the Company. She admitted that she had read them and that there was nothing in them setting out what the Company did and why it was set up.

[70] She was referred to the minutes dated 1 May 2003 of the sole director Ramillies Limited by which LO Fui Kiun ("Mr Lo") was appointed sole director of STIC, and minutes dated 1 June 2003 by Mr Lo as sole director where Ms Kwan Suet Fun was appointed alternate director.

[71] She was referred to paragraph 11 and 12 of her statement and admitted that despite her claim she did not know why WKN decided to create the CPS.

[72] She was further taken through the Resolution by Mr Lo dated 1 July 2004 and the Subscription Agreement dated 1 August 2004 whereby the company WTK Realty agreed to issue the CPS. The conversion ratio set out in the resolution was one ordinary share for every twenty CPS subject to adjustment as stated in the Subscription Agreement. Counsel pointed out and she agreed that the Subscription Agreement was between WTK Realty and STIC. By clause 2.1 WTK Realty agreed to alter its share capital to create the CPS, and by clause 2.2 STIC agreed to subscribe for them. He pointed out that in the 1st schedule it set out the terms of issue, and clause 4 set out the details of how the CPS could be converted. Counsel pointed out and she agreed that under the first Schedule the holder of the CPS was entitled to convert the CPS at any time.

[73] Counsel drew her attention to the Director's resolution dated 30 August 2004 issuing the CPS noting, and she agreed that WKN, WKY, WKC as well as Neil and Patrick Wong, the son of WKY, signed. He then drew her attention to the special resolution the same date amending the Memorandum and Articles of Association

to increase the share Capital of the company to make provision for the CPS and setting out the rights of holders of the CPS, and that that special resolution was signed by WKN.

[74] Counsel put to Ms Ma the pleading in her amended statement of claim and her re-amended statement of claim which stated:

> "11. It was agreed between the Brothers at the time alternatively understood between them that the Company would not exercise its rights to convert the CPS without the consent of all three Brothers ("the Shareholders' Agreement"). The Shareholders' Agreement is such that it enures and was understood to enure for the benefit of the beneficiaries of the Brothers' respective estates upon death. Due to the mutual trust and confidence which existed between the Brothers and previous dealings between them, the Shareholders' Agreement was not put in writing."

[75] Under cross examination Ms Ma could not say when where or at what time the agreement was made. She stated that it was evidenced by the Gainsville Trust because all of the trustees had to agree before anything could be done.

Evaluation Of Ms Ma's Evidence

[76] Ms Ma was referred to in the closing written submission by counsel for the WKY and WKC as a "guarded witness" and by counsel for the claimant as a "careful..." witness. From the court's observation these were both accurate descriptions.

[77] In her witness statement as well as in oral testimony Ms Ma was limited in what she could say from her own personal knowledge. She admitted that up until 2013, the year of her husband WKN's death, she knew very little about the Company. She also had very little personal knowledge about the Company's finances, its financial needs or how it was run. She admitted that she never developed a relationship of trust with WKY and WKC, but heard that there was a relationship of trust between the three Brothers, WKN, WKY and WKC, and knew that WKN had

taken leadership of the family business after their father WTK, who founded what developed into the WTK Group of companies, died on 10 November 2004.

[78] In relation to the alleged family meeting held on 6 December 2012 at the Jewish Hospital in Wollahra where WKN was undergoing treatment for cancer and the family members went to visit him, she was not at the meeting and her evidence related to what she allegedly was told by her son Neil. She understood him to say that an agreement was reached to split up the family assets into two parts and that valuations of properties should proceed to achieve that objective. Witnesses who were at the meeting stated that Janice Ting (as she confirmed in her evidence) put the idea forward and stated that an agreement was made only to explore the idea further.

[79] In relation to the shareholders meeting called to approve the Conversion, Ms Ma confirmed that she had requested WKY to postpone the meeting so that she could obtain probate, and although she had asked for a postponement of several weeks, as it turned out she received probate in Malaysia over a portion of WKN shares on 11 April 2013 just days after the resolution was passed on 6 April 2013 by WTK Realty to authorize the Conversion after STIC by resolution elected to convert them at a meeting on 25 March. However on the evidence the probate did not apply to the majority of shares registered in the name of WKN which were not obtained in the BVI until 2014.

[80] Ms Ma in her witness statement complained that despite being the executor of WKN's estate and one of his heirs she was not consulted on the Conversion. She stated that the Conversion had the effect of diluting the combined shareholding of the WKN estate and her son Neil's shareholding from 54.68% to 46.8% in WTK Realty in an effort by WKY and WKN to seize control of the WTK Group and shut out her side of the family from the level of participation both in management and profit sharing to which they were entitled.

[81] She made an assertion of belief that WTK Realty was a family company. She then made the assertion that as a family company she believed that everyone would have expected the same relationship to continue between the surviving members of the family after any one of them died, but that after WKN's death the relationship between her side of the family on the one hand (notably her and Neil) and WKC and WKC and their families on the other hand has completely broken down. She evidenced this by the large number of ongoing court actions (over 60) between them in Malaysia, BVI and elsewhere.

[82] Under cross examination she admitted that after marrying WKN in 1970 she and her children moved from Malaysia to Australia in 2003 and stayed there until 2013 the year of WKN's death when she went back to see him during his illness. She regarded Hong Kong as her home because that is where her mother lived.

[83] Ms Ma admitted that she knew nothing about the setting up or the terms on which the CPS were set up. She said that when in her statement of claim she referred to a shareholders agreement between the three Brothers, she was not referring to a written agreement, but one that was supposed to be evidenced by the Trust Company Gainsville Limited. She said Gainsville Limited was evidence of the agreement between the Brothers, because the trustee had to agree on any matter before it proceeded. She considered that WKN WKY and WKC had to work together because Gainsville Limited held one of the three shares in trust for each brother and the trusteee had to agree. 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.

[84] Mr Alexander QC put to Ms Ma that her evidence that there was a Family Agreement on 6 December 2012 was in direct contrast to that of her son Neil's that there was no agreement. He referred her to an e-mail dated 15 December 2015 from Neil just 9 days after the meeting where the alleged agreement was to

have taken place where he said that there was no agreement. The e-mail read as follows:

> "Hi Helen,
> I met WKY, WKC and Janice 1 ½ weeks ago.
> They want to break up and divide up the companies and want everything to be valued.
> Janice suggests VPC [valuer] . Can you give me your opinion and recommend other valuers who can do the job?
> They want the public company. They are unable to answer my question on what else they want and the difference in value between the public company and private companies.
> Thus there is no agreement in place except getting valuation organized.
> Who does the audit for the group? Ernst Young Sibu or Ernst Young KL?
> Thanks Neil"

[85] When this was put to her, after a pause, she stated that Neil was referring to the fact that there was no *written* agreement. An e-mail dated 26 December 2012 from Peter Bobbin of Argyle Lawyers Pty Ltd to Janice Ting spoke about getting the appraisals "to enable a *future* agreement for the holding of shares and other interests". Peter Bobbin was WKN's lawyer who was also at the 6 December meeting.

[86] Ms Ma also admitted, when it was put to her, that she could not dispute WKC's account as contained in paragraph 57-67 of his witness statement. In those paragraphs WKC stated that he was at the meeting. He stated that it was an impromptu meeting brought about by his and Janice's visit to the hospital on 5 December when WKN told them Neil wanted to meet them. So they went back the following day and met with Neil. Neil brought a lawyer and introduced him as the

lawyer engaged by WKN's family to design a trust to protect WKN's assets from possible claims against WKN's estate after he passed away.

[87] He stated that there was no agreement as alleged by Ms Ma on the following matters:

(1) that the business of the WTK Group was to be divided between the two sides of the family (the estate and Neil on the one hand and himself and WKY on the other) in accordance with their respective holdings on WTK Realty as at 6 December 2012;

(2) that WKY and he would assume control of WTK Holdings, while the Estate and Neil would assume control of the privately held businesses, including WTK Realty (in its then shareholding structure), STIC and certain other Australian companies and Offshore Companies; and

(3) that any difference in value between WTK Holdings and the remaining privately held businesses would be reconciled between the respective parties in accordance with their respective shareholdings in WTK Realty as at 6 December 2012, following formal valuations obtained by the family.

[88] He said Janice Ting came up with the suggestion of separating the assets because she felt that because of the generation gap, Neil would not work well with WKY and WKC and for that purpose the location of the assets had to be identified.

[89] With respect to Ms Ma's complaints about not having received dividends, Mr Alexander Q.C. took her through the years prior to her receiving probate in the BVI in 2014 showing dividends of RM27,500 per year. He also drew her attention to correspondence with her lawyers showing that a request for information was refused before she was a shareholder, but after she became a shareholder more information than that to which she was entitled was sent to her. There was no

complaint about the information and several months later she commenced this action.

[90] I observed Ms Ma's demeanour throughout, including her expressions, when there was a long pause before she answered certain questions, and when she denied some suggestions even before they were fully put by Mr Alexander QC. In addition to being a "guarded" and "careful" witness as described by counsel, it appeared that her primary aim was to prove her case.

[91] For example, she was less than forthcoming to suggest that, had the shareholder's meeting to approve conversion of the CPS been postponed as she had requested of WKC, she would have within a few days secured the probate of WKN's estate and been able to influence the vote at the meeting. In fact, she knew that that related to probate in Malaysia only which comprised less than one half of the shares of WKN. The probate in relation to all the shares of WKN was not obtained in The BVI until 7 February 2014.

[92] She also clearly extemporaneously tried to sustain her case that Neil had told her that there had been an agreement at the 6 December 2012 "family meeting" by improvising that when Neil stated in his e-mail that there was no agreement he was referring to no *written* agreement.

[93] I formed the view that Ms Ma wanted to be an honest witness, however she was challenged when that conflicted with what she considered necessary to prove her case. This was evident when she was confronted with the conflict in evidence at this trial with what the transcripts recorded her to have stated on the same issue in some of the Malaysian trials. Her explanation was that her answers may be different based on the advice which she obtained at the time.

[94] Much of the relevant evidence is contained in the contemporary documents: the provisions of the Memorandum and Articles of Association, the distribution of the

ownership of shares and directorships in WTK Realty, the profitability of WTK Realty, the history of distribution of dividends to STIC, what happened at the Board minutes, and other such information. The way in which the evidence of the witnesses shed light on this documentation informed my view on whether the allegations of the claimant were proved.

[95] What I have found from the contemporary documents is that the Conversion was done in compliance with the requirements and not in breach of the provisions of the Articles and Memoranda of Association of both STIC and WTK Realty in relation to, inter alia, notices of meetings, and voting on shareholders' and directors' resolutions. Nor was the Conversion done in breach of any relevant law so far as it was material to the determination of this case.

[96] Based on the evidence of Ms Ma reviewed in the context of the contemporary documents, in my judgment the claimant has failed to prove on a balance of probability essential elements of her case namely that there was an agreement not to convert the CPS without the approval of all three of the Brothers, that there was a "Family Meeting" on 6 December 2012, or an agreement at the alleged Family Meeting to dismantle the WTK Group of companies and split up the assets between the two families namely Ms Ma and Neil on the one part and WKY and WKC on the other. The evidence also clearly did not support her claim that there was ever trust and confidence between her and WKY and WKC either before or after the death of WKN.

(2) WKC

[97] In his witness statement WKC adopted the paragraphs of WKY's statement giving the background of the development of the WTK Group of companies. He stated that from its inception his father WTK wished for the three Brothers to have an equal shareholding in WTK Realty. This was the case from its formation in 1981 through share capital increases in 1985, and two increases in 1998, and 1999.

The result was that each of them held 29.16 percent and WTK held 12.52%. In 2002 WKN issued 800,000 shares to his son Neil and 800,000 was issued to each of the other brothers thereby maintaining the ratio of 29.97% to WKC and WKY and 23.52% to WKN and 6.45% to his son Neil, with the remaining 10.09% to WTK.

[98] However, WKN changed this in August 2004 when he filled in blank transfers signed by WTK shortly before he died transferring 1,252,000 shares in WTK Realty to himself which he said was a gift from WTK and again in 2007 he issued 4,000,000 million shares in the company to himself without offering them to other members, without shareholders or Board approval. These gave him a majority over the other two brothers whose shareholding was diluted to 22.66% each, which increased his and Neil's majority to 54.68%.

[99] The other brothers claim that the transfers were unlawful and it is now the subject matter of litigation in the place of incorporation of WTK Realty, Malaysia. WKC stated in his witness statement that he is challenging the validity of the transfers and asking the court to void them so that the shares can be returned to WTK's estate for the benefit of all the beneficiaries.

[100] Those cases are filed in Sibu High Court, Originating Summons No: Sibu HC O/S:SBW-24-39/3-2013 ("OS 39") to challenge the 4,000,000 shares, and in Sibu High Court Civil Suit No: SBW-22NCVC-14/4-2014 ("14/4 Writ") challenging the 1,252,000. WKY presumably has not taken part in the suit because over the years he has signed the company's public accounts confirming the holdings by WKN.

[101] The trial of the 14/4 Writ has concluded and is pending judgment by the Malaysian Court. No date had been fixed for judgment to be handed down.

[102] The defendants say that OS39 and the 14/4 Writ are relevant because if decided in their favour it would show that the majority held by WKN's side of the family was

an illegal majority. The claimant states that it is irrelevant to the basis of her claim that the shares were diluted by the conversion of the CPS.

[103] In cross examination Mr Crow QC explored the meaning of "family company" and the meaning of "family". The witness confirmed that family consisted of the three Brothers (including himself) 3 sisters and their children. The court notes that he omitted to name Ms Ma. His father was the founder of the business.

[104] After Ms Ma obtained probate in the BVI the three shares held by Gainsville Limited were transferred one each the estate, to him and to WKY.

[105] In his witness statement WKC denied that there was a quasi-partnership in relation to STIC and said that WKN ran the company himself. Although there was trust between the three brothers generally when it came to running the company it was left to WKN.

[106] He gave a summary of a number of actions started by Ms Ma and her son in Malaysia in 2014 and 2015 challenging the Conversion, alleging oppression, and conspiracy to injure WKN's estate by diluting the family's majority shareholding in converting the CPS. Some of the actions have been stayed pending determination of others due to the overlap of issues.

[107] In cross examination by Mr Crow QC he made several points set out below.

[108] He accepted that the underlying understanding amongst all three Brothers was that each would have an equal number and percentage of shares in the Company given the fact that all of them were actively involved in and had contributed to the growth and expansion of the business of the WTK Group. There was no written contract.

[109] He said that the trust and confidence only existed when WKN was alive. That trust and confidence never existed with Ms Ma and so there was nothing to break down.

[110] With respect to the 6 December "Family meeting" he said that Janice made the suggestion that the three Brothers should separate because they were not getting along. He said no agreement was reached to do that but there was an agreement to explore it. They agreed to do valuations of property to explore the idea further.

[111] He said with respect to the loan from AmBank he knew there was a requirement that in order to get the financing WTK Realty had to increase its capital.

[112] In his view the Conversion was done in the best interests of the shareholders of STIC, who were also shareholders of WTK Realty as it allowed WTK Realty to comply with the Special Condition of the bank to extend the loan facility. In addition STIC stood to benefit by owning 2,750,000 fully paid up ordinary shares in WTK Realty which were worth substantially more than RM 2,750,000 which it paid for them.

[113] Although the witness 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 for advice he was quite clear: He was at the meeting on 6 December, 2012, and there was no family agreement, there was no agreement not to convert the

CPS, and there was no relationship between Ms Ma and the other two brothers. I found his explanations in this regard credible within the context of the contemporaneous documents.

[115] In the circumstances when it came to making a determination on the motive and reasons for making decisions by WTK Realty and STIC, I relied on the contemporary documents and circumstances themselves and what could be obtained from other witnesses. I did rely on his evidence for matters of which he had direct knowledge and gave clear evidence which in my view was credible. This included matters mentioned in the previous paragraph.

(3) Janice Ting's Evidence

[116] She stated that she is a chartered accountant and is the CFO of WTK Realty, the flagship of the WTK Group of companies headquartered in Malaysia. Her job was to remain in charge of accounts and finance departments assigned to her, directing accounts in the various companies within the WTK Group, and responsible for arranging credit facilities for WTK Realty and various other companies within the WTK Group. Until 2011 when WKN became ill with cancer she had taken instructions from him and after that from WKY who became *de facto* managing director.

[117] However she knew nothing about the accounts of STIC; WKN took care of that himself.

[118] The CPS came into existence by the amendment of WTK Realty's Articles of Association in August 2004. WTK Realty and STIC entered into a subscription agreement to subscribe for 55,000,000 CPS at RM.01 each in WTK Realty for which the Company paid RM550,000. The subscription provided that the company could convert them at any time at the rate of 20 CPS for one ordinary share of WTK Realty.

[119] She assisted WKY in arranging the formalities for the Conversion.

[120] She gave an account of the circumstances leading to the Conversion. Because of pending loss of credit facilities from HSBC Bank Malaysia Berhad ("HSBC") in the sum of RM 15 million and Standard Chartered Bank ("SCB") in the sum of RM 4 million it was necessary to make arrangements to replace RM19 million in working capital for WTK Realty. This resulted from environmental standards required by the banks which were not economically viable for WTK Realty to meet. The facilities were to expire 31 December 2012 but were extended to 31 March 2013, and 30 June 2013 respectively.

[121] Upon informing WKY of the pending financing requirements Janice was instructed to seek alternative financing. By letter dated 16 January 2013 she approached RHB Bank Berhad with which they had a RM7 million facility and AmBank with which they had had a credit facility of RM 15 million nine years previously. She wrote to RHB Bank but received no positive response, which in cross examination she insisted that she followed up by telephone. She also wrote to AmBank and received a positive response requesting further information.

[122] She negotiated with Gary Sim, the director of Corporate & Institutional Banking at AmBank. After back and forth communication by telephone, on 19 March 2013 the bank agreed to make the loan on condition that WTK Realty increased its total issued and paid in capital by RM2,500,000 to bring it to RM19,450,000. She expressed the view that the final figure of RM19,450,000 was due to an erroneous assumption that the paid in capital was RM16,950,000 when in fact it was only RM16,400,000 and so an increase of RM2,500,000 would result in a paid in capital of RM18,900,000. After discovering the mistake she informed AmBank by telephone. They requested that she inform them by letter, which she did and they accepted the position by letter dated 15 July 2013 after the facility had taken effect on 17 May 2013.

[123] A special condition of the loan was that the bank required that the issued paid in capital of WTK Realty be increased. At the meeting Janice admitted that she informed the Board that the conversion of the CPS was the best way to increase the capital because it would not require coming up with any cash. This was because she was aware of a net balance in the ledger of RM5.2 million due by STIC to WTK Reality which she thought could be offset as final payment for the shares. However, she was advised by WTK Realty's Malaysian solicitors that it would be prudent for the company to pay cash for the RM2,200,000 top up so they could confirm to the bank that there was an actual infusion of cash for the converted shares. So STIC was required to pay cash. Arrangements were made to pay the cash as explained later.

[124] WTK Realty gave approval to accept the loan at an emergency meeting of its board of directors held on 22 March 2013 for which written notice had been duly given in accordance with its Articles of Association. On 25 March 2013 STIC resolved to elect to convert the 55,000,000 CPS into 2,750,000 ordinary shares in WTK Realty and gave Notice of Election to WTK Realty.

[125] WTK Realty at an Extraordinary General Meeting (EGM) duly called, resolved to issue the allotment of the 2,750,000 ordinary shares in WTK Realty to STIC and to convert the CPS into ordinary shares. The meeting was held on 6 April 2013 at which a majority of shareholders of WTK Realty voted in favour of authorizing the actions. On 8 April 2013 STIC became the registered holder of 2,750,000 ordinary shares in the capital of WTK Realty.

[126] The AmBank facility finally took effect on 17 May 2013 the month before its extended expiry date.

[127] Janice also denied that the Conversion was to dilute the shareholding of Ms Ma's and Neil's shareholding and noted that if there was dilution all parties suffered

dilution by the same amount and that the Estate's indirect interest increased. This is evident from the table in paragraph [16] above.

[128] She stated that she attended the 6 December 2012 meeting referred to by Ms Ma as the "Family Meeting". Her account was similar to that of WKC that it was not a family meeting and no agreement was reached except to explore an idea which she had put forward to value the assets. That idea was to separate the assets of WKY WKC and WKN's family as she believed that because of the generation gap Neil would not be able to work with WKC and WKY.

[129] She said the suggestion was her own. Neil asked her how they could resolve the difference in value between the publically listed WTK Holdings Berhad and the privately owned companies operating the lumber business. Her suggestion was as follows:

(1) 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 WKT Group;

(2) That Messrs Ernst & Young be appointed to value WTK Holdings Berhad's shares given Messrs Ernst & Young were (and remained) the auditors of the WTK Group; and

(3) 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.

[130] She also offered her opinion to Neil that she 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. She confirmed that no agreement was reached.

[131] Janice also commented on the other proceedings taking place in Malaysia to which she and Ms Ma were parties.

[132] Finally she stated that she tried to get Mr Sim from AmBank to give evidence but because he no longer works with AmBank and due to his current work commitments he was not willing to do so.

[133] Mr Crow QC in cross examination tested the evidence under several heads: the conversion of the CPS was not urgent, Janice did not approach a sufficient number of banks, WTK Realty did not have to borrow because its retained earnings and capital were more than adequate over the years, and it didn't make use of existing facilities.

[134] It was also put to her that she was dishonest. She was dishonest, he suggested, with AmBank in relation to WTK Realty's capitalization, with the Board of WTK Realty in failing to tell them that the Company had to come up with cash to fund the conversion of the CPS after first telling them otherwise, to send the bank a list of shareholders showing WKN was the holder of a number of shares in WTK Realty when she knew his right to certain shares were being challenged in actions in Malaysia, about whether and how much WTK Realty paid for the CPS on conversion, and to say that she was not upset with Neil when he appeared after an absence of 11 years and purported to fire her because he declared that with the death of his father his side of the family had the majority of shares as a result of which he was the managing director of WTK Realty.

[135] In cross examination Janice 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. She outlined the process through which she went to obtain the financing by way of oral and written correspondence from the later quarter of 2012 in accordance with her normal practice to various banks where she thought there was a real possibility of

obtaining the type of financing which WTK Realty required. One real problem she identified which was not evident from her witness statement was the problem of replacement of personal guarantees on the loans. This problem had arisen because of WKY's advancing age and the terminal illness of WKN around that time. Over the years WKN, WKY and WKC had provided the personal guaranties for most of the Group's borrowing, and the banks were becoming jittery about who would replace them, preferring the second generation on the Board namely Neil and Patrick. Indeed the problem manifested itself at the 6 April meeting where the minutes show that Neil refused to give his guarantee to the AmBank loan. This required Janice to go back to the bank and ask that they accept the guarantee of WKY despite his age.

[136] Based on solid accounting principles she dismissed the suggestion that the retained earnings of WTK Realty over the years had anything to do with the need for working capital and that one of the banks she mentioned as a source dealt in property loans not working capital loans. She admitted that a mistake was made concerning the calculation of the total capitalization of WTK Reality at RM19.45 million which had been given to AmBank and admitted that she had to contact the bank and inform them of the mistake and that it should have instead been RM 19.15million. This was due to use of an erroneous figure of RM16.95 million paid in capital instead of RM16.40 million as the starting point of the capitalization before the addition of the RM2.2 million. The RM16.95 million figure actually contained RM550,000 of the convertible shares but to satisfy AmBank's special condition only ordinary shares could be taken into account. The figure RM16.95 million had obviously included the convertible shares as well, which in all of the accounts was carried as capital. 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.

[137] As to the disputes taking place in Malaysia about the validity of WKN's shareholding she said she had to make a presentation to the bank based on the situation as it existed in the accounts, not on what might happen based on the outcome of the cases in Malaysia. No evidence was brought to the attention of the court that the bank required representations concerning pending litigation.

[138] She admitted that prior to the vote to convert the CPS she had told the Board that the best option to increase the share capital to satisfy the special condition of AmBank to provide the facility was conversion of the CPS because it did not require cash. She explained that she thought at the time that she could offset the RM2,200,000 due for the shares at conversion against RM5.2 million owed by STIC to WTK Realty. She said she had to change that approach because of legal advice from the law firm Reddi & Co. that the bank required actual cash flow into WTK Realty to pay for the increased capitalization. She passed this on to WKY and he made arrangements for the money to be wired in that same day.

[139] Counsel tested in cross examination whether STIC in fact paid upon conversion of the CPS and the issuance of the 2,750,000 ordinary shares on the grounds that the exact amount in US$s was not wire transferred in by Centre View, that the instructions for wiring the US$ dollars was on 5 April the same day that the need arose, and that one of the two experts (Mr P Gananathan Pathmanathan and Mr Gopal Sreenevasan) queried whether the RM550,000 that had been paid upon subscription years earlier could be credited to the final payment of RM2,200,000.

[140] Janice relied on entries in WTK Realty's Bank Statement with Standard Chartered Bank dated 30 April 2013 which showed that the sum of RM2,283,576.44 was deposited to the account of WTK Realty on 8 April 2013. This was as a result of a remittance by Centre View Ltd to WTK Realty of an amount of US$749,943.00 which converted into RM2,283,576.44. There was also Official Receipt No. 5267 dated 8 April 2013 from WTK Realty to STIC acknowledging the receipt of the sum of RM 2,200,000.00 cash in payment for the issuance of the ordinary shares.

[141] The remittance advice from Standard Chartered Bank was for RM83,576.44 more than was required and counsel pointed out that the reason given by Janice for the overpayment being the exchange rate difference at the time did not make any sense. Counsel put to the witness that having made a check of the exchange rate movement at the time, Centre View would have had to issue instructions to transfer roughly US$1.5 billion on 5 April (when the payment instruction was issued) to produce an exchange rate differential of RM83,576.11 (when the payment arrived in WKT Realty's account). That, of course, was not evidence and she denied the suggestion.

[142] The witness had from the outset stated that both the arrangement for the funds, and the excess amount over the requirement for RM2.2 million was communicated to her by WKY. She also said that WKY told her that the difference was due to exchange rate fluctuation and she credited the excess to STIC's account.

[143] If this were someone out of the blue advising Janice about the funds, the court might have taken a different view. However, in the emergency circumstances in which the money was required and the fact that it was being confirmed by the head of the company for which she had worked for decades, she cannot be too heavily criticized for not asking a flurry of questions about the source of funds and querying exchange rates, as counsel seemed to suggest.

[144] I also preferred the expert evidence that the first payment of RM550,000 could be credited towards the total subscription price of RM2,750,000 for the issue of ordinary shares.

[145] Even without the Official Receipt for the payment from STIC to WTK Realty, the above evidence including the coincidence of the amount appearing in WTK Realty's accounts on the same day, the bank records showing the remittance, and the time difference between Malaysia and New York of which I take judicial notice,

was sufficient on balance to show that the transfer of the money in for the credit of WTK Realty from Centre View was for the payment by or on behalf of STIC to WTK Realty. On the face of it the documents support the view that as between AmBank and WTK Realty the shares were paid for by cash provided to WTK Realty, and the cash went into the capitalization as required by the bank to satisfy its special condition.

[146] Janice did nevertheless try to defend the excess amount of RM83,576.44 having already admitted that the information came from WKY, and so Mr Crow's criticism of her is well based in that regard.

[147] There was also the suggestion that Janice and WKY expedited the Conversion in reaction to Neil's threatening their positions after returning following an 11 year absence, to claim the throne as managing director by attempting to fire Janice. Janice and WKY denied this motivation. Although this was one of the topics of a separate Board meeting, the real evidence and contemporaneous documents show on a balance of probability, at the very least, that the need for funding was the dominant reason for the Conversion.

[148] In my judgment these opposing submissions do not cast a shadow on the primary issue of whether the funds were paid to WTK Realty for the ordinary shares, or the motivation behind the Conversion. There is also no evidence that AmBank took any issue with the source of the funds to WTK Realty, or raised any issue that the cash was not paid to increase its ordinary share capital in accordance with the bank's special condition. Furthermore, the events help to support the view that in a genuine funding emergency situation everyone was trying to meet the requirements of the bank, and not focusing on diluting any shareholding.

[149] I will summarize this aspect of the evidence by stating that Janice Ting's evidence was tested by skillful and thorough cross examination by Mr Crow QC.

[150] It is telling that in Ms Ma's closing submissions while mention was made of a family group of companies, no mention was made of the 6 December 2012 alleged "family meeting" which featured so prominently in the opening submissions.

[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.

[152] At the end of the day her evidence significantly contributed to the failure of the claimant's claim of a 6 December 2012 "Family Meeting" at the hospital in Sydney, Australia, and the purported agreements that were made thereat on which a significant part of the claimant's primary case was based. This result was confirmed by the contemporaneous documents and, of course, WKC. Significant to the failure of Ms Ma's case on that issue was that she was not at the meeting, and purported to rely on a report of her son Neil. However, both the witnesses who were at the meeting and the contemporaneous documents confirm that there was no such agreement at the meeting. Janice's evidence also neutralized the claim that the claimant was not allowed to register as a shareholder for the 6 April EGM out of spite by WKY and WKC when Janice made it clear without equivocation that they acted on the advice of a named legal firm. To the extent that there were inconsistencies in other parts of her evidence, in my judgment they do nothing to redeem the claimant's primary case.

Witnesses Not Called

[153] Several witnesses were not called who could have possibly given pertinent evidence. WKY was not called. He had applied for leave to give evidence by video link from Malaysia which after a hearing was refused by the court. He therefore relied on the advice of his doctors not to travel the long distance to St Lucia for the trial. Gary Sim who was the banking officer who dealt with the AmBank loan was asked by Janice to give evidence but declined to do so because he is now working in a different institution and did not wish to take the time off. Neil was in court during the trial but he was not called. There were nevertheless contemporaneous documents of which Neil was the author which were helpful to the court. In the circumstances I make no adverse findings in relation to the absence of these or other potential witnesses.

Breach of s.175 under the BCA

[154] Ms Ma complained that as the CPS were 100% of the assets of STIC the Conversion was a breach of s.175 of the BCA because it was not approved by a shareholders' resolution.

[155] Section 175 of the BCA (which replaced and repealed Section 80 of the International Business Companies Act 1984 (the "IBCA")) provides as follows:

> "Subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than fifty per cent in value of the assets of the company, other than a transfer pursuant to the power described in section 28(3), if not made in the usual or regular course of the business carried on by the company, shall be made as follows:
>
> (a) the sale, transfer, lease, exchange or other disposition shall be approved by the directors;
>
> (b) upon approval of the sale, transfer, lease, exchange or other disposition, the directors shall submit details of the

disposition to the members for it to be authorised by a resolution of the members;

(c) if a meeting of members is to be held, notice of the meeting, accompanied by an outline of the disposition, shall be given to each member, whether or not he is entitled to vote on the sale, transfer, lease, exchange or other disposition; and

(d) if it is proposed to obtain the written consent of members, an outline of the disposition shall be given to each member, whether or not he is entitled to consent to the sale, transfer, lease, exchange or other disposition"

[156] Mr Alexander Q.C. argued that the memorandum and articles of association of STIC excluded s.175 by implication by virtue of Clause 12 of the memorandum of association which states:

> *"The directors shall have the power to sell, lease, or otherwise dispose of the whole or any part of the assets, rights, property, or undertaking of the Company for cash, shares, debentures, bonds, mortgages or other securities of any other company, or for such consideration as the Board of Directors may think fit and to assign, transfer, or dispose of all or any of the Company's assets, rights and obligations either for or free of consideration or as donations or gifts, and to improve, manage, develop, exchange, mortgage, turn to account or otherwise deal with all or any part of the assets, rights and property of the Company."*

[157] This is a general power usually contained in the memoranda of association of most companies and it is not necessary to imply that it excludes s.175. I would therefore reject that argument.

[158] Mr Alexander QC also drew reference to **Ciban Management Corporation v Citco (BVI) Ltd & Anor**, a decision of Bannister J dated 27 November 2012 on section 80 of the IBCA. In **Ciban** Bannister J's view was that the purpose of Section 80 (i.e. now section 175 of the BCA) is to ensure that directors do not use their powers to dispose of ventures to which the company's shareholders have not signed up. At paragraphs [67] and [68] he said:

> "In order for section 80 to apply the underlying transaction must not be one made in the usual or regular course of a company's business. Its purpose is to ensure that directors do not use their powers in order to dispose of assets of a company on ventures to which its members have not signed up. I cannot see how it can be said that a sale of a property was not in the usual or regular course of Spectacular's business. Spectacular's business was that of a property holding company. In the nature of things, property holding companies dispose of, as well as acquire, property ...
> In my judgment section 80 did not apply to this transaction ..."

[159] Counsel also drew attention to a BVI commentary on what constitutes the usual or regular course of the business carried on by a company in *British Virgin Islands Commercial Law*, Harney Westwood & Riegels, 3rd Ed which states as at para 2.314:

> "... the judicial analysis [in *Ciban*] suggests a sale by an SPV of its sole asset should be considered to be in the usual and regular course of its business. The court's view is consistent with certain US authorities and appears to refute counter arguments that the use of [the] word "course" in the section seemed to suggest there must be something ongoing in the nature of the business (as indeed the word "business" implies), rather than a one-off function ... For the moment the law on this point appears to be settled"

[160] On the evidence, STIC was a holding company for the CPS which at its inception was approved by all of its beneficial owners (WKN, WKY and WKC) and the CPS were to be converted into ordinary shares in WTK Realty when it wanted to do so. As a holding company, I am persuaded by the argument that all that the Company has done is to exercise its contractual right to "convert".

[161] In any event WKY and WKC (as the majority beneficial owners of the Company) approved the Conversion at the time when it was done because WKY and WKC supported the Conversion by reason of the instructions that WKY, with WKC's blessing, gave to sole director FK Lo regarding carrying out the Conversion.

[162] On the above view, which I support, there has not been a sale, transfer, lease, exchange nor "other disposition" of the CPS in contravention of s175 of the BCA.

Dividends

[163] Ms Ma complained that she has not received any dividends since the Conversion. Mr Alexander QC argued that it is unclear whether or not any of the shareholders have ever received a dividend from STIC prior to the death of WKN. However, until March 2013 the only dividends that the Company received from WTK Realty were small. At the rate of 4.2 US$ to the RM 1 the annual dividend received by STIC was just under US$5,550. Even if all of that were to have been declared as a dividend to the shareholders, that would amount to just over US $1,800 per annum per shareholder. In the context of the value of WTK Realty (US$250 million) and the value of the STIC's shareholding in WTK Realty I am persuaded that is *de minimis*.

Information

[164] Mr Alexander QC pointed out that although Ms Ma accepts that some limited information was provided before the Claim was filed and some further information was provided for what she says was the first time over a year after the Statement of Claim was filed and served, Ms Ma complains that she has not received adequate information or financial statements from the Company.

[165] He argued that the information which a BVI company is required to provide to a member of a company is very limited. Section 100(2) of the BCA provides as follows:

> "Subject to subsection (3), a member of a company is entitled, on giving written notice to the company, to inspect:
> (a) the memorandum and articles;

(b) the register of members;

(c) the register of directors; and

(d) minutes of meetings and resolutions of members and of those classes of members of which he is a member"

[166] He noted that Ms Ma admitted in cross examination that she had been provided with all the information that she was entitled to pursuant to Section 100 of the BCA promptly once she became a shareholder of record in 2014. Further, her complaint that she was only provided with some information more than a year after the proceedings is largely because she did not actually make the request until nearly a year after the proceedings were commenced. It was unclear on the evidence what financial information was available on STIC.

Breach of Malaysian Law

[167] An issue was raised by WKY and WKC of whether the issuance of 4,000,000 shares in WTK Realty caused to be issued by WKN to himself in 2007, and the transfer of 1,252,000 shares transferred to himself in 2004 by use of blank share transfer forms presigned by WTK in 1999 prior to his death, were illegal and void or voidable.

[168] Consequently, they contend that the purported majority in WTK Realty claimed by Ms Ma is the subject matter of dispute in two separate claims filed by WKC in OS 39 and the 14/14 Writ. The results of those cases will decide whether those transactions hold up. In one case the trial is complete and awaiting the court's decision and the other case is part heard.

[169] One expert for the claimant and one for the first and second defendants, Mr P Gananathan Pathmanathan and Mr Gopal Sreenevasan, gave evidence on this issue, among others.

[170] These cases are well advanced in the Malaysian courts. In the interest of comity, I will not decide on these issues which have been fully ventilated in the Malaysian courts and awaiting judgment in one case. The court agrees with Mr Crow QC that it is not necessary to do so to decide on the issues in this case.

Findings of Fact

[171] Applying the law to the totality of the evidence including the oral testimony and the documentary evidence I make the following findings of fact. For ease of reference an attempt was made to tie them directly to the claimant's claims.

(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 6 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.

(2) The Conversion resulted in the dilution of the shareholding of all shareholders, not just Ms Ma.

(3) No Shareholders' Agreement or any common understanding, consensus or agreement existed between the three Brothers in relation to the Conversion and the terms and conditions for same.

(4) No Family Agreement was ever reached between the three Brothers and Neil that the CPS would not be converted into ordinary shares in WTK Realty in the absence of unanimous agreement. Further, there was no proposal or any discussion by the parties at the meeting between the three Brothers and Neil on 6 December 2012 that any separation of the assets of the three Brothers' families, if agreed upon, would be in accordance with the respective shareholdings of the three Brothers and Neil in WTK Realty.

(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.

(8) The resolution to convert the CPS, and ultimately the Conversion, were authorized by the Company and 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. 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.

(9) There is not sufficient evidence that the non-payment of dividends by STIC to Ms Ma has been unfairly prejudicial or unfairly discriminatory to her. To the extent that she has not received dividends to which she is entitled they should be paid to her forthwith.

(10) There is no evidence to support the claim that STIC has been oppressive, unfairly prejudicial or unfairly discriminatory in not providing Ms Ma with information. On the evidence she has been supplied with what is required by the law and the circumstances.

(11) The Conversion was paid for at par value by STIC to WTK Realty and comprised the RM550,000 paid at the time of subscription and the RM2,200,000 at the time of the Conversion.

(12) The Resolution and Conversion was not a breach by each of WKY and WKC of their fiduciary/and or statutory duty under s.121 or s.175 of the BCA not to act, or agree to STIC acting in contravention of the BCA and/or the memorandum and articles of association of STIC.

(13) The Estate's indirect interest in WTK Realty (as a result of its shareholding in STIC) was not adversely affected by the Conversion; in fact it was enhanced.

Summary

[172] As to liability, applying the principles of law governing this to the evidence I am not persuaded that the claimant has proved on a balance of probability that she was subjected to oppression or that the actions of STIC were unfair to her within the meaning of s.184I of the BCA.

[173] Prior to the death of WKN in 2013 it was clear that the three Brothers worked together but without supporting evidence this was not a sufficient basis upon which to create a legitimate expectation that the trust and confidence enjoyed between him and his brothers would continue between his successors and the WKY and WKC parts of the family. I cannot see how that could be as a matter of law only without supporting evidence to that effect. At the time of his death there was no evidence that any trust and confidence ever existed between them so there was none to break down. In May 2014 Gainsville Limited, the trustee, conveyed the shares to each of Ms Ma, WKY, and WKC.

[174] As to the breach of s.121 and s.175 in of the BCA, while a member undoubtedly has a legitimate expectation that a company would act in accordance with the law, it has not been shown that a breach has taken place, and even if it had, how it was

unfair to the Claimant to effectuate the Share Subscription Agreement by converting the CPS into ordinary shares in WTK Realty.

[175] It was suggested that STIC's purpose has been spent because it no longer holds preference shares in WTK Realty and therefore it should be wound up. Although it was said by the Claimant that holding the CPS in WTK Realty was its *raison d'être*, it is not a tenable argument because the objects listed in paragraph 4 of its Memorandum of Association are standard. None of them expressly refers to the holding of preference shares in WTK Realty.

[176] Although it did not feature into my decision on the merits of the claim under s184I, because of the procedure used to commence this action I have doubts whether it would have been open to me to order that the Company be wound up even if I were so minded to do. The court was informed by Mr Crow QC on the last day of the hearing that there was an order made that day in Malaysia that WTK Realty and a few other companies in the WTK Group be wound up. I understand these are now under appeal. In looking at the transcripts I noted that, unlike this case, they were the subject matter of winding up petitions.

Conclusion

[177] For the foregoing reasons I dismiss the claim.

[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 s.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.

[179] A buy-out happens to be one of the remedies which Ms Ma herself asked of the court in her re-amended statement of claim but on special terms. For the avoidance of doubt I am not ordering any special terms.

[180] The value of the shares will be determined at the quantification stage of this action if the parties do not determine it by agreement beforehand.

[181] A case management conference must be set.

[182] I order that the costs of this action be paid by the claimant to the defendants to be assessed if not agreed.

[183] I wish to thank both leading counsel and Mr Clifton and their teams for their assistance on which I relied heavily.

K. Neville Adderley
Commercial Court Judge (Ag.)

By the Court

Registrar