Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1057 OF 2011
NALLINI PATHMANATHAN J
21 MARCH 2014

Company Law — Directors — Breach of fiduciary duties — Claim by company against ex-directors upon allegation of wrongful divestment of company's shareholding in subsidiary — Divestments made to meet urgent liquidity needs of the company — Whether directors acted in breach of fiduciary and statutory duties — Whether breach of duty of care and trust obligations — Whether conspiracy to injure the company — Whether divestments were to detriment of the company — Application of statutory business judgment rule — Whether directors ought to be excused for negligence, default or breach — Companies Act 1965 ss 132(1B) & 354

The plaintiff was a public limited company. The first to third defendants ('the defendants') were the previous directors of the plaintiff. At one time, Petra Energy Bhd ('PEB'), another public listed company, was a subsidiary of the plaintiff. The litigation here arose as a consequence of the divestment of a substantial portion of the shareholding of PEB in 2009, by the then directors of the plaintiff, particularly the defendants. It was the plaintiff's case that through a series of systematic acts and omissions on the part of the defendants, the plaintiff's shares in PEB were methodically disposed of, through two divestments. The fourth defendant is alleged to have assisted or facilitated these divestments. As a consequence of these divestments, the plaintiff complained that it lost its controlling block of shares in PEB and PEB ceased to be a subsidiary of the plaintiff. The shares so divested ended up in the hands of one Shorefield Resources Sdn Bhd, who in turn became the single largest shareholder in PEB. Subsequent to the impugned divestments, an extraordinary general meeting of the plaintiff was convened and held, where the defendants were removed as directors. The plaintiff claimed that the defendants had: (a) acted in breach of their fiduciary and statutory duties as directors of the plaintiff; (b) breached their duty of care and trust obligations as directors of the plaintiff; and (c) conspired to injure the plaintiff by divesting of its shares in PEB, which divestments were to the detriment of the plaintiff. The defendants contended that, in authorising and effecting the two impugned divestments of shares in PEB, they had at all material times acted pursuant to the mandates of the board of directors collectively arrived at in August and November 2009. The defendants pointed to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the

plaintiff and to assuage its dire cash flow position because the plaintiff was at the time in a tight liquidity position and there was threatened litigation by creditors, particularly one Shin Yang Shipyard. The plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9m in the third quarter of 2009 and was unable to obtain funds expeditiously through other means.

Held:

(1) The statutory business judgment rule in s 132(1B) of the Companies Act 1965 ('the Act') encapsulates the common law business judgment rule as set out in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821. It follows from the statutory provisions of s 132(1B) and the common law business judgment rule that in order for the court to ascertain the true purpose/s or dominant purpose for the disposal of the PEB shares comprising an asset of the plaintiff, it was entitled to objectively appraise the chronology of events and situation giving rise to the second and third divestments in order to estimate how pressing or substantial the liquidity issue alleged by the directors was (see para 216).

(2) A company director is recognised as having a fiduciary relationship with his company. A director is therefore subject to the fiduciary's duty of loyalty and the duty to avoid conflicts of interest. The essence of the fiduciary duty is a duty to act bona fide in the interests of the company and not for a collateral purpose. Although the directors are vested with powers which carry implicitly some degree of discretion, such powers must be exercised bona fide, meaning for the purpose for which they were conferred and not arbitrarily or at the will of the directors, but in the interests of the company (see para 219).

(3) In ascertaining the substantial object or purpose for which each of the three directors decided to divest of the PEB shares, it was necessary to ascertain their individual states of mind at the time when the decision to undertake the divestments was made. In ascertaining the state of mind of the directors, regard may be had to the circumstances surrounding the decision (see para 222).

(4) The first defendant who was then the executive chairman and/or director of the plaintiff acted properly in effecting the second and third divestments. There was no breach of his fiduciary, statutory or common law duties. He was not negligent in effecting these divestments. The first defendant was properly conferred with the power to dispose of PEB's shares under the second divestment by reason of the mandate accorded to him by the board of directors of the plaintiff on 26 August 2009. In view of the urgency of the liquidity problem, the first defendant was justified in selling the shares under the second divestment at the depressed price of RM1.53. The defendants had exercised their powers as directors bona

fide in the best interest of the plaintiff. None of these directors exercised their powers for an improper purpose or with ulterior motives (see para 489(a)–(e)).

(5) The decision to undertake the divestments was a business judgment made by the defendants. Even if they had breached their duties albeit statutory, common law or fiduciary, then the fact that they acted honestly and in good faith warranted the invocation of s 354 of the Act (see para 489(h)(i)).

(6) In effecting the third divestment, the first defendant was at all times advised by, and therefore entitled to rely on the advice of professional advisors. The mode of sale of the PEB shares under the third divestment was ratified by the board of directors at their meeting on 22 December 2009. The disposal price of the shares under the third divestment was higher than the mandated price of RM1.80 and the market price. It fell within the valuation range of the fairness consideration report procured by the first defendant prior to effecting the sale. As a consequence the plaintiff made a gain from the third divestment. There was no personal gain to the defendants as a consequence of the third divestment (see para 489(i)(m)).

(7) The allegation of conspiracy failed because there was insufficient evidence to establish this cause of action, albeit lawful means or unlawful means conspiracy. Intention and damage are key elements that had not been established. On the contrary in light of the finding that the defendants acted in the best interest of the plaintiff, this cause of action failed. The two contentions were mutually exclusive (see para 489(q)).

(8) The evidence established at best that the first defendant was aware that the most likely potential purchaser for the PEB shares was going to be Shorefield Resources Sdn Bhd. This fact, taken and considered cumulatively within the chronology of events both prior to and after the divestments, did not form the basis for a cause of action in conspiracy. Instead the evidence taken as a whole established that the primary reason for the divestments was to protect the interests of the company, rather than endanger it (see para 489(r)).

(9) The one exception was the appointment of Fiduciary Ltd to sell the shares falling within the purview of the second divestment. The first defendant alone was negligent or breached his duty of care in appointing a placement agent or broker that was unlicensed under the Capital Market Services Act 2007. Hence, the first defendant was liable to pay the sum of RM192,780 being the costs of appointment of Fiduciary Ltd to the plaintiff (see paras 490–491).

[Bahasa Malaysia summary

Plaintif merupakan syarikat awam berhad. Defendan pertama hingga ketiga ('defendan-defendan') merupakan pengarah-pengarah terdahulu plaintif. Pada satu masa, Petra Energy Bhd ('PEB'), syarikat awam berhad yang lain, adalah subsidiari kepada plaintif. Tindakan undang-undang ini timbul akibat daripada penjualan sebahagian besar pegangan saham oleh PEB pada tahun 2009 oleh pengarah-pengarah terdahulu plaintif, khususnya defendan-defendan. Kes plaintif adalah bahawa menerusi satu siri tindakan dan peninggalan bagi pihak defendan-defendan, saham-saham plaintif dalam PEB dilupuskan secara tidak teratur, melalui dua penjualan. Defendan keempat didakwa membantu atau memudahkan penjualan tersebut. Akibat daripada penjualan ini, plaintif mendakwa bahawa plaintif kehilangan kawalan blok saham-saham dalam PEB dan PEB berhenti menjadi subsidiari kepada plaintif. Saham-saham yang dijual berakhir di tangan Shorefield Resources Sdn Bhd yang kemudiannya menjadi pemegang saham tunggal terbesar dalam PEB. Berikutan penjualan yang diperkatakan, suatu mesyuarat agung luar biasa plaintif telah bersidang dan diadakan, yang mana defendan-defendan dilucut jawatan sebagai pengarah-pengarah. Plaintif mendakwa bahawa defendan-defendan telah: (a) bertindak melanggar kewajipan fidusiari dan statutori mereka sebagai pengarah-pengarah plaintif; (b) melanggar kewajipan menjaga dan amanah mereka sebagai pengarah-pengarah plaintif; dan (c) berkonspirasi untuk merosakkan plaintif dengan menjual saham-sahamnya dalam PEB, yang mana penjualan tersebut merugikan plaintif. Defendan-defendan berhujah bahawa, ketika mengarahkan dan melaksanakan dua penjualan saham-saham dalam PEB, mereka pada semua masa material bertindak menurut mandat lembaga pengarah secara kolektif yang dibuat pada Ogos dan November 2009. Defendan-defendan merujuk kepada fakta bahawa tujuan utama penjualan tersebut adalah untuk memenuhi keperluan likuiditi segera plaintif dan untuk meredakan kedudukan aliran tunainya kerana plaintif pada masa itu berada dalam keadaan likuiditi yang terhad dan diancam tindakan undang-undang oleh pemiutang-pemiutang, khususnya Shin Yang Shipyard. Plaintif telah, untuk pertama kalinya dalam sejarah korporatnya, membuat kerugian kira-kira RM8.9 juta dalam suku ketiga tahun 2009 dan tidak mampu untuk memperolehi dana-dana dengan segera melalui cara lain.

Diputuskan:

(1) Prinsip pertimbangan perniagaan berkanun dalam s 132(1B) Akta Syarikat 1965 ('Akta') merangkumi prinsip pertimbangan perniagaan *common law* seperti yang dinyatakan dalam kes *Howard Smith Ltd v Ampol Ltd* [1974] AC 821. Daripada rujukan peruntukan statutori s 132(1B) dan prinsip pertimbangan perniagaan *common law* bahawa untuk mahkamah memastikan tujuan sebenar atau utama untuk pelupusan saham-saham PEB termasuk satu aset plaintif, mahkamah berhak untuk menilai secara objektif kronologi peristiwa dan keadaan

yang membawa kepada penjualan kedua dan ketiga untuk menilai bagaimana mendesak atau pentingnya isu likuiditi seperti yang telah didakwa oleh pengarah-pengarah (lihat perenggan 216).

(2) Seorang pengarah syarikat diiktiraf dengan mempunyai hubungan fidusiari dengan syarikatnya. Seorang pengarah dengan itu tertakluk kepada kewajipan fidusiari untuk jujur dan kewajipan untuk mengelakkan konflik kepentingan. Inti pati kewajipan fidusiari ialah kewajipan untuk bertindak secara suci hati bagi kepentingan syarikat dan bukannya untuk tujuan kolateral. Walaupun pengarah-pengarah diberikan kuasa untuk melaksanakan pertimbangan secara tersirat, kuasa tersebut mestilah dijalankan secara suci hati, iaitu untuk tujuan di mana kuasa tersebut diberikan dan bukannya secara timbang tara atau mengikut kemahuan pengarah-pengarah tetapi untuk kepentingan syarikat (lihat perenggan 219).

(3) Dalam menentukan objektif atau tujuan untuk tiga pengarah yang masing-masingnya memilih untuk menjual saham-saham PEB, adalah penting untuk memastikan keadaan fikiran mereka pada masa keputusan untuk menjual tersebut dibuat. Dalam memastikan keadaan fikiran pengarah-pengarah, pertimbangan harus dibuat kepada keadaan yang mempengaruhi keputusan tersebut (lihat perenggan 222).

(4) Defendan pertama yang dahulunya pengerusi eksekutif dan/atau pengarah plaintif bertindak wajar dalam melaksanakan penjualan kedua dan ketiga. Tidak terdapat pelanggaran kewajipan fidusiarinya, statutori atau *common law*. Dia tidak cuai dalam menjalankan penjualan tersebut. Defendan pertama diberi kuasa sewajarnya untuk melupuskan saham-saham PEB di bawah penjualan kedua disebabkan mandat yang diberikan kepadanya oleh lembaga pengarah plaintif pada 26 Ogos 2009. Berhubung masalah likuiditi segera, defendan pertama bertindak wajar dalam menjual saham-saham di bawah penjualan kedua pada harga serendah RM1.53. Defendan-defendan telah menggunakan kuasa mereka sebagai pengarah-pengarah secara suci hati untuk kepentingan terbaik plaintif. Tiada seorang pun daripada pengarah-pengarah ini yang menggunakan kuasa mereka untuk tujuan yang tidak wajar atau dengan motif tersembunyi (lihat perenggan 489(a)–(e)).

(5) Keputusan untuk melakukan penjualan merupakan pertimbangan perniagaan yang dibuat oleh defendan-defendan. Walaupun mereka telah melanggar kewajipan sama ada kewajipan statutori, *common law* atau fidusiari mereka, fakta bahawa mereka bertindak jujur dan secara suci hati mewajarkan penggunaan s 354 Akta (lihat perenggan 489(h)(i)).

(6) Dalam menjalankan penjualan ketiga, defendan pertama pada setiap masa dinasihatkan oleh dan dengan itu, berhak untuk bergantung

kepada nasihat penasihat-penasihat profesional. Cara penjualan saham-saham PEB di bawah penjualan ketiga disahkan oleh lembaga pengarah di mesyuarat mereka pada 22 Disember 2009. Harga pelupusan saham-saham di bawah penjualan ketiga lebih tinggi daripada harga yang dimandatkan sebanyak RM1.80 dan harga pasaran. Harga tersebut terangkum dalam julat penilaian laporan pertimbangan keadilan yang diperoleh oleh defendan pertama sebelum menjalankan penjualan. Akibatnya, plaintif mendapat hasil daripada penjualan ketiga. Tiada hasil peribadi kepada defendan-defendan akibat daripada penjualan ketiga (lihat perenggan 489(i)(m)).

(7) Dakwaan konspirasi gagal kerana tidak terdapat keterangan mencukupi untuk membuktikan kausa tindakan ini, sama ada konspirasi secara sah atau tidak sah. Tujuan dan ganti rugi merupakan elemen utama yang tidak dibuktikan. Sebaliknya, berdasarkan dapatan bahawa defendan-defendan bertindak untuk kepentingan terbaik plaintif, kausa tindakan ini gagal. Kedua-dua dakwaan tersebut adalah saling eksklusif (lihat perenggan 489(q)).

(8) Keterangan jelas dibuktikan bahawa defendan pertama juga sedar bahawa pembeli yang paling berpotensi untuk saham-saham PEB ialah Shorefield Resources Sdn Bhd. Fakta ini diambil dan dipertimbangkan secara kumulatif dalam kronologi peristiwa sebelum dan selepas penjualan, tidak membentuk asas untuk kausa tindakan dalam konspirasi. Sebaliknya keterangan tersebut dilihat secara menyeluruh membuktikan bahawa tujuan utama untuk penjualan adalah untuk melindungi kepentingan syarikat, daripada membahayakannya (lihat perenggan 489(r)).

(9) Satu pengecualian adalah pelantikan Fiduciary Ltd untuk menjual saham-saham termasuk dalam bidang kuasa penjualan kedua. Defendan pertama sendiri yang cuai atau melanggar kewajipan menjaganya dalam melantik ejen penempatan atau broker yang tidak berlesen di bawah Akta Perkhidmatan Pasaran Modal 2007. Oleh itu, defendan pertama bertanggungan untuk membayar sejumlah RM192,780 sebagai kos melantik Fiduciary Ltd kepada plaintif (lihat perenggan 490–491).]

Notes

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 204–222.

Cases referred to

A company (No 002708 of 1989) ex parte W and another, Re [1990] BCLC 795, Ch D (refd)

Australian Growth Resources v Van Reesema (1988) 13 ACLR 261, SC (refd)

Australian Securities and Investments Commission v Healey [2011] FCA 717, FC (refd) **A**
Australian Securities and Investments Commission v Rich (2009) 75 ACSR 1, SC (refd)
Automatic Self-Cleansing Filter Syndicate Company Limited v Cunningham [1906] 2 Ch 34, CA (refd) **B**
Blackwell v Moray and Anor (1991) 3 ACSR 255, SC (refd)
Buckingham v Francis and others [1986] BCLC 353, QBD (refd)
Capricorn Diamonds Investments Pty Ltd v Catto and Others (2002) 41 ACSR 376, SC (refd)
Charterbridge Corpn Ltd v Lloyds Bank Ltd [1970] Ch 62, Ch D (refd) **C**
Chew v R (1991) 5 ACSR 473, SC (refd)
City Equitable Fire Insurance Co Ltd, Re [1925] Ch 407, CA (refd)
Deepak Jaikishen a/l Jaikishen Rewachand v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, HC (refd) **D**
Double Acres Sdn Bhd v Tiarasetia [2000] MLJU 477; [2000] 7 CLJ 550, HC (refd)
Duomatic, Re [1969] 2 Ch 365, Ch D (refd)
Fitrzsimmons v R (1997) 23 ACSR 335, SC (folld)
Greenhagh v Ardene Cinemas Ltd [1951] Ch 286, CA (refd) **E**
Hindle v John Cotton Ltd (1919) 56 Sc LR 625 (refd)
Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors [1994] 2 SLR 282, HC (refd)
Maple Leaf Foods Inc v Schenieder Corp (1998) 42 OR (3d) 177 (refd)
Mills v Mills (1938) 60 CLR 150, HC (refd) **F**
Ng Pak Cheong v Global Insurance Co Sdn Bhd [1995] 1 MLJ 64, HC (folld)
Norman and another v Theodore Goddard (a firm) and others (Quirk, third party) [1991] BCLC 1028, Ch D (refd)
Peoples Department Stores Inc (Trustee of) v Wise [2004] 3 SCJ No 64, SC (refd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (folld) **G**
Quin & Axtens Ltd v Salmon [1909] AC 442, HL (refd)
Rose v McGivern [1998] 2 BCLC 593, Ch D (refd)
Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip [1995] 3 MLJ 74; [1996] 2 CLJ 380, PC (refd) **H**
Scott v Scott [1943] 1 All ER 582, Ch D (refd)
Shaw John & Sons (Salford) Ltd v Shaw [1935] 2 KB 113, CA (refd)
Smith and Fawcett, Limited, Re [1942] Ch 304, CA (refd)
Smith (Howard) Ltd v Ampol Petroleum Ltd [1974] AC 821, PC (folld)
Southern Resources Ltd, Re (1989) 15 ACLR 770, SC (refd) **I**

Legislation referred to

Capital Market Services Act 2007
Companies Act 1965 ss 4, 30, 132(1), (1A), (1B), (1C), (1D), (1D)(a),

A (b) 354, Schedule 4 Table A
Evidence Act 1950 s 114(g)

Robert Low (Wong Kian Kheong, Chris Lim, Ariani Abu Bakar and Derrick Chan with him) (Chris Lim Ting & Partners) for the plaintiff.
B *Ben Chan (BH Yap, Philip Koh and Vanessa Wong with him) (Mah Kamariyah & Philip Koh) for the first defendant.*
Alex De Silva (Veena Raguran with him) (Bodipalar Ponnudurai De Silva) for the second and third defendants.
Brendan Siva (Brendan Siva) for the fourth defendant.

C

Nallini Pathmanathan J:

INTRODUCTION

D **[1]** The plaintiff is a public limited company whose shares are traded on Bursa Malaysia. The first to third defendants are the previous directors of the plaintiff. At one time, Petra Energy Bhd ('PEB'), another public listed company, was a subsidiary of the plaintiff.

E **[2]** The litigation here arose as a consequence of the divestment of a substantial portion of the shareholding of PEB in 2009, by the then directors of the plaintiff, particularly the first to third defendants. The first and third defendants were also directors of PEB. The fourth defendant was at all material
F times an executive director of PEB.

[3] It is the plaintiff's case that through a series of systematic acts and omissions on the part of the previous directors, more particularly the first to third defendants, the plaintiff's shares in Petra Energy Bhd were methodically
G disposed of, through two particular divestments. The fourth defendant is alleged to have assisted or facilitated these divestments. As a consequence of these divestments, the plaintiff complains that it lost its controlling block of shares in PEB, which it considered its 'jewel in the crown'. PEB ceased to be a subsidiary of the plaintiff.

H

[4] The plaintiff further complains that all the shares so divested ended up in the hands of one Shorefield Resources Sdn Bhd, who in turn became the single largest shareholder in PEB.

I **[5]** Subsequent to the impugned divestments, an extraordinary general meeting of the plaintiff was convened and held, where the first to third defendants were removed as directors. A new board was reconstituted. The plaintiff then took issue with these divestments by instituting, inter alia, this suit.

[6] The plaintiff's pleaded case, in summary is that the first to third defendants:

(a) acted in breach of their fiduciary and statutory duties as directors of the plaintiff;

(b) breached their duty of care and trust obligations as directors of the plaintiff; and

(c) conspired either lawfully or unlawfully with other persons, including the fourth defendant, to injure the plaintiff by divesting of its shares in PEB, which divestments were to the detriment of the plaintiff.

[7] The defence of the first to third defendants is that they did, in authorising and effecting the two impugned divestments of shares in PEB, act at all material times pursuant to the mandates of the board of directors collectively arrived at in August and November 2009. They maintain that they did, at all times act bona fide in the interests of the plaintiff when effecting such divestments which were duly authorised by the board. In essence they point to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the plaintiff and to assuage its dire cash flow position because:

(a) the plaintiff was at the time in a tight liquidity position;

(b) there was threatened litigation by creditors, particularly one Shin Yang Shipyard;

(c) the plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9m in the third quarter of 2009; and

(d) the plaintiff was unable to obtain funds expeditiously through other means.

[8] As such the first to third defendants maintain that they duly discharged their fiduciary and statutory duties as directors of the plaintiff with regards to these disputed divestments. They point to the fact that they relied on professional advisors in carrying out these transactions.

[9] As for the plea of conspiracy, the first to third and fourth defendants deny the same absolutely, maintaining that there was never at any point of time any agreement arrived at between them and/or others to injure the plaintiff. They deny the existence of any scheme designed to injure the plaintiff by causing the divestment of its 'crown jewel', namely PEB.

[10] It is immediately apparent from the summation of the bare facts of this dispute that the core issues before this court turn on whether the first to third directors:

(a) breached their fiduciary or statutory duties as directors; or

(b) acted in breach of the duty of care they owed (as directors) to the plaintiff in tort; or

(c) acted in breach of their obligations of trust as directors of the plaintiff; and finally

(d) conspired, albeit lawfully or unlawfully to injure the plaintiff by deliberately causing it to lose its prized subsidiary.

(Limb (a) encompasses both the common law and statutory duties owed by the directors to the plaintiff).

[11] In determining these questions it will be necessary to deliberate upon and weigh up the defendant's responses as outlined above.

The trial

[12] The trial of this matter was protracted and took place over the 23 days. The length of the trial can be attributed primarily to the lengthy cross-examination of the defendants. Seven witnesses were called for the plaintiff and seven for the defendant. They are as follows:

For the plaintiffs:		
(a) Shamsul bin Saad	-	PW1
(b) Chew Chong Eu	-	PW2
(c) Tan chee Kiong	-	PW3
(d) Lai Lee Sa	-	PW4
(e) Mohammad Zaidee bin Awang Hipni	-	PW5
(f) Christopher Then Ted Long	-	PW6
(g) Yap Hock Heng	-	PW7
For the defendants:		
(a) Ravindran a/l Navaratnam	-	DW1
(b) Robert Ti	-	DW2
(c) Johan bin Hashim	-	DW3
(d) Tengku Ibrahim Petra	-	DW4
(e) Wong Fook Heng	-	DW5
(f) Tiong Yong Kong	-	DW6
(g) Lee Mee Jiong	-	DW7

[13] The trial was completed on 26 April 2013. Submissions however were only completed and heard in November 2013.

PART I

Salient background facts

The parties

[14] The plaintiff is a public listed company whose shares are quoted and listed on Bursa.

[15] As stated at the outset, PEB is a subsidiary of the plaintiff. To that extent it comprised an asset of the plaintiff. Prior to the listing of PEB, it was a wholly owned subsidiary of the plaintiff.

[16] The main business of PEB is to provide integrated brown field services for the upstream oil and gas industry. In essence PEB provided services for existing onshore or offshore facilities in the development and production of oil and gas. It also provides specialist services for the petrochemical industries in the domestic, regional and global markets.

The defendants

[17]
At the material time, the first to third defendants were directors of the plaintiff. The first and third defendants were also directors of PEB. They were removed as directors by the members of the plaintiff at an extraordinary general meeting of the plaintiff held on 4 February 2010.

[18]
The first defendant, who will be referred to as Tengku Ibrahim, was appointed a director of the plaintiff in May 2000. In addition to being a director, he was also the executive chairman of the plaintiff, and its chief executive officer. He was removed as director on 4 February 2010. His employment as chief executive officer of the plaintiff was terminated by the plaintiff on 19 March 2010.

[19]
The second defendant, who will be referred to as Lawrence Wong, was an independent non-executive director of the plaintiff who was appointed on 27 July 2001 and remained so until his removal on 4 February 2010. He was also the chairman/member of the audit committee of the plaintiff until his removal.

[20]

The third defendant, who will be referred to as Tiong, was appointed as an independent non-executive director of the plaintiff on 3 December 2008 and remained so until his removal on 4 February 2010. He was also a director of PEB.

[21]
The fourth defendant, who will be referred to as Robert Lee, was appointed a director of PEB on 16 May 2007. He was never a director of the plaintiff. He resigned as director of PEB on 18 June 2010.

[22]
The suit against the fifth to seventh defendants, namely TA Securities Holdings Bhd, Yap Hock Heng and TA first Credit Sdn Bhd was discontinued by the plaintiff soon after the commencement of the trial. As such they were no longer defendants in this suit. Only Yap Hock Heng or Richard Yap, who was previously the sixth defendant, testified as a witness in the suit.

The listing of PEB and the procurement of a general shareholders' mandate

[23] PEB was listed on the Bursa in or around 26 July 2007. Its issued and paid up capital was RM97,500,000 comprising 195,000,000 ordinary shares of par value RM0.50 each. The plaintiff owned 126,000,000 of the said ordinary shares. This represented approximately 64.62% of the issued and paid up capital of PEB.

[24] Prior to the listing of PEB, in or around February 2007, the board of directors of the plaintiff sought a general mandate from its shareholders for the divestment of up to 19,500,000 shares or 10% of PEB's issued and paid up capital, post-listing, for cash. The rationale for seeking such a mandate was to enable the plaintiff to effect divestments of portions of its PEB shares at opportune times, in the event of improving market conditions. Such a mandate would eliminate the need to convene separate general meetings to seek shareholders' consent, which would reduce expenses and resources. It would enable the plaintiff to raise and obtain monetary funding expeditiously, to repay borrowings of the plaintiff and to repay bonds that had been issued. The mandate was accorded for a 10% disposal because this would still enable the plaintiff to remain the single largest shareholder of PEB.

[25] The directors succeeded in procuring this mandate. At an extraordinary general meeting held on 26 April 2007, the members resolved and conferred upon the plaintiff, through its directors, a general mandate to divest of up to 10% or 19,5000,000 ordinary shares of PEB of par value RM0.50 ('the general shareholders' mandate'). The terms of the mandate are relevant and in essence provided as follows.

[26] The plaintiff was authorised to divest up to 19.5m shares of RM0.50 each in PEB representing 10% of the enlarged issued and paid-up share capital of PEB after its proposed listing on Bursa, for cash through the open market and or placements, at such time (s) as the directors may in their discretion deem fit, provided the price(s) shall not be more than 10% discount of the five day weighted average market price(s) of the ordinary shares of RM0.50 each in PEB preceding the relevant date of divestment. If the five day weighted average market price is not available than the divestment price is not to be lower than the issue price of the public issue shares. The mandate was to continue until the conclusion of the annual general meeting of PEB for 2008 unless revoked earlier by shareholders in general meeting.

[27] It is pertinent to note that in respect of this divestment the directors were authorised to act for and on behalf of PEB and to take all such steps and execute all necessary documents to effect the divestment mandate. The directors were also accorded full powers under this shareholders' mandate, to give effect or assent to any conditions, modifications, variations and/or amendments as may be required by the relevant authorities or otherwise thought by the directors to be in the interest of the plaintiff ('the general shareholders' mandate').

[28] On 26 July 2007 PEB was duly listed on the main market of Bursa Malaysia.

The first divestment

[29] In or around 10 December 2007, the plaintiff, pursuant to the general mandate accorded to it by the shareholders at general meeting as set out above, divested or disposed of 9 million PEB shares representing approximately 4.62% of the equity of PEB to Lembaga Tabung Haji at a price of RM3.50 per ordinary share ('the first divestment'). This first divestment is not in issue in this suit. Subsequent to such sale, the plaintiffs shareholding in PEB stood at 117 million shares. A balance 10.5 million shares remained earmarked for divestment pursuant to the general shareholders' mandate.

[30] The general shareholder's mandate was renewed on identical terms the following year on 26 June 2008. By this time, the first divestment had been effected. It was subsequently renewed once again on 25 June 2009 on identical terms at the annual general meeting of the plaintiff.

A The chronology of events prior to the disputed second divestment

[31] The next relevant event is a divestment of PEB shares which was effected on 10 September 2009 ('the second divestment'). This divestment is very much in issue.

B

[32] Vide the second divestment the plaintiff divested some 10.5 million PEB shares at the price of RM1.53 per share to TA First Credit Sdn Bhd. After this sale, the plaintiff's shareholding in PEB was reduced to 53.64% or 106.5 million ordinary shares in PEB. The plaintiff also suffered a loss in the sum of about RM500,000 on this disposal to TA First Credit.

C

[33] Prior to the second divestment, at a board meeting of the plaintiff's directors on 26 August 2009, the directors unanimously resolved to effect/achieve this sale, and to that end, authorised D1 to negotiate and finalise the price and sale of PEB shares.

D

[34] The plaintiff by this claim, maintains that the second divestment, and subsequently a third divestment were effected for a collateral and dominant purpose, which was not in the best interests of the company. The plaintiff in fact maintains that far from being in the best interests of the company, these divestments were effected deliberately for the purposes of inflicting or causing injury to the plaintiff. That injury involved the deliberate dissipation or divestment of the majority shareholding of the plaintiff in PEB. Consequently the pleas of a breach of fiduciary, statutory and common law duties are alleged against the defendants in their capacity as directors (save for D4). The defendants, on the other hand, contend to the contrary. They maintain that the two divestments effected in 2009 were undertaken by reason of the solvency needs of the plaintiff, which were dire.

E

F

G

[35] In essence therefore, the dispute before this court centres on the purpose for which the two divestments, namely the second and subsequent divestments in 2009, were actually effected.

H

[36] In order to ascertain the true purpose for which these divestments were undertaken it is necessary to outline and consider the progress of the business of the plaintiff as captured in the meetings of the board of directors throughout the period from mid-2008 to 2009, when the impugned divestments were effected.

I

[37] This is necessary because, in order for the court to assess and adjudicate upon the directors' real purpose or rationale for deciding to sell the shares in PEB during the latter half of 2009, consideration will have to be given to the chronology of events and the state of affairs of the plaintiff both prior to and

during the period when these transactions were undertaken. In this context, the most useful available and objective evidence comprises the minutes of meetings of the board of directors during this period. The minutes of meetings relied upon are all confirmed as correct by the chairman as well as the rest of the directors, and as such comprise evidence of the proceedings and resolutions arrived a those meetings, unless the contrary is proven. The plaintiff has taken issue with some of the minutes (particularly those meetings where the decision to undertake the divestments arose). The plaintiff also seeks to rely on audio tape recordings for selected meetings. The audio recordings are admissible in evidence.

[38] The minutes provide an accurate and contemporaneous record of the state of mind of the directors, the rationale for their decisions and their acts and omissions. It also offers an insight into the running and management of the plaintiff including the part played by senior management personnel. Articles 123(c) and (d) of the articles of association of the plaintiff provide as follows:

> The directors shall cause minutes to be duly entered in books provided for the purpose:
>
> (a) ...
>
> (b) ...
>
> (c) of all resolutions and proceedings at all meetings of the Company and of the directors. Such minutes shall be signed by the Chairman of the meeting at which the proceedings were held or by the Chairman of the next succeeding meeting in which case the minutes shall be confirmed as correct by a director or directors present at the succeeding meeting who was or were also present at the preceding meeting. Such minutes shall be conclusive evidence without further proof of the facts thereon stated; and
>
> (d) of all orders made by the directors and any Committee of directors.

[39] As such, the minutes form a valuable and objective study of the proceedings of the plaintiff at the material time. Apart from the minutes of directors meetings, I have sought to interpose relevant events in the chronology of minutes of meetings.

[40] Matters as encompassed in the minutes of meeting, in conjunction with these other documented events, are therefore directly relevant and assist the court to ascertain the rationale or purpose underlying the decision to sell the subject PEB shares vide the second and third divestments.

Meetings of the board of directors of the plaintiff between February–June 2008 and other salient events

[41] In 2008, the board of directors of the plaintiff comprised Tengku Ibrahim who was also the executive chairman, his wife, Datin Nariza Hajjar Hashim, one Ahmad bin Hj Mohd Sharkan ('Ahmad Sharkan') and Lawrence Wong. A perusal of the minutes of meetings of the plaintiff discloses that relatively detailed minutes of the meetings of the board on a periodic basis are available. A perusal of the minutes of meeting between February 2008 and June 2008 disclose discussions at board level of the proposed expansion and progress of the business of the plaintiff.

Meetings of the board of directors of the plaintiff between August 2008 and July 2009

Meeting of 22 August 2008

[42] For the purposes of this suit, a relevant point in time would be the meeting on 22 August 2008, approximately one year prior to the second divestment. That meeting was attended by Tengku Ibrahim, his wife, Ahmad Sharkan and and Lawrence Wong. *It was noted then that a total of RM400m in borrowings would be due for repayment in the year 2009. The group's cash and cash equivalents available for repayment including escrow accounts pledged as security amounted to only RM200m*. As such the minutes disclose that at that stage, the plaintiff was exploring several methods of fund raising for the group. In short the solvency position of the group, which included the plaintiff, was already noted as giving rise to a problem for the impending year 2009.

Meeting of 27 November 2008

[43] Subsequently at the board meeting of 27 November 2008, comprising the same directors, Tengku Ibrahim highlighted that there would be a delay in the delivery of some vessels which were due in 2008, until 2009. Thirteen vessels were expected for the year 2009. Two workboats being built by an entity known as the Shin Yang Shipyard, were identified for sale to PEB. In this context PEB wanted to purchase two workboats and one work barge from the plaintiff and was sourcing funding in the region of RM200m. There was no dissent expressed from any of the board members in this regard.

[44] At this same meeting it was noted that the results for the plaintiff group for the first nine months of the year 2008 were poor. The board noted even at that stage that meetings would be held with holders of the bonds issue and medium term notes to amend the terms and conditions of the respective issues, so as to alleviate the plaintiff's borrowing position.

[45] At this meeting Tiong was approved as an independent non-executive director of the plaintiff.

[46] It is significant that Tengku Ibrahim also proposed that one Dato' Henry Kho and Shamsul Saad, PW1 ('Shamsul Saad') be appointed as additional executive directors of the plaintiff. However Lawrence Wong wanted to carry out a risk management exercise to ensure complete independence in assessing the risk profiles of the plaintiff's group and the direction of the plaintiff, prior to the entry of more executive directors. It was then decided that the appointment of these two prospective directors would be reviewed at a later date.

[47] This issue is highlighted because it comprises a salient background fact, namely that Dato' Henry Kho and his brother Francis Koh wanted to be appointed to the board of the plaintiff. They were senior general managers with substantial personal shareholdings in the plaintiff. Dato' Henry Kho and Tengku Ibrahim had set up the business of the plaintiff together. By this date, the relationship between the parties had begun to sour. This may be gleaned from a perusal of the evidence of Tengku Ibrahim and in the course of the cross-examination of the plaintiffs primary witness, Shamsul Saad.

Meeting of 26 February 2009

[48] The next board of directors meeting on 26 February 2009 reflected that the share prices of both the plaintiff and PEB were relatively low. Tengku Ibrahim reported that PEB had made an offer on 22 January 2009 to purchase four boats from the plaintiff, as these boats were required by PEB to facilitate a contract awarded to its subsidiary, Petra Resources Sdn Bhd by Sarawak Shell Bhd and Sabah Shell. PEB preferred to acquire the vessels outright from the plaintiff rather than to have to hire the same.

[49] As such, the board of the plaintiff agreed to dispose of these vessels at arm's length prices, or commercial prices. Lawrence Wong requested that an independent valuation be obtained to ascertain the commercial value of these vessels. PEB intended to purchase the vessels utilising financing from banks in the sum of some RM206m.

[50] It is evident from the foregoing that these vessels which were being built at the behest of the plaintiff, would have to be financed initially by the plaintiff, so that it could then proceed to on-sell the same to PEB, after which PEB would take on the financing. (This issue is highlighted because it becomes relevant in the assessment of the veracity of the cash flow problem asserted by the impugned directors in relation to the second divestment).

[51] During this meeting on 26 February 2009, the board was briefed on the audit committee meeting held earlier that day. The minutes disclose that the finance manager of the plaintiff, one Mr Soon Fook Kian, had reported to the audit committee that it would be detrimental for the plaintiff's balance sheet to include further loans in financing the balance purchase price of the vessels which the plaintiff had commissioned to be built. In other words, the finance manager discouraged any further borrowings to alleviate the plaintiff's liability to meet the balance purchase price due for the ships it had commissioned.

[52] In this context the board noted that more borrowings would mean increasing the gearing ratio which would affect the bond ratings and medium term notes issue of the plaintiff. It was further noted by the audit committee that the unaudited interim results for 2008 were considerably lower than 2007, being RM84.9m as at 31 December 2008 as compared to RM155.7m as at 31 December 2007.

[53] With respect to the repayment of borrowings due in 2009, the audit committee was advised, and informed the board that the management personnel of the plaintiff would be signing new loan documentation relating to a RM150m term loan facility from Hwang-DBS Investment Bank Bhd ('Hwang-DBS'). The first tranche comprising RM135m was to be signed by management personnel in Singapore on 27 February 2009, ie the following day. The balance RM14m tranche would be signed a few days later in Malaysia.

[54] This facility was procured to repay the existing bridging loan of RM140m granted by UOB out of which RM32m had been repaid, leaving a balance of RM108m repayable. In addition, the plaintiff had to repay the existing bridging loan of RM100m granted by Hwang-DBS and UOB Malaysia. *In summary, the total liability under the existing loans was in the region of RM208m and the plaintiff would be procuring only RM150m. The balance 58m had to be sourced from internally generated funds.*

[55] Lawrence Wong queried whether it would be possible to save costs by reviewing the need for a senior general manager to be in Singapore, when those same operations could be overseen from the KL office. This query directly impinged on a senior manager named Francis Koh who was seconded there. Francis Koh is Dato' Henry Kho's brother.

Meetings with a prospective purchaser of the plaintiff's or PEB's shares in February and March 2009

[56]
Around February or March 2009, Tengku Ibrahim had two or three meetings with representatives from one Shorefield Resources Sdn Bhd ('Shorefield').

Lawrence Wong and Robert Lee, joined him at one or more of these meetings. According to the defendants, these meetings were initially to discuss issues in relation to the oil and gas industry in general and business in general.

[57]
Tengku Ibrahim testified that initially Shorefield was interested in the purchasing of the plaintiff's shares. Shorefield then expressed an interest in the possible purchase of PEB shares. In May 2009 it requested for permission to conduct a due diligence exercise on PEB. These expressions of interest in the purchase of PEB shares were not reported to the Board. Tengku Ibrahim maintained that as there was no firm offer or indication of the quantum of shares likely to be purchased, save that it could be substantial, he saw no reason to raise it at the Board level.

Meeting of 28 April 2009 which was a joint meeting of the boards of the plaintiff and PEB

[58] At this meeting the board of directors of the plaintiff and PEB compared quotations for the proposed purchase/ acquisition of workboats/barges by PEB from PPB. They determined that the consideration for the workboats would be RM58.4m each and RM96.6m for the barge. Again it is pertinent to note that there was no dissent from any board member with regards to this proposed disposal.

Meeting of the board of directors of the plaintiff on 28 April 2009

[59] The review of the costs of the Singapore operations was presented by Shamsul bin Saad, PW1, who was then part of the management team of the plaintiff and not a director. He discouraged relocation of the Singapore office. It was noted that Kho's remuneration comprised 40–50% of the administrative costs.

[60] The board discussed the renewal of the general mandate from the shareholders. Tengku Ibrahim informed the board that the plaintiff had no intention or plan to further divest any shares in PEB, but that having the mandate in place would be beneficial as PPB could act fast when required to facilitate debt repayment priorities.

Meeting of the board of directors of the plaintiff on 27 May 2009

[61] All three defendants were present at this meeting. Issues of conflict arising from the proposed sale or disposal of the workboats and barge by a subsidiary of the plaintiff to a subsidiary of PEB were discussed. Affin

Investment Bank was appointed as the plaintiff's main adviser and TA Securities Holdings Bhd as the plaintiff's independent advisor for the proposed sale of these vessels to PEB.

[62] Tengku Ibrahim briefed the Board that operational costs had increased by reason of the delayed delivery of the vessels for the shell contract.

[63] Ahmad Sharkan advised that the Finance Manager, Soon Fook Kian had briefed the audit committee meeting that financing arrangements of USD 96m or RM336m had not as yet been arranged for five vessels. The disposal of two to three new vessels would alleviate the financing needed. The disposal of the work boats would be the most appropriate vessels to be disposed of, according to Soon Fook Kian.

[64] Shamsul Saad was then invited to join the meeting in his capacity as the executive director of Intra Oil Services Bhd. The Board expressed concern about losses incurred by Intra Oil Services Bhd. Shamsul sought to allay their fears by stating, inter alia, that management was making both Intra Oil Services Bhd and the Singapore company loss making companies to absorb tax. He proposed the sale of old vessels. Shamsul then left the meeting.

[65] Tengku Ibrahim again advised the board that he had been approached with a request to upgrade Dato' Kho Poh Eng, Francis Koh Pho Wat and Shamsul Saad to be executive directors of the plaintiff. The board noted that while it would welcome the three candidates in view of their valuable services, the board had to consider the impact of having additional executive board members, given the board composition in terms of the number of independent directors and its status of being a bumiputera company with bumiputera content. Accordingly Shamsul Saad was the first to join the board of the plaintiff commencing 1 July 2009.

Due diligence by Ernst & Young in May 2009

[66] Datuk Bustari Yusof of Shorefield Resources Sdn Bhd as stated earlier, had expressed an interest in purchasing, inter alia, PEB shares. It was one of several entities that had expressed an interest in purchasing these shares. OBYU Holdings is another of Datuk Bustari Yusof's companies. OBYU Holdings then sought permission to appoint professionals to conduct a due diligence exercise. Permission to do so was granted by Tengku Ibrahim who duly informed Robert Lee, the fourth defendant, in his capacity as an executive director of PEB. However the due diligence exercise was not carried out until September 2009 by two representatives from Ernst & Young. Robert Lee was not advised of the purpose of the due diligence exercise.

[67] The evidence of D4 discloses that upon being advised of the due diligence he instructed the financial controller of PEB, on Chong Chie Ming to issue an email to several members of the accounting department to facilitate the due diligence exercise. This email was produced in evidence and disclosed to the recipients, namely employees of PEB, that Ernst & Young as external auditors were undertaking a due diligence. It is evident that the exercise was not a covert operation.

[68] The undertaking of this due diligence of PEB's operations was not formally reported to the board of the plaintiff by Tengku Ibrahim. It was not reported to the board of PEB by Robert Lee. Both these defendants testified that they did not think it was material to do so because there was no firm indication from Shorefield that it was going to purchase PEB shares at that juncture.

[69] In order to ensure the confidentiality of PEB's records, a non-disclosure agreement was executed. It was signed by Tengku Ibrahim on behalf of the plaintiff. There are no minutes from the board of directors authorising the disclosure of PEB information to Ernst & Young or Shorefield. Neither was the fact of the execution of the non-disclosure agreement reported formally to the board. Tengku Ibrahim maintained in the course of his evidence that he did not believe he had to bring the matter to the board in order to authorise the due diligence.

[70] The plaintiff points to this fact as primary evidence of Tengku Ibrahim and the other defendants conspiring with Shorefield Resources Sdn Bhd to sell the plaintiff's shares in PEB to Shorefield Resources Sdn Bhd with the ultimate purpose of causing injury or detriment to the plaintiff.

Annual General Meeting of the plaintiff of 25 June 2009

[71] The shareholders' general mandate was renewed.

Other meetings in June 2009

[72] Tengku Ibrahim met up with one Robert Ti of TA Securities Holdings Bhd and asked him to undertake a valuation of PEB shares. Lawrence Wong and Tiong were present at this meeting. Robert Ti testified that he was not advised of the purpose for the valuation. Neither was there any mention of a sale of PEB shares. A report entitled the fairness consideration report was eventually issued in November 2009.

[73] In June 2009, the fourth defendant, Robert Lee arranged for a meeting between Datuk Bustari Yusof of Shorefield and one AWT, a joint venture partner of PEB in Perth. The meeting was set up at Datuk Yusof s behest.

Meeting of the board of the plaintiff on 23 July 2009

[74] Shamsul Saad, Lawrence Wong, Tiong and Ahmad Sharkan were present and Sharkan presided as chairman. He advised that the workboats were ready for delivery and a discussion on the registration of these vessels, in order to cushion and buffer costs and expenses for the plaintiff's group, was discussed with independent advisors who were present at the meeting. It is pertinent that Shamsul expressed no dissent at all in relation to the proposed disposal of these vessels by the plaintiff to PEB.

Event of August 2009

[75] Robert Lee, the fourth defendant in this suit, then the executive director of PEB, advised Tengku Ibrahim that Shin Yang Shipyard was threatening to take legal action against the plaintiff for its failure to pay the balance purchase price for the vessel known as Petra Galaxy, which had been completely built and completed.

[76] The vessel was required by a PEB subsidiary for a contract with Shell worth approximately RM1.1 billion and compliance with this contract had already been delayed since early 2009. Notwithstanding the completion of the vessel, delivery could not be undertaken because the balance purchase price had not, or could not be paid by the plaintiff.

Meeting of 26 August 2009

[77] The meeting on 26 August 2009 was the meeting immediately prior to the second divestment and is therefore of considerable significance. Tengku Ibrahim, Shamsul Saad, Ahmad Sharkan, Lawrence Wong and Tiong were present. Mr Soon Fook Kian, a manager in the chief executive officer's office, who was in charge of finance also joined the meeting on invitation.

(a) Tengku Ibrahim advised the Board that Shin Yang Shipyard had advised of its intention to take legal action against the plaintiff's group in respect of the delayed payment of the balance sums due for a vessel that was being built by the shipyard, namely Petra Galaxy.

Tengku Ibrahim further advised that the delay in the sale of the vessels by the plaintiff to PEB, ie the proposed disposal exercise was holding up the release of the syndicated term loan facilities already approved by the bankers to the Petra Energy Group to finance the said vessels;

(b) PEB had exhausted all internal funds to pay the deposit of RM59m for Petra Endeavour and RM41m for Petra Orbit and had insufficient cash flow to pay the deposit of RM41m for Petra Galaxy. In effect therefore, PEB was short of RM41m. However it was the plaintiff who had contracted for the building of these vessels. It was the plaintiff who stood to be sued by Shin Yang Shipyard for non payment. There could also not be any drawdown of PEB's approved facilities for these vessels until the disposal exercise from the plaintiff to PEB had been achieved. This in turn could only be achieved after the shareholders consent had been obtained. The extraordinary general meeting to procure such consent was fixed for the following month, ie September 2009. (The approval was ultimately only obtained in November 2009). In other words, as matters stood, there appeared to be insufficient credit or funding to meet the demand for payment by Shin Yang Shipyard;

(c) PEB required the vessels to meet the shell contracts. The shell contract with PEB was valued at RM1.1 billion;

(d) the board was concerned about the possible loss of the shell contract if the vessels were not delivered on time. It considered the payment of a portion of the balance payment to Shin Yang first so that Petra Galaxy could be delivered to PEB to meet the shell contract by early October;

In order to assess the feasibility of this idea, Mr Soon Fook Kian, the finance manager, was called to join the meeting to discuss the cash flow position of the plaintiff's group.

The minutes disclose the following: Mr Soon Fook Kian was asked whether the plaintiff had sufficient surplus cash flow to pay Shin Yang the balance payment for Petra Galaxy in order to take delivery of it. Mr Soon Fook Kian advised that the cash flow as 'very tight' and that the plaintiff group had no surplus cash for that purpose.

Mr Soon Fook Kian went on to inform the Board that the management had been meeting up with many bankers. He also said that the plaintiff would have to forego taking delivery of several other vessels if funding for them was not available. He stated that the plaintiff's cash position was expected to increase by RM75m, but only upon the successful implementation of the disposal to PEB of the three vessels.

In other words, Mr Soon Fook Kian made it clear that it was simply not possible for the plaintiff to use any cash to pay Shin Yang Shipyard so as to take delivery of Petra Galaxy. This seemingly less than significant matter was in fact of great importance because without the vessel the group stood to lose out on significant revenue from the Shell contract which was worth about RM1.1 billion. It is also clear from a perusal of the minutes of this meeting that no solutions were put forward by the finance manager to resolve this cash flow problem.

(e) a solution had to be found in respect of the plaintiff's predicament. The Board then considered the option of selling the plaintiff's shareholding in PEB as a means of raising cash. After some deliberation, the Board resolved that in view of the current tight cash flow position of the plaintiff, it should divest of some its shares in PEB to meet the cash requirements of the plaintiff;

It is noteworthy that Shamsul Saad, the primary witness for the plaintiff, made no comment nor objected to the proposed sale. On the contrary it appears from the minutes that he supported this initiative to raise funds. Nor was there any protestation or opposition to this proposed sale by the primary person charged with the responsibility for the finances of the plaintiff, namely Soon Fook Kian.

A perusal of the minutes discloses that Soon Fook Kian, despite being the primary financial officer having conduct of the finances of the plaintiff at an operational level, failed or neglected to point out that any such sale of PEB shares would be futile or useless in that it would not resolve the plaintiff's problems. He failed to highlight that the proceeds of any such sale would go towards an escrow account which the plaintiff had with Hwang-DBS Investment Bank Bhd ('Hwang-DBS') because the plaintiff had recently borrowed some RM 150m from the bank (as set out above in February 2009). The entirety of the PEB shares had been pledged to Hwang- DBS as security for the purpose of procuring the RM150m loan. Mr Soon Fook Kian's lack of objection in fact suggests that he, in his capacity as the manager responsible for finance, concurred with and supported the board's decision. Mr Soon Fook Kian left only after this issue had been deliberated upon.

(f) The board then passed a resolution authorising Tengku Ibrahim to:

(i) negotiate;

(ii) finalise the price; and

(iii) finalise the sale of the PEB shares.

(g) Shamsul Saad then briefed the board on the prevailing business position of the plaintiff and its business outlook. In essence Shamsul advised that the plaintiff's marine business was badly affected by the global economic crisis resulting in profit margins having decreased for the second quarter financial results for 2009.

He went on to advise that the vessel utilisation rate was only 67% while marine business activity was down by 30%. Only a small number of vessels were on hire. Four were idle and two old vessels were laid up for sale to mitigate operational costs. In other words Shamsul Saad himself presented a bleak picture in relation to the future business prospects of PPB.

The second divestment

[78] As a result of the decision of the Board, as evidenced by the resolutions passed on 26 August 2009, Tengku Ibrahim undertook the second divestment on 10 September 2009. Prior to this, on 4 September 2009 Tengku Ibrahim, in his capacity as the executive chairman and chief executive officer of the plaintiff, wrote a letter to Hwang-DBS stating, inter alia, as follows:

(a) he clarified that at the AGM of the plaintiff held on 25 June 2009 the shareholders had approved the renewal of the Shareholders General Mandate to divest up to 19.5 million ordinary shares of RM0.50 each in EPB representing 10% of the enlarged issued and paid up share capital of PEB. With the disposal of 9 million shares on 10 December 2007, a balance of 10.5 million PEB shares remained mandated for divestment.

(b) he further advised that the plaintiff intended to divest of the balance 10.5 million shares at the best obtained price through a private placement.

(c) he specified that he was writing to Hwang-DBS to seek its consent for the private placement and undertook to remit the proceeds of the share placement into the escrow account kept with Hwang DBS.

[79] As outlined earlier, all the PEB shares owned by the plaintiff were pledged to Hwang-DBS as collateral for loan or credit facilities extended to the plaintiff in the sum of RM150m. The loan from DBS had been arranged and procured in or around 27 February 2009. Soon Fook Kian was the contact person named in the agreements relating to this loan ('the facility agreement').

[80] Tengku Ibrahim testified in the course of his evidence that this letter of 4 September 2009 was prepared by his management personnel for him to sign, as a matter of course, more particularly Mr Soon Fook Kian. In any event, despite the contents of the same, it does not appear to have occurred to either Tengku Ibrahim or Mr Soon Fook Kian, that the proposed sale of the PEB shares would not have the desired effect of alleviating the plaintiff's cash flow. Neither does it appear to have occurred to either of them that the sale had in fact been mandated by the board on 26 August 2009 primarily to meet the plaintiff's urgent cash flow or liquidity problem, pursuant to the board's powers of management which necessarily included the power to sell.

[81] In this context it should be noted that the plaintiff maintains vide its pleadings and evidence that the second divestment was undertaken pursuant to the shareholders general mandate and relies on the foregoing letter in part to support its contention.

The sale of 10.5 million shares on 10 September 2009 ('the second divestment')

[82] How then was the sale effected? Tengku Ibrahim had been accorded full powers by the board to negotiate, finalise the sale price and finally the sale itself of the 10.5 million PEB shares. Tengku Ibrahim, upon recommendation, appointed one fiduciary limited, a foreign based broker to source a purchaser and effect the transaction. The basis for a choice of a foreign broker was to invite a wider group of bidders. However unknown to Tengku Ibrahim, fiduciary limited had no license under the Capital Market Services Act 2007.

[83] Fiduciary limited received and therefore forwarded the proposal of only one bidder who offered to purchase the 10.5 million shares at RM1.53 per share. The purchaser of the shares, according to Tengku Ibrahim, was not divulged to him. As the primary consideration at the time was to raise cash to meet the plaintiff's cash flow problems, this sole offer was accepted. The offer was below market price. However, according to Tengku Ibrahim, his primary concern was the tight cash flow affecting operations. He was concerned that there would be difficulties even paying the plaintiff's own employees' salaries. He maintained that although the price offered reflected more than the 10% discount authorised by the shareholders under the general shareholders' mandate, such extra discount was justified by the urgency of the disposal. This decision forms a core part of the plaintiff's complaint against Tengku Ibrahim and the other defendant directors. In any event, the sale proceeded.

[84] On 10 September 2009, the 10.5 million PEB shares were disposed at a price of RM1.53 per share giving rise to an aggregate sale consideration of RM16,065,000. Fiduciary limited levied a fee equivalent to 1.2% of the total consideration underlying the second divestment in the sum of RM192,780 which was duly paid on 14 September 2009. Overall the plaintiff suffered a loss of RM500,000 by reason of this sale. The plaintiff's shareholding in PEB was reduced to 54.62% or 106.5 million ordinary shares in PEB. It subsequently transpired that the purchaser of this bloc of shares was TA first Credit Sdn Bhd (previously the seventh defendant, but the plaintiff discontinued its claim against it). It is pertinent that TA first Credit Sdn Bhd maintained that the 10.5 million PEB shares were purchased from Maybank Investment Bank Bhd.

First announcement to Bursa relating to second divestment

[85] On 11 September 2009, the plaintiff made an announcement to Bursa Malaysia in respect of this disposal. The announcement stipulated, inter alia, that:

(a) it had disposed of 10.5 million ordinary shares of RM0.50 in PEB at the price of RM1.53 per share via placement by broker;

(b) the proceeds from the divestment would be utilised to pare down bank borrowings;

(c) the plaintiff and the group would have a loss on disposal of approximately RM0.5 million;

(d) none of the directors, major shareholders of the plaintiff or its subsidiaries or persons connected with them had any interest, direct or indirect in the divestment.

[86] On 30 September 2009, TA first Credit Sdn Bhd sold 2m PEB shares to one Shorefield Resources Sdn Bhd ('Shorefield') at a price of RM1.80. Then subsequently on 27 October 2009, TA first Credit Sdn Bhd sold a further 7.7 million PEB shares to Shorefield Bhd at RM1.80 per share.

[87] In summary, as a consequence of the second divestment the plaintiff incurred a loss of RM500,000. Tengku Ibrahim testified in the course of his evidence that the shares had to be disposed at that point in time because of the tight liquidity position of the plaintiff which was exacerbated by the impending threat of a legal demand for payment by Shin Yang, and the need to take delivery of a much needed vessel. If delivery of the vessel could not be obtained, then there was the further bleak prospect of losing a lucrative contract with Shell worth almost RM1 billion.

[88] As against this, the plaintiff maintains that there was no evidence proffered of the demand for repayment by Shin Yang or the other consequential problems and issues arising from the cash flow problem.

[89] In short, the plaintiff maintains that the entire 'cash flow issue' was contrived or engineered by Tengku Ibrahim with the assistance or connivance of Lawrence Wong and Tiong, the two independent non-executive directors.

[90] It should also be noted that no personal gain nor interest was acquired by either Tengku Ibrahim or any of the other impugned directors by reason of the second divestment. No such allegation is made against the impugned directors.

[91] However, it is clear that the second divestment did not achieve the purpose of alleviating the cash flow problem as intended, by reason of the monies being channelled directly to the plaintiff's Hwang-DBS account as explained earlier.

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[92] Tengku Ibrahim realised that the proceeds of sale fo the second divestment could not be utilised to meet the Shin Yang demand as they were held in an escrow account for the repayment of the Hwang-DBS loan. In the course of his evidence, Tengku Ibrahim stated that he then had to find some other resolution. This was ultimately achieved by PEB sourcing sufficient monies to procure a bank guarantee in favour of Shin Yang. This is one of the main reasons the plaintiff maintains evidences the fact that the cash flow problem relied upon by the impugned directors is 'contrived'.

Disposal of three of the plaintiff's vessels to PEB

[93] On 24 October 2009 in preparation for the impending extraordinary general meeting to be held on 9 November 2009 in relation to the disposal of vessels by the plaintiff to PEB, the plaintiff's independent advisor, TA Securities Holdings Bhd issued an independent letter of advice to non-interested shareholders of the plaintiff in relation to the proposed disposal.

[94] The independent advisor essentially approved the sale and the rationale for the same. At no time was it suggested that this proposed disposal was to the detriment of either the plaintiff or PEB.

[95] A circular to shareholders containing, inter alia, this independent advice as well as all salient details pertaining to the proposed disposal of three vessels from to the plaintiff to the defendant was duly circulated in anticipation of the extraordinary general meeting on 9 November 2009.

[96] On 27 October 2009, Lawrence Wong and Tiong met up with Affin Investment Bank for the purposes of exploratory discussions on the regulations involved in any possible disposal of PEB shares. No written advice was issued pursuant to this meeting.

The extraordinary general meeting of 9 November 2009

[97] On 9 November 2009, the plaintiff convened an extraordinary general meeting to procure shareholder consent for the proposed disposal of the three vessels to PEB by the plaintiff. Ahmad Sharkan, Lawrence Wong, Tiong and Shamsul were present at this meeting. Ahmad Sharkan chaired the meeting. (It should be noted that he was not present at the meeting on 26 August 2009 when the decision to undertake the second divestment was made). Tengku Ibrahim and his wife were not at the meeting as both of them were interested parties in the business to be conducted that morning. All three resolutions that

morning pertained to the sale of the three vessels from the plaintiff to PEB. The three resolutions were passed unanimously.

[98] In the course of this meeting questions were posed in relation to the disposal of the PEB shares vide the second divestment. One Madam Cheng, a shareholder, asked whether the plaintiff's board of directors intended to sell the plaintiff's entire shareholding in PEB and if so, whether the Board would call for an EGM for shareholder's approval. Ahmad Sharkan replied that the mandate for the sale of 55% of PEB shares had not been discussed. He also stated that the second divestment had been undertaken effectively pursuant to the shareholders' general mandate.

Letter from Nagendran a/l Nadarajah

[99] Nagendran is a shareholder in a public listed company called Perisai Petroleum Bhd together with Dato' Henry Kho. On 11 November 2009, the aforesaid Nagendran wrote to Tengku Ibrahim proposing to purchase the entirety of Tengku Ibrahim's shareholding in the plaintiff. Reference was made to a meeting between Tengku Ibrahim and Dato' Henry Kho Poh Eng.

[100] A perusal of this letter reveals an offer to relieve Tengku Ibrahim of his shareholding in the plaintiff on terms. It is pertinent that in his letter, Nagendran makes reference to the proposed sale of the plaintiff's entire 55% equity in PEB on an en bloc basis. The letter also seeks to impose a condition to the offer to purchase, whereby Dato' Kho Poh Eng and his brother Mr Koh Pho Wat, who were both then senior management personnel of the Group, come onto the Board of the plaintiff upon acceptance of the offer. Nagendran appeared to be allied to Dato' Kho Poh Eng.

[101] While scarce evidence was led at trial on this issue, particularly as neither of the Koh brothers or other senior management personnel of the plaintiff testified, it appears that the relationship between Tengku Ibrahim and the Koh brothers was clearly breaking down or had already broken down.

[102] More significantly it also shows that the possibility of the sale of the entirety of the PEB shares was already a matter that had been discussed, certainly by Dato' Kho Poh Eng, Tengku Ibrahim and Nagendran. The offer in its entirety would have the effect of removing Tengku Ibrahim entirely from the plaintiff, with the Koh brothers at the helm of the plaintiff company. The sale of PEB would also have the effect of de-merging PEB and the plaintiff.

[103] This offer to purchase his entire shareholding in the plaintiff was rejected by Tengku Ibrahim.

Meeting of 16 November 2011:

[104] (a) The next salient event is the board meeting held on 16 November 2011. Tengku Ibrahim, his wife, Shamsul Saad, Lawrence Wong and Tiong were present. Mr Soon Fook Kian was present by invitation. It was noted at the outset that the Board meeting had initially been scheduled to be held on 18 November 2009 but had been brought forward to 16 November 2009 as the plaintiff's share price had not been stable over the recent days due to negative news, including speculations on its results;

(b) The minutes of the EGM held on 9 November 2009 were considered. They had been signed by Sharkan as the chairman of the EGM. Shamsul asked that the minutes be amended to record the questions and answers recorded during the EGM. The company secretary explained that it is the general practice for minutes of general meetings to be recorded in the conclusive rather than the narrative form, and that this had been the practice for years. However Shamsul was adamant and after deliberation, the board agreed to his request by instructing the company secretary to keep the digital voice recording of the proceedings of that EGM and all future general meetings of the company in the minutes book from thence forth;

(c) Lawrence Wong then advised the meeting of the outcome of the audit committee meeting which he had chaired immediately prior to the board meeting. He highlighted that the unaudited results of the plaintiff and the group for the third quarter ended 30 September 2009 recorded a consolidated net loss of RM8.9m. The quarter's results were compared with the previous quarter's results and that of the preceding year's corresponding quarter. The net profit of the plaintiff had decreased by a significant 55% compared to the previous year, 2008;

(d) Shamsul then reported on the business position and business outlook of the marine services of the plaintiff and its group. There was a detailed discussion on the various vessels and utilisation rate as well as projections on usage and charter. In essence the business position appeared discouraging and doubtful;

Tiong expressed the board's concern about the manner in which management was managing the plaintiff's profit and loss or cash flow.

Shamsul advised that overall vessel utilisation rate would only be around 50% for the next three months and was unlikely to change for the first quarter of 2010. He only expected improvement towards the fourth quarter of 2010, ie in more than a year's time. Lawrence Wong asked that Soon Fook Kian prepare

cash flow projections based on appropriate assumptions, for example on a worst case scenario and feasible scenario. Soon Fook Kian was asked to join the meeting.

Shamsul was queried on the failure of the plaintiff to submit a tender for a job worth approximately RM400m. Shamsul explained that the tender was only open for a short time and the relevant staff were not familiar with Malaysian domestic tender requirements. Shamsul was effectively censured for failing to secure a lucrative job.

(e) when Mr Soon joined the meeting he was asked specifically, according to the minutes, whether the plaintiff Group would face any cash flow problems assuming a utilisation rate of 50%. Mr Soon commented that he thought a 60% utilisation was within comfort leve but that he needed to do a cash flow simulation. He opined that the sale of old vessels would help improve cash flow, but Shamsul stated that the disposal of old vessels was difficult in the then global economic crunch. Tiong suggested that management prepare the relevant cash flow simulations for the next 12 months, as he thought the group would face cash flow problems in the near future;

It is pertinent to note that throughout this discussion, none of the attendees appeared to be of the opinion that the cash flow situation was a farce or contrived. The minutes divulge that there were serious discussions about cash flow problems, admitted and acknowledged by key management personnel, namely Shamsul and Soon Fook Kian.

(f) the unaudited interim financial results for the third quarter ended 30 September 2009 were then reviewed. A query arose as to a footnote to the notes to the financial results which stated that there remained a balance of 10.5 million PEB shares mandated for divestment under the shareholders general mandate of 25 June 2009. The minutes disclose that Soon Fook Kian advised that he had been asked by analysts whether the sale of the 10.5 million PEB shares in September 2009 was classified under the shareholder's general mandate or otherwise. Tengku Ibrahim stated that that sale was not under the shareholder's general mandate. He further clarified that as such the plaintiff did not have to comply with the 10% discount restriction under the mandate;

(g) It was only at this juncture that Soon Fook Kian, according to the minutes, advised the board that the proceeds arising from the sale of the 10.5 million shares could only be used to repay the RM150m Hwang-DBS syndicated loan facilities as those shares comprised a part of the security for the borrowings by the plaintiff;

He reminded the board that at the last meeting he was asked the cash position of the plaintiff in order to pay up the balance purchase price for Petra Galaxy, which was due for delivery and acceptance, and whether the plaintiff could advance monies to the shipyard so as not to have the vessel delivery delayed. This statement from Soon shows that the demand from Shin Yang shipyard was not a fiction but a reality.

The minutes then go on to state that at the last meeting the board thought that the plaintiff group could use the proceeds arising from the sale of the PEB shares for the purposes of meeting the Shin Yang demand. However Soon explained, in the minutes, that the proceeds of approximately RM16m were instead utilised for the part prepayment of the RM150m syndicated loan from Hwang-DBS. As the first repayment as only due in March 2010, the second divestment had not had any bearing on the plaintiff's cash flow requirements. It is pertinent to note at this juncture that this explanation emanated entirely from Mr Soon who had failed to notify the board of this issue at the previous meeting when the sale of shares was deliberated upon. It is also salient that the minutes indicate that Soon took the stance that the entire board was under the impression that the second divestment would alleviate the plaintiff's cash flow issues. In other words, Soon accepted that there was a cash flow problem vis a vis the plaintiff, as did Shamsul who attended the prior board meeting.

(h) at the board meeting of 16 November 2009, the minutes show that Soon Fook Kian went on to point out that the plaintiff had two major loans, namely the bonds and medium term notes with a total outstanding amount of RM285m remaining due, and the syndicated term loan facility of RM150m;

The board then asked and Soon replied that if the entirety of the PEB shares were sold the plaintiff would have free cash of RM116m plus interest savings of RM13.5m a year following full repayment of the RM150m loan. However there would be an estimated loss of dividend income of RM2m to RM3m expected from the investment in PEB and the loss of consolidated earnings from the investment in PEB.

(i) next the board resolved to release the third quarter results to Bursa and the Securities Commission on behalf of the plaintiff. Tengku Ibrahim cautioned that the net loss had given rise to negative news in relation to the group and he warned that the plaintiff had to be careful not to divulge any price-sensitive information when meeting analysts. The secretary then left to release these results;

(j) the minutes disclose that when the secretary returned an hour later at 7.40pm, the board had gathered from Soon Fook Kian that the plaintiff would face cash flow problems based on the assumption that the vessel utilisation rate

was 50% for the next 12 months, on a worst case scenario. In order to manage this cash flow situation, the board had considered several options including a rights issue or private placement, increased borrowings but not exceeding a gearing ratio of 1.5 times, the disposal of assets including vessels and finally the disposal of PEB shares;

As such the board had requested Shamsul and Soon to report to the board at an adjourned board meeting to be held in two days' time, ie, 18 November 2009, on cash flow simulations based on the worst case scenario and other appropriate scenarios.

Again it is crucial to note that the manner of operations and day to day running of this company required significant input from senior management personnel, namely Shamsul Saad and Soon Fook Kian. The board clearly operated on the basis of factual data and information pertaining to the operations of the plaintiff and the group provided by these two key personnel. There was no reason for any member of the board to doubt the veracity of their presentations. As such it cannot be said that either Tengku Ibrahim or Lawrence Wong or Tiong were instrumental in creating or preparing significant financial data in relation to cash flow projections. Shamsul Saad prepared the operational projections and Soon prepared the financial projections.

(k) the minutes disclose that Soon Fook Kian then informed Tengku Ibrahim that the plaintiff's lead bankers sought meetings with him to seek comfort due to the negative news in the market regarding changes in the controlling shareholders which might trigger default in the borrowings;

(l) the article published in *The Edge Malaysia* week 15 to 22 November 2009 was then discussed. The article spoke of the troubled times in the Petra Perdana Group by reason of shareholder disagreements, referring to the Tengku Ibrahim and Koh factions. It predicted the emergence of a new majority shareholder, Bustari. It also suggested that directors such as Tiong were selling down their shareholding in the plaintiff. As a newspaper report it is hearsay and of little evidential value, but it is mentioned here because the article was discussed;

Tiong denied the allegation of a sale of shares as referred to in the publication. Tengku Ibrahim advised that the group communications director had advised that the source of the news report appeared to be 'high level political sources'. Tengku Ibrahim stated that the allegations in the article were untrue. However he put on record that he knew Datuk Bustari Yusoff as they both had common in-laws. There was no formal disclosure on his part at this juncture that Shorefield had conducted a due diligence on PEB in February and March of that year.

[105] After discussion of a few other matters the meeting was adjourned to 18 November 2009.

Meeting of 18 November 2009:

[106] (a) this is an important meeting because it was at this meeting that the decision to sell the entire remaining balance of PEB shares was taken. The entire discussion at the meeting was recorded and was made available to this court. The meeting took in excess of two hours. The board, with Soon Fook Kian present by invitation, undertook a comprehensive review of the plaintiff's financial status as had been decided at the earlier meeting on 16 November 2011;

I undertook the task of listening to the audio recording of the meeting of 18 November 2011, and found it to be of considerable and significant use. This is primarily because it afforded an objective and honest depiction of the manner in which the decision to dispose of the PEB shares was arrived at. Having listened painstakingly to the same for a period of more than two hours, it appears to this court that this recording affords important evidence in the instant case.

The primary challenge by the plaintiff in this case is that selected directors, namely Tengku Ibrahim, Lawrence Wong and Tiong created and masterminded a plot to divest of the PEB shares to shorefield resources despite the objections and reluctance of Shamsul Saad. After hearing this tape, it will immediately become apparent that the decision to sell the PEB shares was a considered and collective decision by all the members of the Board then present, with importantly, significant support from Soon Fook Kian.

a review was undertaken of the plaintiff's business projections and cash flow requirements. Tengku Ibrahim who chaired the meeting reported to the board that he had to face lenders due to market rumours and the consolidated net loss of RM8.9m for the third quarter of 2009 which had been announced. He expressed disappointment over the net loss for the three months period and commented that management personnel had not performed satisfactorily.

[107] Tengku Ibrahim then focussed on projections and referred to the figures given at the previous meeting where Shamsul had projected a utilisation rate of the fleet of vessels at 57% for the last quarter of 2009 and Soon's projection that a 60% utilisation rate was within comfort levels in terms of cash flow. Mr Soon then highlighted that he had not had sufficient time to prepare a detailed cash flow simulation on a month to month basis.

[108] The minutes and the audio recording disclose that Soon Fook Kian then diverted the attention of the board to advise of what he termed a more critical issue. This related to the timing when PEB would be able to drawdown its facilities with its bankers in relation to the disposal of the three vessels by PPB to it. It will be recalled that upon disposal of the vessels, PEB would then have to pay the plaintiff for those vessels by drawing down on its facilities. The current problem related to when such drawdown could be effected. Normally, Soon pointed out, full payment is made upon exchange of vessel delivery. However in the instant case the plaintiff had already delivered the vessels to PEB, and Soon felt that there would be delay in the creation of a relevant charge before drawdown could be effected. Although this was not expressly stated, it follows that any such delay would have a negative impact on the plaintiff's cash flow as the plaintiff needed to be paid for the sale of the vessels to assist in the alleviation of its cash flow problem. This issue was discussed at some length.

[109] Then Soon Foon Kian went on to deliver the results of the simulations he had projected. He concluded that applying an overall fleet utilisation rate of 50%, the plaintiff group would be short of RM70m at the end of 31 December 2010. If vessel utilisation were 65%, the shortfall would be reduced to RM40m. Shamsul confirmed that he was satisfied with the assumptions utilised by Soon. In summary Soon advised the board that using both scenarios, the group would still have a 'substantial cash flow deficit'. A utilisation rate of 80% was required in order for the group to reach comfort levels.

[110] While the minutes merely record a greatly shortened form of the discussion, the digital recording gives a more fleshed-out picture. The fleshed-out picture discloses that Shamsul and Soon were primarily responsible for the representations on cash flow delivered to the board.

[111] The board collectively (including Shamsul) and Soon Fook Kian agreed that the plaintiff needed to find ways and means for the plaintiff to stay afloat for the following 12 months pending improvements to market conditions.

[112] Shamsul then took up the reins by making presentations on the projected utilisation rate based on a conservative estimate and the worst case scenario.

[113] After hearing Soon's cash flow projections and Shamsul's fleet utilisation rates and projections up to 31 December 2010, the board noted that the bottom line was 'not very good' and that steps had to be taken to manage the situation, especially the cash flow situation. The board then noted that as discussed during the board meeting on 16 November 2009 the following options would be considered to manage the cash flow situation:

(a) rights issue or private placement;

(b) increase borrowings but not exceeding a gearing ratio of 1.5 times;

(c) disposal of assets including but not limited to vessels; and

(d) disposal of PEB shares

[114] Shamsul commented that the option of selling old vessels would be difficult to effect in the near future in view of market conditions. Soon Foon Kian considered the option of the placement of PEB shares and advised that this was not a suitable option. The board agreed that it was not in favour of share placement and additional borrowings from financial institutions, apart from the difficulty of obtaining additional loans.

[115] Tengku Ibrahim noted that there was only RM2m in cash available to the plaintiff at that juncture. Mr Soon advised that cash proceeds would come from PEB arising from the recent disposal of the three vessels in the sum of RM72m but only upon PEB being able to effect a full drawdown of its syndicated loan. Of this sum, after repaying borrowings, the plaintiff would be left with RM52m for its operating expenses for three to four months. There was no solution beyond that.

[116] The board then re-considered the option of disposing of all of the PEB shares. Soon Fook Kian advised that at a proposed disposal rate of RM1.80 per share, the plaintiff could derive RM191m from the 106.5 million available PEB shares. From these proceeds of RM191m, the plaintiff would have to repay Hwang-DBS the sum of RM150m leaving a balance of RM41m plus the RM60m repayment of advances from the PEB Group which would allow the plaintiff to enjoy a net cash inflow of approximately RM100m arising from the disposal of the entirety of the PEB shares. This would cover the plaintiff for the period of up to 31 December 2010 when a shortfall of RM70m was expected, given the projections of Shamsul and Soon. As against this option the board considered that it would mean that the plaintiff could no longer consolidate the PEB Group earnings. The board then considered the fact that the proposed measure was purely a short term measure and that further long term measures were necessary to meet the needs of the plaintiff.

[117] Tengku Ibrahim then summarised the position by stating that it appeared that the sale of the PEB shares appeared to be the best option. All of the board members, including Shamsul agreed in principle to the sale of the entirety of the PEB shares. It is significant and pertinent that Mr Soon supported this proposed course of action by highlighting that the objective would be defeated if the plaintiff only chose to sell 30% or 40% of the plaintiff's holdings in PEB shares.

[118] Tengku further informed the board that he had had to be honest with the bankers the previous day when they asked him whether it was possible that the plaintiff would sell the PEB shares. The bankers' opinions had been sought and they thought it was good to effect the sale.

[119] Shamsul then proposed that the board carry out an open tender for the sale of the PEB shares en bloc so as to be transparent as possible and to ensure that the plaintiff obtained the best possible price for the shares. He also asked that the sale not be carried out by the previous placement agent utilised for the disposal of the 10.5 million PEB shars where a loss of RM500,000 had been incurred.

[120] Tengku commented that the net loss was from the brokerage fee but Mr Soon advised that the brokerage fee was about RM200,000 while the loss was approximately RM500,000. This was because the price of RM1.53 per share was too low a rate. Tengku then assured the board that the rate would not result in a loss on this occasion as a valuation would be carried out.

[121] The board then sought Soon's estimate on a minimum price per share for PEB shares. Soon Fook Kian outlined his assumptions and concluded that the net proceeds obtained from a sale of the PEB shares at RM1.80 would be sufficient to make the plaintiff profitable.

[122] The minutes further disclose that Soon Fook Kian pointed out that from the investor relations point of view, if a general offer is triggered, investors like Lembaga Tabung Haji might be upset with the share price of RM1.80 per share. But if there were no general offer triggered, then it would not affect them. It is clear from this piece of advice emanating from Mr Soon as disclosed by the board minutes, that his estimation of a suitable price to meet the cash flow problem was RM1.80, as a minimum price. Further any offer which triggered a mandatory general offer was not encouraged.

[123] Lawrence Wong suggested the appointment of a placement agent in order to procure the best share price available. Moreover this would mean that the plaintiff would not be involved in any identification of the buyer. Tiong insisted that there had to be a valuation by an investment banker in giving Tengku the mandate to sell the entirety of the PEB shares.

[124] It is therefore clear that all members of the board, including Lawrence Wong and Tiong, suggested various measures to ensure the independence of the sale and the procurement of the best possible price.

[125] The board then had a further discussion with Mr Soon on the minimum share price and agreed at a proposed disposal at a minimum of

RM1.80 per share. If the eventual sale price was below this approved minimum price, then Tengku was required to revert to the board for a discussion again.

[126] At item 3.49 the clear mandate of the board for the disposal of the entirety of the 55% PEB shares comprising 106.5m shares was approved subject to the sale being effected:

(a) en bloc;

(b) by way of an open tender;

(c) the appointment of placement agent and advisers;

(d) the availability of the valuation of PEB shares by an independent valuer;

(e) the net proceeds on the proposed disposal at a minimum of RM1.80 per PEB share; and

(f) compliance with all rules and regulations.

[127] Tengku Ibrahim was mandated to carry out the sale of the PEB shares.

[128] The meeting ended some time after this mandate was given. Discussion centred on the requirement of the consent of Hwang-DBS, the necessity to make an announcement in relation to the proposed disposal etc. The company secretary's advice was sought and she opined that as the proposed sale was in a state of flux no announcement was required. If the sale were to proceed she anticipated that shareholders' approval would be required. It was determined that complete confidentiality be maintained. The board therefore decided against the need to make an announcement.

[129] Shamsul noted that Tengku would be appointing the placement agent. He asked that Dato' Kho Poh Eng and Mr Soon be delegated to handle the corporate exercise. Tengku pointed out that Mr Soon and the company secretary had been assisting him in corporate exercise matters. Mr Soon stated that he takes instructions from both Tengku Ibrahim as chairman and Dato' Kho Poh Eng. Tengku Ibrahim stated he would advise Dato' Kho Poh Eng.

[130] It is clear from the foregoing that Soon Fook Kian took orders from both Tengku and Dato' Kho.

Chronology of events after the meeting of 18 November 2009

Letters to TA Securities Holdings Bhd as placement agent and valuer

[131] Immediately after the meeting on 18 November 2009, Tengku caused to be issued to the placement agent, TA Securities Holding Bhd, two letters.

Both letters are dated 18 November 2009. In the first letter, Tengku Ibrahim asks TA Securities Holdings Bhd to carry out a valuation exercise to ascertain a fair valuation of PEB shares. Vide the second letter Tengku Ibrahim wrote to the same entity, ie TA Securities Holdings Bhd as placement agent. This letter stipulates that the plaintiff irrevocably and unconditionally appoints TA Securities Holdings Bhd to be its exclusive placement agent to sell the entire shareholding of 54.62% of PEB shares by way of tender at a minimum price of RM1.80 per share and to secure the best offer in pricing and terms. An agreed fee of 3% of the total sale price consideration was also stipulated, which was to be deducted from the gross sale proceeds. The irrevocable authorisation was valid for a period of one month from 18 November 2011.

[132] In this context it will be recalled that the board had not decided upon the identity of any particular placement agent but had merely accorded the mandate to Tengku to see to these matters.

[133] Tengku explained that he had written this letter after having contacted one Richard Yap of TA Securities Holdings Bhd, PW7 ('Richard Yap') who had advised on the proper terms to be inserted in the letter. Tengku issued these letters immediately after the board meeting on 18 November 2009 because he was on leave and travelling abroad the following day, from 19 November 2009 to 4 December 2009.

Letter of authority to act issued by Tengku to Lawrence Wong for the tenure of his leave

[134] To that end, Tengku Ibrahim also issued a letter of authority to act to Lawrence Wong to act on his behalf in respect of the disposal of up to 54.62% of Petra Energy shares in accordance with the board approval. It also authorised Lawrence Wong to liaise and act with the placement agent, TA Securities Holdings Bhd. This letter of authority was valid only until Tengku's return on 4 December 2009.

Legal opinion sought on legality of mechanism to sell PEB shares and the necessity or otherwise of an announcement

[135] On 19 November 2009 Lawrence Wong sought and procured a legal opinion from a legal firm called Chris Koh on the following issues:

(a) the mechanism to be undertaken in disposing of the entirety of the PEB shares in the interests of the plaintiff; and

(b) whether an immediate announcement was required.

[136] The legal opinion set out the law relating to the duties of directors to act in the best interests of the company. It goes on to advice that the 'draft' letter of engagement to TA Securities Holdings Bhd appeared to be in order, in so far as it appeared to be issued in good faith by the board that the placement agent had the necessary skill, knowledge and experience to guide and advise the board in meeting its objectives in relation to the sale. In relation to the need for an immediate announcement, the opinion proffered was that given the state of flux in relation to the proposed sale, no announcement was required at that juncture. In short, the legal opinion appeared to provide reassurance in relation to the appointment of a placement agent as well as the lack of the need for an announcement at that juncture.

Letter of advice from Investment Banker, Affin Investment Bank

[137] On 20 November 2009, Lawrence Wong and Tiong visited and sought advice from Affin Investment Bank. On 23 November 2009, the plaintiff received advice from Affin Investment Bank in relation to the proposed disposal of the equity interest in PEB. Johan Hashim, DW3 ('Johan Hashim'). It will be recalled that Lawrence Wong and Tiong had in fact attended a meeting with Johan Hashim in late October 2009. This was at the behest of Tengku Ibrahim who wanted to ascertain the regulatory implications of a disposal of the PEB shares. However Tengku Ibrahim could not attend the meeting and delegated Lawrence Wong and Tiong to do so on his behalf. This is borne out by the evidence of Johan Hashim, Lawrence Wong and Tengku.

[138] Johan Hashim explained that the first meeting related to queries as to how the plaintiff could raise funds given its financial difficulties. One of the options considered the sale of the PEB shares either en bloc or by way of a sale in two tranches. Lawrence Wong and Tiong sought Affin's advice on both options. There was a second meeting held on 20 November 2009 between Johan Hashim and Lawrence Wong and Tiong. They sought his advice in respect of the best possible or most viable way of disposing of the PEB shares given the board's mandate on 18 November 2009.

[139] Vide the letter of advice from Affin dated 23 November 2009, Affin provided comments on the two options available to sell the PEB shares, namely a one- time disposal of the plaintiff's entire 54.62% equity interest in PEB via an open tender process and secondly by a staggered disposal in two tranches of 25% and 29.62% respectively. Johan Hashim recommended to the board of the plaintiff to undertake option 2, namely the staggered disposal in two tranches. This is consonant with the advice given by TA Securities Holdings Bhd.

Letter of advice from placement agent as to mechanism to be adopted in the sale of the PEB shares

[140] On the same day, ie 23 November 2009, TA Securities Holdings Bhd wrote to the plaintiff, attention Lawrence Wong, advising, inter alia, that the maximum shareholding that could be sold without obtaining shareholders' approval was 32%. Therefore TA Securities Holdings Bhd proposed that the placement exercise be undertaken in two stages. Stage one involved the placement of the block of shares that does not require shareholders' approval. Such a sale, which did not require shareholders' mandate, could be sold within the validity period of one month accorded to TA Securities Holdings Bhd. Stage two envisaged the procurement of shareholders' approval for the sale of the remaining balance. This would require more than one month and to that end TA Securities Holdings Bhd sought an extension of the validity period for a further three months.

[141] It was also advised that in view of the urgency of the placement exercise, stage one would be executed by directly approaching and subsequently negotiating with numerous potential genuinely committed parties who were prepared to purchase large blocks of PEB shares. The best offer would be accepted. It is evident from this letter that the placement agent was outlining the best manner in which the PEB shares could be sold in the shortest possible time at the best possible price.

[142] This letter of advice was preceded on 22 November 2009 by an email from Richard Yap, PW7, to Tengku Ibrahim stating that in order to facilitate the sale of the PEB shares ('the third divestment') he would assist in the preparation of a list of six to eight parties to negotiate and bid on the third divestment. This was subsequently referred to as a Dutch auction. Richard Yap also informed Lawrence Wong and Lee Mee Jiong that the bidders would be required to sign a non-disclosure agreement and that a minimum deposit of RM10m would be stipulated.

[143] Tengku Ibrahim who was abroad responded to Richard Yap's email. He was concerned about being accused of rigging the tender and of having placed the shares. He was adamant that the process should appear to be through an open tender.

[144] On 28 November 2009 Richard Yap wrote to Tengku Ibrahimi about what he termed the 'Maybank' dilemma. Maybank was Shorefield Resource Sdn Bhd's broker. It would appear from this email that Richard Yap appeared to be persuaded that the ultimate purchaser for the shares comprising the third divestment would be Datuk Bustari Yusof of Shorefield.

The valuation report

[145] On 30 November 2009 one Robert Ti of TA Securities Holdings Bhd issued a valuation report, termed the 'fairness consideration report'. This report concluded that a fair price for the PEB shares ranged from RM1.63 per share without premium and RM1.99 per share with a 22% premium. Robert Ti, of TA Securities Holdings Bhd , DW2 ('Robert Ti') testified on the basis for his valuation and was cross-examined on the same. A fee of RM52,500 was levied for this report by TA Securities Holdings Bhd.

[146] It should be noted that different personnel in TA Securities Holdings Bhd advised on the placement and the valuation. Robert Ti denied that he knew that Richard Yap had been appointed as the placement agent.

Responses to the placement of the PEB shares for sale

[147] On 2 December 2009 an entity known as the KNM Group Bhd expressed an interest in the purchase of the PEB shares. A fee of RM5,000 was payable for the invitation document (invitation to purchase). This was duly paid on the 3 December 2009 but on 4 December 2009 KNM Group Bhd withdrew its interest.

[148] On the same day, ie 4 December 2009 Shorefield Resources wrote to TA Securities Holdings Bhd indicating an interest in participating in the tender for the purchase of the PEB shares. They enclosed an offer. The offer proposed a purchase price of RM1.91 per PEB share. A 5% deposit was also enclosed by way of bank draft.

Acceptance of offer to purchase

[149] On 7 December 2009, TA Securities Holdings Bhd wrote to Tengku Ibrahim advising that:

(a) it had, as indicated in its letter of 23 November 2013, approached several parties to make offers to purchase large blocks of PEB shares;

(b) it had accepted on behalf of the seller, ie the plaintiff, a conditional offer. The condition was that the entire offer price had to be paid for on or by 11 December 2009;

(c) the identity of the purchaser, the purchase price and the number of shares to be sold would be advised once the condition had been fulfilled;

(d) as such the plaintiff was requested to advise Hwang-DBS that a direct business transaction would be effected on or before 11 December 2009.

[150] On 8 December 2009, Tengku Ibrahim wrote to TA Securities Holdings Bhd in response to its letters of both 23 November and 7 December. He advised that the mandate validity period accorded to TA Securities Holdings Bhd would be extended for a further three months from 18 December 2009 provided it placed out at least 39m shares representing 20% of the PEB shares by 11 December 2009.

[151] On 8 December 2009 the plaintiff also made an announcement where it clarified that the second divestment was not made pursuant to the shareholders general mandate and that the same was not therefore exercised. This announcement was deemed necessary in view of an article that had appeared in *The Edge* the day before, ie 7 December 2009. That article, entitled 'Petra Group: A Partnership under Stress' outlined what appeared to be a falling out between the two factions of shareholders, namely the Koh Group on the one hand and the Tengku Ibrahim group on the other. Although the article is hearsay, it is interesting to note that the fact of the proposed disposal of the plaintiffs entire shareholding in PEB was known in the market and was described as a 'long-expected' move. The prospects of the de-merger of the plaintiff and PEB had been long anticipated.

[152] On 9 December 2009 the consent of Hwang-DBS as requested by TA Securities Holdings Bhd was procured by the plaintiff.

The third divestment

[153] On 11 December 2009, TA Securities Holdings Bhd advised the plaintiff through Tengku Ibrahim that 48.8 million PEB shares had been sold to Shorefield Resources at RM1.91 per share for an aggregate price of RM93,208,000 vide a direct business transaction. The monies from the sale were duly placed in an escrow account assigned to the bankers. In other words, these monies would go towards the repayment of the loan of RM150m to Hwang-DBS as had been discussed earlier.

[154] On the same day, ie 11 December 2009 an announcement was made in relation to the sale of the 48.8 million PEB shares, representing 25.03% of the issued and paid-up capital of PEB ('the third divestment'). The announcement stated that the proceeds from the third divestment would be utilised to pare down bank borrowings and other financial obligations. As a result of this divestment, PEB was no longer a subsidiary of the plaintiff. The announcement further stipulated that the plaintiff would continue to seek buyers for the balance 57.7 million shares representing 29.59% shareholding in PEB to complete the entire disposal of the plaintiff's 54.6% of PEB.

[155] A further announcement in relation to the third divestment was made on 15 December 2009 to provide additional information. In this detailed announcement, details were provided in respect of the utilisation of the sale consideration, the valuation report and pricing of the disposed shares, the original cost of investment, financial information in relation to PEB, details pertaining to the purchaser, the rationale for the divestment which was to pare down borrowings and gearing etc. It was clarified that no approval from the shareholders was required. It concluded by stipulating that the board of the plaintiff, after careful deliberation, was of the opinion that the third divestment was in the best interests of the plaintiff.

[156] On 15 December 2009, Shamsul Saad sent an email to the other board directors referring to newspaper cuttings which provided negative coverage of the third divestment. Shamsul stated in the email that the third divestment had been undertaken in a hasty and unnecessary manner and had been carried out without the due process which had been agreed upon at the 18th November board meeting. He alleged that there was a lack of transparency in the sale because the board was not made aware of the appointment of a valuer or placement agent nor the value attributed to the PEB shares under any valuation report. He also challenged the sale on the grounds that the requirement of an open tender was not complied with.

[157] He demanded that no further disposals be undertaken until a further board meeting could be convened. At this juncture he sought the minutes of the 16 and 18 November board meetings, alleging that the minutes he had received were incomplete.

[158] On 21 December 2009 Shamsul Saad was suspended on half pay for a period of 14 days pending investigation into alleged misconduct. The letter of suspension was signed by Tengku Ibrahim. On the same day, Shamsul filed Kuala Lumpur High Court Suit No D-22NCC-735 of 2009, a derivative action against D1, D2, D3 and D5 ('the derivative action').

Meeting of 22 December 2009

[159] On 22 December 2009 an emergency meeting of the plaintiff's board of directors was called. Tengku Ibrahim, his wife, Shamsul Saad, Lawrence Wong and Tiong were present. There was some discussion on the previous minutes and the article that had appeared in *The Edge* on 16 November and the response posted vide the announcement to Bursa.

[160] Shamsul then sought to summarise once more the conditions set at the 18 November board meeting in relation to the sale of the PEB shares. In relation to the sale enbloc, Tengku Ibrahim sought his confirmation as to

whether he agreed to the disposal of the entire 55% PEB shares, to which Shamsul affirmed that he had, but on an en bloc basis. With respect to pricing Shamsul stated that if the valuation was lower than RM1.80 Tengku was required to revert to the board. The other board members recalled that Tengku was only required to revert if the proposed disposal could not be achieved at a price of RM1.80. Tiong pointed out that the Board had agreed that a valuation had to be carried out. But they had not required Tengku to revert to the board after the valuation. As for compliance with rules and regulations, Tiong maintained that an EGM would be held when required under the law.

[161] Finally Shamsul maintained that it had been a condition that an announcement be made upon a final decision of the board being reached as to the sale. The company secretary clarified her advice at the 18 November 2009 meeting. The rest of the board disagreed that any condition as to an announcement was reached at that meeting. Shamsul finally conceded this point.

[162] Tengku Ibrahim then informed the board that the meeting had been called because of some emails that Shamsul had sent out. He highlighted the fact that Shamsul had in an email dated 9 December 2009 disagreed with the contents of the announcement relating to the disposal of the 10.5 million shares in September 2009 and had used the words 'untruthful and disingenous' in relation to the board. He was queried on this. Shamsul maintained that he meant that the second divestment had been undertaken pursuant to the shareholders' general mandate and no other mandate. Tengku and Shamsul went on to discuss other matters in issue between them. It is clear from a perusal of these minutes that the relationship between Shamsul and the rest of the Board members had disintegrated completely.

[163] Next the board considered Shamsul's email where he had called for a complete halt to the further disposal of PEB shares, as he alleged a lack of transparency in relation to the placement, valuation etc.

[164] Shamsul was reminded that the board had unequivocally given Tengku Ibrahim the mandate to proceed with the sale of the PEB shares. Shamsul maintained that the mandate was conditional and the conditions had not been met.

[165] Tengku referred to Shamsul's email which referred to negative media reports. Tengku enquired why Shamsul had only selected the negative ones and not the positives by other research houses. Shamsul replied that it was the negative media reports that were widely distributed.

[166] Tengku went on to explain that after the meeting concluded on 18 November 2009, he had appointed TA Securities Holdings Bhd to carry out a valuation. As he was abroad during this time, he had appointed Lawrence Wong to act on his behalf in respect of the sale of the shares. In view of the conditions that had to be met, he had also asked Lawrence Wong to meet up with Affin Investment Bank Bhd for their advice on the disposal and the mechanism to achieve such a disposal.

[167] Shamsul wanted to know when Affin had been appointed. Lawrence Wong could not remember but advised it was after the board meeting on 18 November 2009, and that Lawrence Wong and Tiong had met up with Affin on 20 November 2009. They had acted on the instructions of Tengku Ibrahim as chairman.

[168] Tengku also advised Shamsul that TA Securities Holdings Bhd had been appointed as the placement agent on 18 November 2009. The conditions were stipulated in the letter. Tengku Ibrahim clarified that by the words 'sale en bloc' he understood that the entirety of the PEB shares were to be sold but not necessarily at one go. He went on to explain the rationale for the tender being open to persons in a similar line of business to the plaintiff.

[169] Tengku Ibrahim also clarified that the valuation report had stipulated that a fair price was between RM1.63 and RM1.99 giving rise to an average of RM1.81 per share. The valuation report was available for perusal. He then explained that the invitation to tender was sent out to six different companies in similar businesses. Shorefield had been included because they had previously acquired 5.38% of PEB shares. He went on to explain that only KNM and Shorefield had put in offers and KNM had withdrawn its offer. Tengku also highlighted that the recent disposal had complied with the listing requirements. He relied on Affin's letter which advised a staggered sale.

[170] Tengku also referred to the latest announcement which announced the plaintiff's intention to continue to seek buyers for the remaining shaers in PEB to complete the disposal. After a buyer had been found for another 4%–6% of the PEB shares, the balance then remaining would be subject to shareholders' approval at a general meeting in accordance with the rules and advice from Affin.

[171] Shamsul however maintained that TA Securities Holdings Bhd had failed to sell the entirety of the 54.62% shares in one go and this did not meet the conditions set at the 18 November meeting. Hence the matter should have been reverted to the board. The discussion then continued in relation to the meaning of open tender vis a vis the sale of the PEB shares.

[172] Lawrence Wong proposed that the board ratify Tengku Ibrahim's actions in selling the 48.4 million PEB shares, given Shamsul's insistence that Tengku Ibrahim had acted outside his mandate. Shamsul insisted that the sale was beyond the authority mandated by the board. He also maintained that the staggered sale of PEB shares had breached part of the listing rules.

[173] The board then voted on Shamsul's demand to stop any further sale of the PEB shares with immediate effect. Tengku proposed to:

(a) proceed with the disposal of the remaining PEB shares held by the plaintiff totalling up to the 25% threshold, ie the remaining 4%–6% in accordance with the Listing Requirements of Bursa as advised by professional advisors; and

(b) complete the disposal of the balance approximately 25% shareholding remaining after the disposal in (a), upon procurement of the approval of the company's shareholders at general meeting.

[174] All the board members except for Shamsul agreed to (a) while the board as a whole agreed with para (b). Shamsul clarified that he wanted the entirety of the remaining shareholding to be sold after procuring approval at a general meeting.

[175] It is evident from the foregoing that the board in essence was still of the view that the entirety of the PEB shares had to be disposed.

[176] Shamsul however did not alert the board about the suit he had filed in the Kuala Lumpur High Court, where he had applied for injunctive relief to stop any further disposals of the PEB shares.

[177] Shamsul next sought clarification as to a meeting between Robert Lee and Datuk Bustari Yusof at the end of May or mid June in 2009 at some related office in Perth. Shamsul took the view that this raised serious issues because both the plaintiff and PEB had made denial announcements in relation to the eventual new shareholder. He further stated that the sale of the PEB shares was to have been conducted without the prior knowledge of the plaintiff and PEB as to the identity of the buyer. He wanted to know if everything had been conducted in an above board manner. Tengku responded by asking Shamsul for his source, which Shamsul refused to divulge. Tengku then advised that he would seek clarification from Robert Lee.

[178] Shamsul next sought clarification as to a meeting between Robert Lee and Datuk Bustari Yusof at the end of May or mid June in 2009 at some related office in Perth. Shamsul took the view that this raised serious issues because both the plaintiff and PEB had made denial announcements in relation to the

A eventual new shareholder. He further stated that the sale of the PEB shares was to have been conducted without the prior knowledge of the plaintiff and PEB as to the identity of the buyer. He wanted to know if everything had been conducted in an above board manner. Tengku responded by asking Shamsul for his source, which Shamsul refused to divulge. Tengku then advised that he
B would seek clarification from Robert Lee.

[179] The meeting concluded with Tengku Ibrahim suspending Shamsul for a period of two weeks on a charge of insubordination. Shamsul was advised that a domestic inquiry would be conducted within this period for to answer to the
C charges made against him.

[180] An inquiry was conducted with Lawrence Wong heading the inquiry panel, but Shamsul did not attend the same.

D

[181] At some point thereafter eleven other senior personnel aligned to the Koh brothers and working in various departments were suspended from employment.

E Requisition for an EGM

[182] On 6 January 2010, Shamsul and some shareholders requisitioned for an EGM to remove Tengku Ibrahim, Lawrence Wong, Tiong and Datin Nariza. They sought to appoint in their place, Dato' Kho Poh Eng, Francis Kho
F Poh Wat (his brother), one Surya Hidayat Abdul Malik and Ganesan a/l Sundaraj as directors of the plaintiff.

[183] The other requisitionists included Dato' Kho Poh Eng, Kho Pho Wat, Edwin Lim, Soon Fook Kian and some other management personnel. These
G members of management had been suspended.

Injunction

[184] On 11 January 2010, Shamsul obtained an interim order of court in the
H derivative suit, restraining the disposal of the remaining 29.59% PEB shares pending the inter-partes hearing of the application for an interlocutory injunction.

Meeting of 21 January 2010

I

[185] A meeting of the board of directors of the plaintiff proceeded as scheduled on 21 January 2010. I do not propose to set out the detailed events of that meeting as by this date, the relationship between Shamsul and the other directors had irrevocably broken down, particularly given the requisition to

remove some of the directors. Suffice to say that it was a relatively hostile meeting with all parties preparing for the extraordinary general meeting of 4 February 2010.

Extraordinary general meeting of the plaintiff of 4 February 2010

[186] A shareholder's circular had been prepared detailing the requisitonist's complaints against Tengku Ibrahim, his wife, Lawrence Wong and Tiong. The essence of the complaint was that in the disposal of the PEB shares these directors had not acted in the interest of the plaintiff.

[187] The EGM was convened and proceeded as scheduled on 4 February 2010. It was a lengthy meeting that commenced in the morning and concluded at 11.45pm at night after all the resolutions had been voted upon. The content of the arguments in the course of the meeting are lengthy and again I do not propose to reproduce those arguments here. The minutes of the said meeting are comprehensive.

[188] Suffice to say that the requisitionists made their complaints led by Shamsul and and other senior management personnel, while the affected directors sought to explain their actions. The arguments put forward by Shamsul are mirrored in the current proceedings. The statements by the affected directors are in turn mirrored in the defences they file in this action. The minutes offer a microcosm of the arguments put forward in this court.

[189] It is telling that in the course of this EGM, Shamsul and Soon Fook Kian took completely contradictory stances to the statements and advice they had given to the board from 2008 to 2009. Of particular note is the fact that Shamsul, for the first time, took the position, despite his previous statements at board meetings, that there had never been a cash flow problem in the plaintiff, notwithstanding his positive affirmation of this issue at several board meetings. Soon Fook Kian also supported Shamsul and to that extent adopted a completely contrary position to that as borne out by the minutes of the previous meetings. This clearly contradictory stance is particularly evident if one were to listen to the minutes of the meeting of 18 November 2009.

[190] The requisitionists succeeded and Tengku Ibrahim, his wife, Lawrence Wong and Tiong were duly removed. Their explanations to the complaints made against them were not accepted. As a consequence of his removal as a director, Tengku Ibrahim was no longer the chairman of the plaintiff.

[191] The Koh brothers, Shamsul and other named directors were appointed to the board. Today the directors of the plaintiff remain the same, save that Soon Fook Kian has also been appointed a director of the plaintiff.

Events post the EGM of February 2010

[192] On 5 February 2010, Tengku Ibrahim, Lawrence Wong and Tiong were removed as directors of Intra-Oil Services Bhd.

[193] On 11 February 2010 Mr Soon Fook Kian, who was one of the requisitionists, was appointed to the board of Intra-Oil Services Bhd.

[194] On 11 February 2010, Tengku Ibrahim was removed as the chief executive officer of the plaintiff.

[195] In June 2010, Robert Lee resigned as a director of PEB.

[196] On 16 August 2010 the derivative action initiated by Shamsul was struck out. The present suit was initiated against the current defendants in 2011.

[197] Soon Fook Kian was appointed an executive director of the plaintiff.

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[198] CIMB Bank was appointed by the plaintiff to undertake a restricted tender process for the proposed divestment of the plaintiff's entire remaining stake in PEB comprising 57m shares.

[199] In other words, the plaintiff was undertaking some two years later the very same divestment that it had earlier injuncted in 2009/2010. This sale, like the third divestment, was also undertaken by way of a restricted tender. The sale price procured was below the sale price obtained for the third divestment.

[200] This then sets out the salient factual background to the present suit.

PART II

The plaintiff's claim and the defendants' defence in summary

[201] Given the length of the background facts, it is useful to summarise the essence of the plaintiff's claim as arising out of the second divestment on 10 September 2009 and the third divestment on 11 December 2009. As stated in the introduction, the plaintiff maintains that:

(a) in causing the plaintiff to undertake the second divestment and the third divestment, Tengku Ibrahim, Lawrence Wong and Tiong have acted in breach of their fiduciary, statutory and common law duties as directors of the plaintiff;

(b) specifically in relation to the third divestment, Robert Lee, as a director of PEB, dishonestly assisted in Tengku Ibrahim, Lawrence Wong and Tiong's breaches of fiduciary duty in relation to the same;

(c) further or alternatively the plaintiff claims that Lawrence Wong and Tiong had dishonestly assisted Tengku Ibrahim in the various breaches of duty owed him to the plaintiff, and were accessories thereto; and

(d) finally Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee had conspired, either lawfully or unlawfully, to injure the plaintiff in relation to the sale of the plaintiff's PEB shares vide the second and third divestment.

[202] More specifically with respect to the second divestment, the plaintiff maintains that:

(a) the disposal to TA first Credit Sdn Bhd was in breach of the shareholders' general mandate;

(b) the second divestment was effected or transacted pursuant to the instructions and directions of, inter alia, Tengku Ibrahim;

(c) there was no valid or legitimate basis or rationale for the second divestment. In this context the plaintiff maintains that the threatened litigation by Shin Yang and the cash flow or liquidity issues are a sham or contrived;

(d) the appointment of fiduciary limited by Tengku Ibrahim is in breach of the provisions of the CMSA; and

(e) the second divestment was a means of dissipating the plaintiff assets, or is a sham. In this context it is maintained that the second divestment was not undertaken bona fide by the first to third defendants in the best interests of the plaintiff.

[203] With respect to the third divestment:

(a) the plaintiff maintains it was undertaken in breach of the mandate of the board granted on 16 and 18 November 2009;

(b) it was designed to circumvent the need to obtain shareholders' approval in general meeting;

(c) it was done in breach of the sharehodlers' divestment mandate;

(d) like the second divestment it was not undertaken bona fide by the defendants in the best interests of the plaintiff, but for a collateral purpose; and

(e) the defendants had conspired to divest the plaintiff of its 'crown jewel' to the ultimate detriment of the plaintiff and to facilitate the sale of the PEB shares to Shorefield.

[204] The defendants maintain that the second and third divestments were undertaken pursuant to mandates accorded by the board of directors in August and November respectively. They maintain that they had at all material times acted bona fide and in the interests of the plaintiff.

[205] The dominant purpose for which these divestments were undertaken was to raise cash urgently to salvage the dire cash flow position of the plaintiff at the material time. The following matters were key factors in causing the board of directors to arrive a decision to sell the PEB shares:

(a) the tight liquidity position of the plaintiff;

(b) demands for payment or threatened litigation by Shin Yang Shipyard;

(c) the loss suffered by the plaintiff of approximately RM8.9m in the third quarter of 2009 for the very first time in its corporate history; and

(d) the difficulty of obtaining funds expeditiously by other means.

[206] With regards to the conspiracy, the defendants deny the existence of any agreement between them to cause injury to the plaintiff. They deny the formulation or existence of any scheme calculated to divest the plaintiff of its assets. They maintain that the divestments were bona fide, sound commercial decisions arrived at consensually by the board upon the advice of its senior management personnel, including Shamsul Saad. As such it is contended that the divestments were in the best interests of the plaintiff given the prevailing circumstances.

The position in law in relation to the duties of directors

[207] Company law envisages that in the absence of contrary provisions in a company's constitution, the management of a company is vested in a board of directors comprising natural persons. The plaintiff is no different. The plaintiff is however a large public company. Its directors do not therefore actively manage or operate the plaintiff's business on a day to day basis. If an analogy is drawn the structure of the plaintiff is like a pyramid with the board of directors at its apex. Underneath the board is the management team, comprising

executive employees of the company, both senior ranking and otherwise, who are divided into various business units. They manage the day to day operations and running of the company.

[208] As provided in article 115(1) of the articles of association of the plaintiff, the business of the company is managed by the directors who are empowered to exercise all such powers of the plaintiff, and do on behalf of the plaintiff, all such acts as are within the scope of the memorandum and articles of association of the plaintiff and which are not required to be exercised by the plaintiff in general meeting, or under the Companies Act 1965.

[209] Article 115(2) provides that any sale or disposal by the directors of a substantial portion of the company's main undertaking or property shall be subject to ratification by shareholders in general meeting.

[210] The crux of the dispute in the instant case is the allegation of serious mismanagement bordering on fraud. Directors are subject to statutory and strict fiduciary duties.

Statutory duties as codified under the Companies Act 1965 and common law duties

[211] Sections 132(1) and 132(1A) of the Companies Act 1965 set out the statutory duties owed by a director to a company. Section 132(1) provides:

> ... A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company;
>
> Section 132(1 A) provides:
>
> A director of a company shall exercise reasonable care, skill and diligence with:
>
> (a) The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
>
> (b) Any additional knowledge, skill and experience which the director in fact has.

These sections came into force vide Amendment Act A1299/07 on 15 August 2007, having replaced the previous s 132(1) which reads

A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

[212] In *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 at p 654 the Court of Appeal held that ss 132(1) and 132(1A) do not alter the law in this area but enhance the

common law duty of care and equitable fiduciary duties. At para 233, p 654 this is what the court said:

> ... The prior provision of s 132(1) requires a director to act honestly. The current s 132(1) of the Act, requires a director to act in good faith in the best interests of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s 132(1) and the new s 132(1) are the same. Thus the old case law relating to the duty to act honestly continues to be relevant (see *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR 541). It is also recognised that the duty to act in the best interests of the company means different things, depending on the factual circumstances

[213] And the test to be adopted in determining whether there was a breach of such statutory duty was defined as follows at para 238 at p 655:

> [238] ... The test is nicely condensed in Ford's *Principles of Corporations Law* (para 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company.
>
> [239] This test is adopted in *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors the test is whether:
>
> ... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.
>
> [240] The above principle is often referred to as the 'Charterbridge Principle'.
>
> ...
>
> [242] It is important to note, following high authority, such as *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, that the court does not substitute its own decision with that of the directors, since the decision of the directors to enter into the JDA is a management decision.

[214] This encapsulates the core of the duties owed by director under statute.

[215] Of relevance in the instant case is the statutory business judgment rule in s 132(1B) which states as follows:

> A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director
>
> (a) Makes the business judgment in good faith for a proper purpose;
>
> (b) Does not have a material personal interest in the subject matter of the business judgment;
>
> (c) Is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) Reasonably believes that the business judgment is in the best interests of the company.

[216] The statutory business judgment rule encapsulates the common law business judgment rule as set out in *Smith (Howard) Ltd v Ampol Ltd* [1974] AC 821. In that case there was a challenge to the validity of an issue of shares by the directors of a company. The court had to decide whether the said directors had been motivated by any purpose or personal gain or advantage or whether they had acted bona fide in the interests of the company. The judge found that the primary purpose of the allotment was to proportionately reduce the shareholdings of certain majority shareholders such that a take-over could be facilitated by another entity. It was found in those circumstances that the directors had improperly exercised their powers. The matter proceeded to the Privy Council where the judicial committee found, dismissing the appeal that, although the directors had acted honestly and had power to make the allotment, to alter a majority shareholding was to interfere with an element of the company's constitution which was separate from the directors' powers and accordingly it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. And since the directors' primary object for the allotment of shares was to alter the majority shareholding, the directors had improperly exercised their powers and the allotment was invalid.

[217] In so holding the judicial committee commented, inter alia, in relation to the business judgment rule as follows:

> ... In order to assist him in deciding upon the alternative motivations contended for, the judge considered first at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors bona fide considered that condition to be. Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.
>
> But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or another, or whether there being more than one purpose, one or other purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing or substantial or, per contra, insubstantial an alleged requirement might have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to

doubt, or discount the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.

[218] It follows from the statutory provisions of s 132(1B) and the common law business judgment rule that in order for this court to ascertain the true purpose/s or dominant purpose for the disposal of the PEB shares comprising an asset of the plaintiff, it is entitled to objectively appraise the chronology of events and situation giving rise to the second and third divestments in order to estimate how pressing or substantial the liquidity issue alleged by the directors was. This is why I had in Part I undertaken a somewhat extensive study of the status, actions and proceedings in the company for a period of more one year prior to the second divestment.

Fiduciary Duties

[219] A company director is recognised as having a fiduciary relationship with his company. As stated in Ford's *Principles of Corporations Law* in Chapter 8 at para [8.050] at p 312, a director is therefore subject to the fiduciary's duty of loyalty and the duty to avoid conflicts of interest. Case-law establishes under the scope of a director's fiduciary duty that he must exercise his powers bona fide and in the best interests of the company as a whole. This is similar to, and captured by the duties imposed by statute (see s 132(1)). The essence of the fiduciary duty is a duty to act bona fide in the interests of the company and not for a collateral purpose (see *In re Smith and Fawcett, Limited* [1942] Ch 304 at pp 306 and 308 and *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1994] 2 SLR 282 at p 287). Although the directors are vested with powers which carry implicitly some degree of discretion, such powers must be exercised bona fide, meaning for the purpose for which they were conferred and not arbitrarily or at the will of the directors, but in the interests of the company (see *Greenhagh v Ardene Cinemas Ltd* [1951] Ch 286 at p 291; *Blackwell v Moray and Anor* (1991) 3 ACSR 255).

Did Tengku Ibrahim, Lawrence Wong and Tionq who were directors of the plaintiff at the material time exercise their powers for a proper purpose or for an improper purpose when they decided to undertake the second and third divestments?

[220] If the impugned directors exercised their powers for a proper purpose it then follows that they acted bona fide in the interest of the company. If however they exercised their powers for an improper purpose as is alleged by the plaintiff, then they have failed to act in the best interests of the company and would be in breach of their statutory, fiduciary and common law duties as directors.

[221] In order to answer this question in relation to the two divestments this court needs to ascertain the substantial object or purpose for which the board decided to divest of the PEB shares (see *Smith (Howard) Ltd v Ampol Ltd*). A

[222] In ascertaining the substantial object or purpose for which each of these three directors decided to divest of the PEB shares, it is necessary to ascertain their individual states of mind at the time when the decision to undertake the divestments was made. In ascertaining the state of mind of the directors, regard may be had to the circumstances surrounding the decision. In *Hindle v John Cotton Ltd* 1919 56 Sc LR 625 at 630-1 Viscount Findlay stated as follows: B C

> Where the question is one of absence of powers, the state of mind of those who acted and motive on which they acted are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in the discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage or for any other reason. D

[223] Bearing this in mind I turn to consider the primary or dominant purpose for the two divestments. E

What was the primary or dominant purpose for the second and third divestments — to meet genuine cash flow problems or for the collateral or improper purpose of deliberately divesting of the PEB shares to the plaintiffs detriment? F

[224] The primary issue that arises for my consideration is whether the primary or dominant purpose of the majority of the directors, namely the first to third defendants, here was to raise funding to meet the plaintiff's urgent or dire liquidity needs as alleged, or whether their primary purpose was to deplete the plaintiffs majority shareholding in PEB by propelling the same to one Shorefield Resources Sdn Bhd. In other words, did these directors, in breach of their duties, cause the divestment of a significant asset of the plaintiff to its detriment? G H

[225] The foregoing issue has to be determined by a consideration of the facts giving rise to the second and third divestments at the material time. I have set out the objective facts as disclosed by the minutes and contemporaneous events in Part I. It is evident from a perusal of the minutes of several of the board meetings from mid-2008 onwards that the plaintiff was experiencing cash flow concerns during this time. This urgent cash flow problem culminated in mid 2009. I

The Evidence in relation to the reasons for the second and third divestments

[226] It is now necessary to turn to the evidence of the several key witnesses at trial to ascertain the true rationale behind the two divestments. It is convenient to consider the divestments separately.

The second divestment

Shamsul's evidence — PW1's evidence in relation to the dominant purpose underlying the second divestment

[227] I commence with a consideration of the evidence of PW1, Shamsul Saad, in relation to the second divestment. He was a director and also a senior general manager at the material time. In his examination-in-chief, Shamsul maintained that the second divestment was carried out pursuant to the shareholders' general mandate and not pursuant to the board of directors' mandate given on 26 August 2009.

[228] His evidence was premised on the fact that Tengku Ibrahim had written to Hwang-DBS on 4 September 2009 seeking its approval for the second divestment. In this letter reference was made to the shareholders' general mandate. Secondly, Shamsul maintains that the number of shares sold was 10.5 million PEB shares, which was the remaining number of shares available under the shareholders' general mandate after the first divestment. Thirdly he maintains that ' ... there was no other specific board resolution or other shareholders' mandate' in place prior to the second divestment.

[229] In relation to the letter of 4 September 2009, it is also the plaintiff's case through Shamsul Saad that the second divestment could never have been utilised to meet any cash flow problem because the subject PEB shares were at all material time pledged to Hwang-DBS, and so any sale of the same would result in the proceeds being utilised to pare down borrowings in relation to that loan.

[230] However the chronology of events discloses that this issue was not raised when the board considered modes of raising financing to meet the plaintiff's demands in its meetings both prior to and on 26 August 2009 when the decision to sell 10.5 million PEB shares or the decision to transact the second divestment was taken. This is borne out by the minutes of the meeting of 26 August 2009. When queried on the events of the board meeting dated 26 August 2009, ie the meeting at which the decision to sell 10.5 million PEB shares was taken by the board, Shamsul stated that there were discussions which happened at the 'end of the meeting for several minutes'. He recalled that the discussions on possible divestment were not pursuant to any cash flow

constraints. He maintained that the possible divestment as portrayed by Tengku Ibrahim at the time was that a buyer was available and the possible divestment was to complete the remaining shares available for sale under the shareholders' general mandate. He stated so in the course of his examination in chief. When queried as to why the minutes of the meeting show otherwise he maintained that the minutes did not accurately reflect the chronology of events and discussions that took place.

[231] He described Mr Soon Fook Kian's role thus:

> I recall that Mr Soon was called in sometime in the middle of the meeting. The Board wanted to know whether PPB could pay Shin Yang shipyard for the construction of the work boat known as Petra Galaxy. ... Mr Soon explained that as D1 had instructed that PPB (ie the plaintiff) not seek financing for the vessels to be sold to PEB, PPB do not have sufficient cash flow to assist PEB to pay the amount requested. Mr Soon left soon after.

[232] It must be stated that this version of events is completely dissimilar to the recording of events at the meeting on 26 August 2009. At risk of repetition the confirmed minutes of the meeting of 26 August 2009 disclose, inter alia, that:

(a) Tengku Ibrahim advised the board that Shin Yang Shipyard Sdn Bhd had notified of their intention to take legal action against the plaintiff group for the delayed payment of the balance sum for a workboat known as Petra Galaxy;

(b) there was a delay in the proposed disposal exercise for shareholders' approval in respect of the disposal of three workboats including the Petra Galaxy to PEB by the plaintiff. This in turn was holding up PEB's ability to procure financing from approved financing sources, as any drawdown was subject to shareholders' approval of the proposed sale and purchase of the said three vessels;

(c) PEB's contracting customer, Shell expected the vessel to be delivered by October 2009 and any delay in delivery could result in PEB losing a RM1.1 billion contract from Shell;

(d) the board considered the payment of a portion of the balance payment to Shin Yang first and Mr Soon was called to join the meeting. Upon the Board's query as to whether the plaintiff group had surplus cash flow to pay Shin Yang the remaining payment due to Shin yang for Petra Galaxy in order to enable delivery of the vessel to be procured, ... *Mr Soon informed that the cash flow is very tight and PPB Group does not have surplus cash for that purpose.*

(e) *Mr Soon further informed that the management has vigorously been meeting with bankers from CIMB Group, AmBank Group, Al Rajhi Bank, RHB*

Bank and so on. There are also possibilities that the PPB Group (the plaintiff Group) would have to forego the taking delivery of SK303, SK304, and SK403 (ie the three vessels being built by Shin Yang) if the funding for these vessels was not available. He added that however the plaintiff's cash position is expected to increase by approximately RM75m, subject to and upon the successful implementation of the proposed disposal.

(f) *In light of the above, the board considered the option to sell PPB's (the plaintiff's) shareholdings in PEB. After some deliberation, the board resolved that in view of the current tight cash flow position of the PPB Group (the plaintiff Group), the company do hereby divest some of the ordinary shares of RM0.50 each in PEB to meet the cash requirements of PPB Group (the plaintiff group).*

[233] It was only then that Mr Soon left the meeting. The board, including Shamsul then resolved that Tengku Ibrahim be authorised to negotiate and finalise the sale price and sale of PEB shares. It is immediately apparent from a simple comparison of Shamsul's evidence in chief and the confirmed minutes of the meeting of 26 August 2009 that there are considerable and significant discrepancies in the two versions.

[234] Shamsul's sworn evidence, as shown above, strove to attribute culpability for the second divestment entirely on Tengku Ibrahim, by stating, without any other evidential basis, that Tengku Ibrahim had instructed that the plaintiff procure no further financing and therefore there was insufficient cash to pay Shin Yang. However the minutes make absolutely no mention of Tengku Ibrahim having issued any direction or instruction of this sort. It is not captured in any earlier minutes either.

[235] The minutes instead disclose a query put by the board to Soon Fook Kian as to whether there was sufficient cash flow to meet Shin Yang's demand. And Soon simply responded that there was insufficient cash. Shamsul's evidence is therefore entirely disparate from the minutes.

[236] Shamsul sought to gloss over these substantive differences by merely stating that the minutes were incorrect and that he had tried to have the minutes corrected some months later. However this was long after the minutes of 26 August 2009 had been confirmed as accurately reflecting the proceedings of that day. This in itself is sufficient to substantiate this court's finding that Shamsul's evidence was less than candid, even at that early juncture.

[237] In the course cross-examination when these minutes were specifically read out to Shamsul, he simply agreed with the same. He also agreed that at the meeting on 26 August 2009, Tengku Ibrahim was authorised to negotiate and

finalise the price and sale of PEB shares. He also agreed that the sale of the 10.5 million PEB shares, ie the second divestment did not require shareholder's approval.

[238] However he maintained that the sale was still bound by the mandate accorded by the shareholders. He also sought to maintain that he had challenged the 26 August minutes by a series of emails, but it is incontrovertible that these emails are long after the second divestment and well after Shamsul himself had participated as director in the authorisation of Tengku Ibrahim to effect the second divestment to avert or meet a cash flow dilemma that the plaintiff was facing.

[239] When cross-examined by learned counsel for the second and third defendants on the minutes relating to the second divestment, Shamsul failed to answer questions put to him directly. When asked whether in his capacity as both director and a senior general manager he was aware that from as far back as 2008 the plaintiff was looking for means to raise funds because of its extensive borrowings, his reply was that he was the senior general manager of business. He essentially refused to answer that question. He was then taken to the minutes dating back from 2008 and 2009 in relation to the disposal of vessels from the plaintiff to PEB with a view to establishing that the disposal had been agreed upon long before August 2009 and was bona fide. Shamsul then agreed. He also accepted that the board was concerned about its gearing ratio during this period.

[240] When cross-examined about the problems with Shin Yang's demands, Shamsul maintained that he relied on what Tengku Ibrahim advised the board, but was unaware personally. Finally he conceded that he was aware of the existence of a cash flow problem in August 2009. When the entire circumstances of the cash flow problem were however summarised and put to him in accordance with the minutes of meetings during that period, Shamsul simply responded that he was unable to confirm. It is clear to this court that Shamsul was being evasive, as he was bent upon highlighting evidence which supported or substantiated the plaintiff's case, rather than the truth of matters as borne out by the signed minutes of meetings between mid-2008 and November 2009.

[241] When Soon's confirmation of matters were put to him, he agreed with the same but finally disagreed that the board had resolved to sell the PEB shares in view of the tight cash flow position of the plaintiff group. He chose to disagree despite the express words in the minutes which he did not seek to have amended until several months thereafter. It appears to this court therefore that his evidence was less than credible and calculated to support the plaintiff's case rather than provide this court with full and frank disclosure.

[242] In so concluding I have also considered Shamsul's testimony in the course of re-examination where he sought to bolster his inconsistencies above by suggesting once again that the entire cash flow problem as alluded to in the minutes of meeting were contrived and that there was in reality no cash flow problem at all, as borne out by the fact that funding was finally sourced for the payment of the deposit to Shin Yang Shipyard for the vessel named Petra Galaxy. However the net result is that his evidence on the rationale for the second divestment is entirely at odds with the documentary evidence, namely the minutes, and the evidence of the other witnesses, more particularly Lawrence Wong and Tiong. I am therefore unable to accept conclusively Shamsul's evidence that the second divestment was for a purpose other than to meet the cash flow needs of the plaintiff. He was an unreliable witness.

The failure to call Mr Soon Fook Kian as a witness to the plaintiff's case

[243] I now turn to an important aspect of the plaintiff's case. It is the plaintiff's case that the second divestment was not bona fide but contrived. The plaintiff maintains that it was not carried out in the best interests of the plaintiff. As is apparent from the chronology of events, particularly the minutes of 26 August 2009 when the decision to undertake the second divestment was made, the board appeared, from the minutes, to have relied wholly on the advice of the Finance Manager, Soon Fook Kian. The part played by Soon Fook Kian in advising on the lack of available cash, giving rise to a cash flow problem is expressly reflected in the said minutes.

[244] Shamsul, as I have pointed out earlier, sought to contradict the minutes by suggesting that Tengku Ibrahim had stopped Soon Fook Kian from procuring financing giving rise thereby to cash flow problems artificially. This is a bare hearsay statement by Shamsul with nothing to support the statement. Significantly and importantly, given the importance of Soon Fook Kian's evidence on this point, no effort was made by the plaintiff to call him as a witness. His evidence would have been directly relevant. It is evident from a perusal of the minutes that the board relied on Soon Fook Kian as a senior manager responsible for the day to day aspects of finance, to provide a comprehensive and accurate picture of the status of the company at that juncture. It was premised on Sook Fook Kian's statements as borne out by the minutes, that a decision was undertaken in respect of the second divestment. However he was not called.

[245] Mr Soon Fook Kian ought to have been called for an even more important reason. The minutes indicate that he left the meeting only after the board had deliberated on the 'tight cash flow problem of the plaintiff group, and after a decision had been made to divest of the PEB shares. However at no

point did Mr Soon Fook Kian alert the board that any such divestment would be utterly useless because the shares were pledged to Hwang-DBS.

[246] In this context, the minutes of early 2009 disclose that it was Soon Fook Kian who had alerted the board about the procurement of this loan for RM150m from Hwang-DBS. He had told the audit committee meeting in February 2009 that the first tranche of the RM150m loan comprising RM135m would be signed in Singapore on 27 February 2009. Only the balance RM14m would be signed a few days later in Malaysia. He was the contact person named in this facility agreement. It is evident from this that he would have been best positioned to advise the board that the PEB shares were not available for fund raising as they were pledged to Hwang-DBS, and therefore any proceeds of sale would go to an escrow account and could not be utilised for cash flow purposes. However no such advice appears forthcoming in the August 2009 meeting.

[247] This is particularly important given Tengku Ibrahim's evidence that the letter of 4 September 2009 was prepared for his signature by Mr Soon Fook Kian. In other words, even at that juncture, it does not appear to have occurred to Tengku Ibrahim nor more significantly, the finance manager, Soon Fook Kian that the disposal would not meet the intended needs of the plaintiff, namely to alleviate its liquidity problem.

[248] Neither, more significantly, was Soon Fook Kian called to explain this issue at trial. In this context it is to be noted that Soon Fook Kian is now an executive director in the plaintiff, having been so appointed in 2012. It will be recalled that Soon himself clarified that he worked under both Tengku Ibrahim and Dato' Henry Kho and took instructions from the latter. Given these circumstances, the failure to call such a material and key witness can only warrant the irresistible inference that Soon Fook Kian's evidence, if he had been called, would have been detrimental to the plaintiff's case. As such, this court takes the view that this is a fit and proper case to invoke s 114(g) of the Evidence Act 1950 and hereby does so.

[249] It is for the plaintiff and not the defendants to call Soon Fook Kian because it is the plaintiff who alleges, contrary to the documentary evidence available in the form of the objective minutes of meetings, that the cash flow problem was a sham or contrived. The onus of establishing that the cash flow problem was a sham or contrived therefore fell upon the plaintiff, not the defendants.

[250] In the course of cross-examining Tengku Ibrahim, learned counsel for the plaintiff sought to establish various matters pertaining to financing that had been raised by Soon Fook Kian at the EGM on 4 February 2010, well after both

divestments and a chronology of other events, including the suspension of key employees. All those statements, it appears to this court were an attempt to adduce Soon's version of events without calling him as a witness. In essence it was sought to be shown that Tengku Ibrahim had stopped Soon Fook Kian from obtaining further financing. However there is no documentary evidence to this effect. It was an oral statement by Soon and therefore could only be established by calling Soon as a witness. This is in contradiction to the board minute which are accepted as a true and accurate account of matters. As such Soon Fook Kian should have been called to establish this bare oral contention. The plaintiff ought not to have sought to circumvent the necessity of calling Soon as a witness in these proceedings.

[251] It bears saying at this juncture that the plaintiff's case appears to this court to have been carefully crafted so as to focus only on allegations of breaches of duty by the first to third defendants specifically, while seeking to keep out of evidence the broader background canvas of facts relating to the then ongoing shareholder and board room tussle surging up between Tengku Ibrahim and those directors appearing to be aligned to him on the one hand, and the Kho brothers and the directors aligned to them on the other hand. As alluded to in the course of the background facts, the Kho brothers wanted seats on the board, like Shamsul, but had been unsuccessful.

[252] The fact of this ongoing tussle which was an underlying and material fact was established by learned counsel for Lawrence Wong and Tiong in the course of his cross-examination which therefore permits this court to make reference to the subsistence of this tussle. As a consequence of the selective or 'carved-out' nature of the plaintiff's claim, which made no mention of this boardroom struggle, a considerable amount of relevant and salient evidence was not available to this court, including but not limited to the evidence of Mr Soon Fook Kian.

The evidence for the defence

Tengku Ibrahim's evidence in relation to the dominant purpose underlying the second divestment

[253] The reasons for the second divestment were explained by Tengku Ibrahim, in summary as follows:

(a) Shin Yang Shipyard had threatened to sue the plaintiff for the delayed payment of the balance purchase price of the vessel, the Petra Galaxy;

(b) the plaintiff was not in a position to pay the balance purchase price due to its tight cash flow position. Although this vessel was to be on-sold to PEB, and PEB would then pay the plaintiff the purchase price and

thereafter bear the financing for these vessels, PEB itself was unable to drawdown on its financing, until approval for the sale or disposal was obtained from the plaintiff's shareholders at general meeting. The EGM was scheduled to be held in September 2009. PEB could only hope to drawdown on its financing after delivery of the vessels and charges had been created. As such the plaintiff could not simply maintain that the vessels were being sold to PEB and were therefore PEB's responsibility. It was incumbent upon the plaintiff to make the balance payment to Shin Yang first. In other words, it appeared at that juncture that monies could not be procured from PEB to pay Shin Yang. Neither was it PEB's responsibility to make that balance purchase payment because it was the plaintiff and not PEB that had commissioned Shin Yang to build the boats;

(c) the further repercussion of failing to take delivery of the Petra Galaxy was that PEB's subsidiary's proposed contract with Shell amounting to RM1 billion was at stake. Petra Galaxy was to be utilised in a contract between a PEB subsidiary and Shell. The contract was worth about RM1.1 billion. Therefore the Shin Yang demand also had to be met to comply with this valuable Shell contract. If Petra Galaxy could not be delivered within time, the plaintiff would have been constrained to charter a third party vessel at a higher rate just to carry out its obligations under the Shell contract. Therefore the disposal of the PEB shares appeared to be an expeditious manner of raising funding to, inter alia, meet this demand;

(d) finally although the proceeds could not be utilised as intended by the board, the monies were set aside to go towards the paring down of the plaintiff's debt due and owing to Hwang-DBS although payment was only due the following year.

[254] These reasons appear to be fully fortified or supported by the minutes of the 26 August 2009 board of directors meeting which I have set out above. Given the conclusive nature of these minutes (pursuant to article 123(c) of the articles of association of the plaintiff) it would appear that Tengku Ibrahim's belief that a disposal of the PEB shares would alleviate the plaintiff's problems, was genuine. It is pertinent that in arriving at the decision to dispose, the directors, including Shamsul, relied on the statements by Soon Fook Kian. Tengku Ibrahim was cross-examined on the letter of 4 September 2009 to Hwang-DBS prior to the second divestment. It was put to him that the sale proceeds from the second (and third) divestments could not go towards elevating the plaintiffs tight cash flow problem. As such the suggestion was that the problem was contrived. Tengku Ibrahim responded in the course of cross-examination as follows:

When we sold the second divestment My Lady. The purpose was to raise funds to pay off Shin Yang because they were threatening us about the non-payment of the balance. And also to take care of the cash flow problems. Now, it was only later I mean, if I was the only one who missed about the money going to the bank, that's fine but the whole board could not remember or was not aware or missed the point about the proceeds will definitely have to go to the bank payments and that was simply because as I've said in my witness statement, that Mr Soon being the responsible financial officer in my office and as what Mr Wong says, has a duty to me. Why did he not alert us? He has been on top of things? Why did he not alert I and the board? He was present at the board meeting when we were discussing about the sale of the shares to raise funds. He did not alert us at all. Not only that, after the sale was done, Sorry. Prior to the sale was done, when he handed me letter to write to Hwang-DBS, he could have just told me 'Tengku, this is not going to happen because all the money will go to Hwang DBS'. He as a financial person could have alerted me from December, from August 26th until the sale of the shares, he had two weeks to tell me. He knew what we were going to do that we were going to sell the shares and pay off Shin Yang and also take care of the tight cash flow problem.

Not once did he raise that to me. Not only to me, but to also other fellow directors. Now, if he had done that, we would have called off everything. What's the use of going through the motion of selling the shares when we know very well that it's not going to help us in what we wanted to do in the first place. That's for the 2nd trance and for the 3rd tranche it's the same thing.

[255] I find and accept that Tengku Ibrahim was telling the truth when he explained as aforesaid that the second divestment was genuinely undertaken to try and resolve the Shin Yang problem. The letter of 4 September 2009 shows that Soon failed or neglected to alert Tengku Ibrahim on the futility of the entire exercise. Whether deliberately or otherwise would be entirely conjecture because as stated earlier, Soon Fook Kian did not testify.

[256] Tengku Ibrahim then explained what he did when he found out that the proceeds of the second divestment could not be utilised to meet the Shin Yang demand. He testified that he contacted PEB and PEB managed to gather a sum of approximately RM8 to 10m which could be placed with a bank as security for the issuance of a bank guarantee in favour of Shin Yang. Shin Yang then released Petra Galaxy to the plaintiff. Only then was legal ownership transferable to PEB, followed by the creation of a charge and then the drawdown by PEB. This necessarily begs the question why this option was not considered by the board at the August 2009 meeting. However, it is clear that thus option did not occur to any of the director or Soon Fook Kian as that stage. There is no evidence that Tengku had any personal interest in effecting this sale, Nor is there any evidence before this court to the effect that the second divestment benefitted parties associated with him.

[257] Tengku Ibrahim was cross-examined extensively on this issue, namely the real purpose or rationale for the second divestment by learned counsel for the plaintiff, Tengku Ibrahim was taken through the chronology of events. Counsel pointed to the fact that Tengku Ibrahim and Lawrence Wong had had meetings with PW5, one Encik Hafitz, a representative of Shorefield Resources Sdn Bhd in early 2009 culminating in due diligence on PEB in May 2009. Tengku Ibrahim explained that these meetings were initially about the oil and gas industry in general and the business in general. He stated that he agreed to a due diligence being conducted on PEB after the third or fourth meeting. But he maintained that initially the interest was in respect of the plaintiff's and not PEB shares. There was also interest in Tengku Ibrahim's personal shares. It was put to Tengku that nothing had been documented on this due diligence at board level. Tengku agreed. A non-disclosure agreement was also signed in respect of this due diligence, which had not been specifically reported to the board. Tengku Ibrahim agreed but maintained that it was within his powers as chief executive officer to do so. He also explained that there was nothing covert about this due diligence as numerous officers in PEB including the fourth defendant, Robert Lee, were well aware of this matter. Further Tengku also pointed out that apart from Shorefield other companies had expressed an interest in PEB as well.

[258] In essence it was sought to be suggested to Tengku Ibrahim that he had deliberately withheld key information from the board of directors in relation to Shorefield Resources Sdn Bhd and its possible interest in PEB shares. It was also suggested that the mandate of the board had been thus procured by the suppression of material facts relating to the meetings with Shorefield, the due diligence and the non-disclosure agreement, all of which were not 'disclosed' to the board. Tengku Ibrahim denied that this was the case. In conjunction with this learned counsel put to Tengku Ibrahim that he could not find any demand from Shin Yang Shipyard. Tengku Ibrahim maintained that a demand had been made.

[259] Tengku Ibrahim maintained that he had been advised of this demand by the Executive Director of PEB, Robert Lee. Tengku Ibrahim was then shown some novation and termination letters, of which he was unaware. These agreements had not been signed by him. However Tengku Ibrahim agreed that he was aware that once the three vessels had been sold to PEB it became PEB's responsibility to pay for the ships. It was then put to Tengku that the Shin Yang demand and the need to pay for the balance price of the ships was not a genuine or valid reason for the second divestment, because the obligation to pay for the ships vested solely in PEB and not PPB. Tengku responded by pointing out that the requirement for the payment of the balance purchase price became imminent in August 2009. That was prior to the plaintiff procuring shareholders' approval for the sale of these vessels to PEB. As such PEB could

not drawdown on its facilities to pay for the vessels. It therefore remained incumbent upon the plaintiff to make the requisite payment for the balance purchase price for Petra Galaxy until such shareholders' approval was obtained and legal ownership could be transferred to PEB, such that charges could be created by the relevant financing institutions which would only then take over the financing of the vessels. Tengku Ibrahim was therefore referring to the tight cash flow position prior to delivery.

[260] However putting these factors together, namely the due diligence by Shorefield Resources Sdn Bhd in May 2009, the lack of evidence of a clear demand from Shin Yang Shipyard Sdn Bhd and the fact that PEB would ultimately have to take responsibility for the financing of the three vessels upon disposal and delivery to PEB, it was put to Tengku Ibrahim that his stated purpose or rationale for the sale of the PEB shares vide the second divestment was contrived and a sham. It was put to him that cash flow only became an issue suddenly in August 2009. Tengku Ibrahim disagreed.

[261] Later on in cross-examination after covering the third divestment, it was put to Tengku that he together with Lawrence Wong, Tiong and Robert Lee had conspired to the detriment of the plaintiff to sell the PEB shares through the second and third divestment so that Datuk Bustari Yusof could control PEB and the three directors could then join PEB. And this encapsulates the heart of the plaintiff's case, although it has not been so expressly pleaded. Tengku disagreed with this suggestion.

[262] Tengku Ibrahim responded comprehensively to the contention that the second (and third) divestments were contrived in re-examination as follows:

> Q And why did you still carry on? (with the second divestment despite the price offered)
>
> A To me, My Lady the importance of raising the funds, to take care of the Shin Yang payments, the balance payments and to address the cash flow problem. To me, that was very, very serious but what was more serious to me is if we didn't have the money to pay Shin Yang. Then Shin Yang will not deliver the vessels to the company and because of that, that will jeopardise the 1.1 billion contract we had just secured from Sarawak Shell. So all this is gathering in my head here that you know, I have to save the company. I have to do something about it and mind you which I have not raised in this court before is that throughout all this period, I am one of the major shareholders of the company. The company bears my name. That is how serious and how passionate I am about my own company. I brought it up together with Henry Koh and you know the two of us, from 1988 where we were till 2009. So it's not like why am I going to kill this company? Why am I just going to let it go like that? Sot me, whatever I did whether second or third divestment or any other problems that arise from the company, it affects me also. I'm the shareholder of the company. Why do I want to conspire with people and kill

> my own company for it? Why do I want to give it cheap just like that? So yes, the price was 1.53 yes I admit it was below the market price at the time but to me, what was more important is to save face for the company so that Shin Yang would not sue us. That I can at least try to help out with the cash flow problem. So that was the reason why and then likewise also with the 3rd divestment that here we are. Do you know how it feels? For the first time in 18 years your company made a loss? That came as a shock to all of us. How do you think I feel? I am one of the major shareholders. And like I said my asset is my name. My name is up there. It's called Petra Perdana. It's not called Premier Perdana or KL Perdana or whatever. It's called Petra. That's my family name that is up there. So this is where I got all upset ...

[263] This passage summarises Tengku Ibrahim's response to the plaintiffs claim that the ultimate purpose of the second and third divestments were calculated to dissipate or injure the plaintiff by divesting of the plaintiff's subsidiary, PEB. He consistently maintained throughout his defence and testimony in court that he had undertaken these divestments for the dominant purpose of dealing with a cash flow problem within the plaintiff. It must be said again that this is wholly consistent with the minutes of meetings held during that period.

[264] If Tengku Ibrahim and the others had indeed contrived the cash flow problem as a ruse or a sham and had the ulterior motive of selling the PEB shares to Shorefield Resources as is contended, then the board minutes had also to be wholly contrived, including the participation and consensus to the divestments by Shamsul Saad in his capacity as director and Soon Fook Kian. At the 26 August 2009 meeting when the decision to undertake the second divestment was reached, Ahmad Sharkan was present and also acceded and supported the decision to sell. Is it then to be inferred that Tengku Ibrahim, Lawrence Wong and Tiong somehow induced Ahmad Sharkan, Shamsul Saad and Soon Fook Kian into agreeing to this sale? This is particularly difficult to infer or accept given that both Shamsul Saad and Soon Fook Kian were senior members of management in charge of operations and finance who were charged with providing the requisite data for the board to review. As such they would have been well aware if the cash flow issue was entirely contrived or a sham as is subsequently alleged by the plaintiff. Given their individual comments and statements during the meeting it is not possible to infer that their participation in the advice given to the Board and Shamsul's agreement with the second divestment was wrongfully induced by the defendants in this suit. Soon's advice and Shamsul's consent to the second divestment appear to be wholly independent and voluntary. This too detracts from the suggestion that the cash flow issue/problem was contrived entirely by the defendants in this suit.

Events-Post the meeting of 26 August 2009

[265] The chronology of events after the meeting when Tengku Ibrahim was given the mandate to dispose of PEB shares resulted in Tengku Ibrahim procuring a broker known as Fiduciary Ltd to sell 10.5 million PEB shares at a price of RM1.53 each. This resulted in a loss of RM500,000 as stated earlier. These issues will be dealt with in further detail later on in the judgment under separate heads. Suffice to say that for the purposes of ascertaining the true purpose of the directors in approving the second divestment, these matters appear to the court to be of less significance than the matters arising before and during the meeting of 26 August 2009. The plaintiff does point to the fact of the appointment of an unlicensed broker and failing to procure a higher price as indicia of a collateral purpose. These matters, to my mind, are more relevant to the issue of negligence in the transacting of the second divestment, rather than comprising relevant evidence for the purposes of ascertaining the dominant purpose for such sale.

[266] Having heard Tengku Ibrahim's evidence in totality and certainly in relation to the second divestment, I concluded that he was a credible witness who answered questions put to him truthfully to the best of his knowledge. He accepted and explained minor inconsistencies in his evidence. He answered all questions put to him and did not choose to evade troubling questions. His evidence was moreover consistent with the minutes of meetings and such audio recordings as were available. He accepted that there were instances where he could have exercised greater caution, but explained his actions as being necessary given the seeming exigencies of the plaintiff's situation, as represented to him by senior management executives.

[267] Prior to determining the true rationale or dominant purpose for the second divestment, it is necessary to consider the evidence of Lawrence Wong and Tiong.

Lawrence Wong's testimony in relation to the dominant purpose underlying the second divestment

[268] Lawrence Wong joined the plaintiff in 2001 at the behest of Tengku Ibrahim and Dato' Henry Kho to replace a director who had passed away. He stated in examination in chief that he attended board meetings usually held on a quarterly basis where the management team would brief, and the board would review the performance of the plaintiff's group of companies. He also sat as a member of the audit committee in his capacity as an independent non-executive director. These audit committee meetings were usually held immediately prior to the board meetings. This is borne out by the minutes of meetings.

[269] In his examination in chief, Lawrence Wong set out the events giving rise to the cash flow problem. His version of events is supported by the minutes of meeting of 26 August 2009 and similar to Tengku Ibrahim's version. In short he testified that there was a genuine, if temporary cash flow problem faced by the plaintiff at the material time, immediately prior to the second divestment. He stated that the quickest way to raise funds was to sell some of the plaintiff's shares in PEB.

[270] In cross-examination in relation to the second divestment the focus was on the timing of the second divestment when considered in conjunction with other events, for example the meetings between Tengku Ibrahim and representatives of Shorefield Resources including Datuk Bustari in early 2009. These facts were coupled with (a) the conduct of a due diligence on PEB in May 2009, (b) the execution of a non-disclosure agreement in relation to the due diligence in relation to PEB; (c) the non-disclosure to the board of the fact of such a due diligence and Shorefield's interest in the purchase of shares, and given this factual matrix the suggestion was that the dominant purpose of the second (and third) divestments was actually to facilitate a sale of the plaintiffs assets, namely its shares in PEB, to Shorefield rather than any genuine cash flow problem. Lawrence Wong disagreed that there was any ulterior motive as alleged, other than the cash flow problem. However he agreed that the fact of the due diligence, the execution of the non-disclosure agreement and the meetings with Bustari were not disclosed specifically in board meetings.

[271] Lawrence Wong was also asked, in relation to the second divestment, whether he had asked Tengku Ibrahim to refer the demand to legal advisors. He confirmed that he had not. It was also effectively suggested through a series of questions that the responsibility for the payment for the three vessels lay with PEB rather than the plaintiff. The implication therefore was that there was no real cash flow problem, as it was PEB's liability rather than the plaintiff's. However Lawrence Wong explained that while the balance of the purchase consideration was to be borne by PEB pursuant to several novation agreements, on 26 August 2009 the primary issue concerning the board was the need to pay the balance purchase price. It was incumbent upon the plaintiff to do so, rather than PEB. Lawrence Wong also pointed out that the payment of the purchase price by PEB would only take effect provided there was no delay in the delivery of the subject vessels.

[272] It was then put to him that this issue of the novation, whereby PEB would take over the payment of the purchase price, was not recorded in the board minutes of 26 August 2009. Lawrence Wong maintained that while not recorded it was probably discussed. It was put to him that he failed to disclose to the board that given the existence of the novation agreements, the obligation to pay the balance of the purchase price lay with PEB. Lawrence Wong

maintained that there was no necessity for him to do so when the board was aware of the status of sale of the three vessels.

[273] In this context it is relevant that to note that the cash flow requirements which were discussed at the August meeting were premised on the basis, as set out earlier, that the plaintiff's shareholders' approval had to be procured before the ownership of the vessels could be transferred to PEB whereupon the obligation to pay would effectively be transferred to PEB. However the shareholders' approval was only scheduled to be obtained in September and in fact was procured in November 2009. In the interim there was a requirement for the plaintiff and not PEB to make the balance purchase payment to Shin Yang who it had commissioned to build the vessels.

[274] Lawrence Wong was also asked whether he ascertained how Tengku Ibrahim had dealt with the Shin Yang problem when it became apparent that the proceeds of sale of the PEB shares could not be utilised to meet the cash flow problem. He responded that he had asked Tengku Ibrahim who had told him about the procurement of a bank guarantee. He was also asked whether Tengku Ibrahim complained about Soon Fook Kian failing to advise him that the sale proceeds arising from the second divestment could not be utilised to alleviate the cash problem. Lawrence Wong answered that Tengku Ibrahim was not happy about the mistake. He accepted that as a member of the audit committee he had not singled out Soon as the cause of the confusion in relation to the utilisation of the proceeds from the second divestment.

[275] It was then put to Lawrence Wong that the entire Shin Yang demand issue giving rise to a cash flow problem was contrived. He disagreed. Later on it was also put to him that he was privy to a conspiracy with the other defendants to injure the plaintiff which he denied.

[276] The entire cross-examination of Lawrence Wong by learned counsel for the plaintiff was lengthy. It is not feasible to set out the entirety of the same here. However having read the entirety of the questions put in cross-examination, it suffices to summarise that the questions were directed at establishing that both divestments were undertaken for the dominant purpose of injuring the plaintiff.

[277] In the course of re-examination, in relation to the Shin Yang demand and payments due, Lawrence Wong explained that he relied entirely on the data and information provided by the management of the plaintiff. He had no reason to doubt the accuracy of the information provided by them. He would have verified matters personally only if he doubted the information presented by the management.

[278] He further stated that all facts and figures were presented and worked out and determined by key management staff, namely Soon and Shamsul. He highlighted the fact that the directors themselves took no part in the preparation of the facts and figures at all. He therefore denied that the cash flow situation could have been 'contrived' solely by the impugned directors, namely the defendants in this suit. In this context he recalled that Soon Fook Kian, whom he described as the Head of Finance was present at the August meeting and never raised any issues in relation to the veracity of the Shin Yang demand, either at that time or subsequently. He completed his evidence on this issue of the cash flow problem being contrived by pointing out that at all board meetings and audit committee meetings, senior management namely Mr Soon Fook Kian and the heads of other departments were present and all facts and figures were presented by them. Therefore he denied the possibility that the cash flow 'problem' had been created by the defendants, with a view to cause the loss of the PEB shares to the detriment of the plaintiff. Ultimately Lawrence Wong stated that there was no reason for him to cause loss to the plaintiff.

[279] I found Lawrence Wong to be direct and honest in his answers, again despite lengthy and circuitous cross-examination. He sought clarification where it was necessary and answered questions as directly as he could. His evidence was also consistent with the documentary evidence.

Tiong's testimony in relation to the purpose underlying the second divestment

[280] Tiong became an independent non-executive director of the plaintiff in late 2008 at the request of Lawrence Wong. He explained how he functioned as a director at the time. He stated that in late 2008 the management team of the plaintiff represented that there was sufficient cash flow to service the relatively large borrowings and financial commitments which were in the region of RM1.8 billion at the time. He stated in examination in chief that at the August meeting, the management team including Tengku and Shamsul informed the board that the plaintiff was suffering from a tight cash flow position. He then set out the problem relating to the Shin Yang demand. This was again consistent with the minutes as well as the testimony of both Tengku Ibrahim and Lawrence Wong. Tiong recalled that the management team comprising Tengku Ibrahim, Shamsul and Soon had reported that the group had insufficient cash flow to pay the balance purchase price for an additional vessel that had been commissioned. He testified that the board discussed the mode of addressing this cash flow problem. He recalled that someone from the management suggested the sale of some of the PEB shares to bring in some cash. This appeared to be a viable and immediate mode of resolving the short term cash flow problem. He termed it a short-term problem because the management team advised that upon the successful disposal of the three vessels to PEB, approximately RM75m would be brought in to the plaintiff group.

This again is consonant with the minutes. On the issue of pricing, Tiong maintained, like Lawrence Wong that Tengku could be entrusted to finalise the price and sale because he remained answerable to the board and would have to justify both the price and number of shares sold.

[281] In the course of cross-examination which was also lengthy, Tiong was cross-examined about the meetings that he was present at between Tengku Ibrahim and Bustari Yusof or other representatives of Shorefield Resources Sdn Bhd prior to August 2009. He was asked if he was aware of the nature of Bustari Yusof's interest in the plaintiff and PEB, including Tengku Ibrahim's shares in these entities. He was asked whether he was aware that Shorefield Resources was the ultimate purchaser under both the second and third divestments. Tiong replied that he had become aware through reports, and not personally. He was also questioned on the due diligence which he stated he only became aware of subsequent to the commencement of litigation. Similarly with the non-disclosure agreement.

[282] In relation to the second divestment, Tiong was questioned at length about the syndicated loan from Hwang-DBS. He could not recall the latter loan although it had been discussed at the February 2009 meeting. When it was pointed out to him, he accepted that he had forgotten, but maintained that he was not aware of how the loan monies were utilised. It is clear from a perusal of his evidence that he was not entirely aware of the details pertaining to the various loans procured by the plaintiff or even the details of the disposal of the three vessels by the plaintiff to PEB.

[283] It was pointed out to him as a member of the audit committee that that committee had sat before the board meeting on 26 August 2009 but the issue of a cash flow problem had not been raised. On this basis it was suggested that the cash flow problem raised subsequently at the 26 August 2009 meeting was contrived. Tiong disagreed. It was suggested to him that the problems relating to paying salaries, the servicing of loans etc were not set out in the minutes of 26 August 2009. Tiong maintained that while it had been discussed it had not been minuted specifically.

[284] It was then put to him that the minutes also did not reflect that Shamsul and Soon had advised of the demand. He was also asked whether he had seen the demand by Shin Yang and he responded that he had been advised that it was a verbal demand. It was also put to him that the Shin Yang demand was not mentioned in the circular relating to the disposal of the three vessels from the plaintiff to PEB. Tiong's response was that the issue had been resolved and there was therefore no necessity to refer to it again. It was then again suggested that this issue of the Shin Yang demand was contrived.

[285] With regards to the mandate given to Tengku Ibrahim in respect of the second divestment it was put to him that there was no discussion on the minimum price nor any conditions whatsoever. Tiong agreed. It was then suggested that the second divestment amounted to a conspiracy between Tengku Ibrahim, Lawrence Wong and Robert Lee. He disagreed. It was also put to Tiong that the tight cash flow problem had been contrived by Tengku Ibrahim, Lawrence Wong and Tiong himself, as otherwise Tiong as a member of the audit committee would have taken action against Tengku Ibrahim for failing to prevent the cash flow problem in his capacity as CEO. Tiong disagreed. A perusal of the notes of proceedings discloses that many variations on this theme were put to Tiong. It is again, simply not possible to reproduce the entirety of the cross-examination here as it is simply too lengthy. Suffice to summarise that Tiong definitively denied the possibility of any conspiracy or contrivance on his part in relation to the second divestment.

[286] In re-examination he explained that audit committee meetings were led by the internal auditor who highlighted existing problems. The internal auditor had not highlighted any problems in relation to cash flow at the audit committee meeting on 26 August 2009. Again like Lawrence Wong, he explained that he had relied on the presentation of data by Soon and Shamsul in arriving at the decision to sell PEB shares in relation to the second divestment. As the decision was anchored on the presentations by management, he refuted any possibility of the cash flow problem being contrived. He also dismissed the possibility of exploring other objectives like further loans, because the borrowing ratio had already reached a maximum. His evidence was therefore essentially entirely consistent with that of both Tengku Ibrahim and Lawrence Wong. Although it might be said that this is to be expected, I must clarify that I make that comment having considered the entirety of each witness' evidence. Their testimony despite gruelling and extremely lengthy cross-examination, was remarkably consistent.

[287] I found Tiong to be a straightforward witness. He did not have the degree of knowledge exhibited by Lawrence Wong and Tengku Ibrahim but this was not surprising given that he was only appointed as a non-executive director in November 2008. I have no reason to doubt his veracity or credibility.

[288] The foregoing then is the main testimony available to the court in order that a determination may be made in relation to the ultimate or dominant purpose for the sale of the 10.5m PEB shares on 11 September 2009 comprising second divestment. Having considered the entirety of the evidence of Shamsul as well as these three impugned directors, it remains for me to make a determination as to the dominant purpose for the second divestment.

Conclusion on the dominant purpose for the second divestment as borne out by the totality of the relevant evidence at trial

[289] Having considered and analysed the evidence of the key directors in relation to the underlying reason for the second divestment, it appears to this court that the dominant purpose for the second divestment was the alleviation of a genuine cash flow concern or problem relating to the financial status of the plaintiff which culminated in August 2009, when it was highlighted to the then board of directors of the plaintiff by senior management personnel. In arriving at this conclusion I had to examine and weigh the contrasting versions of events put forward by Shamsul Saad on the one hand against that of the impugned directors on the other. I also had to consider the surrounding factual matrix for the period of about a year prior to, and the events following the second divestment. The following matters had to be weighed and balanced in determining whether the dominant purpose was a genuine cash flow problem or whether it was, as strongly alleged by counsel for the plaintiff in the course of cross-examination merely contrived and a sham:

(a) the minutes of the meetings of the board of directors of the plaintiff for the period from mid-2008 to the fateful meeting of 26 August 2009. These minutes supported the subsistence of a genuine cash flow problem as I have explained exhaustively earlier. In so concluding, I have considered Shamsul's statement that the minutes of 26 August 2009 are not accurate. However I am unable to accept that the minutes are inaccurate because Shamsul failed to make any attempt whatsoever to correct the same for several months after the second divestment. He also failed to require any amendment or correction of the minutes at the board meeting subsequent to the meeting of 26 August 2009;

(b) the oral evidence of the three impugned directors, namely Tengku Ibrahim, Lawrence Wong and Tiong who were consistent in their evidence that they believed on the basis of representations by Soon Fook Kian that there was an urgent or dire need for cash to make the balance purchase price payment for the Petra Galaxy. In this context, I have analysed their evidence at some length and concluded that their testimony is credible;

(c) the fact that after the second divestment at the meeting on 16 November 2011 the Finance Manager, Soon Fook Kian also referred to the fact that the sale proceeds would not go towards meeting the plaintiff's cash flow requirements. This too points to the fact that there was a genuine cash flow problem;

(d) the fact that the plaintiff's board had been considering issues of solvency and repayments for borrowings as early as August 2008 and thereafter until 2009. The minutes again disclose that the directors were exploring means of raising funding as far back as that date;

(e) the background minutes prior to 26 August 2009 commencing from February 2009 when Tengku Ibrahim reported that PEB was interested in purchasing vessels to facilitate a contract between its subsidiary and Shell that was worth a significant sum of money. This shows that the subsequent delay in the procurement of the vessel which would in turn delay the procurement of the Shell contract was a reality, and not something contrived or thought bup by Tengku Ibrahim, Lawrence Wong and Tiong, albeit collectively or singly;

(f) as against this, the factors that point towards the 'cash flow' problem being contrived include the letter written to Hwang-DBS on 4 September 2009 by Tengku Ibrahim where he seeks permission to sell the shares under the second divestment. It ought to have been apparent to him at that juncture that the proceeds could not be utilised to alleviate the cash flow problem. The plaintiff contends that this proves the cash flow issue was not genuine. However, it is also in evidence that the letter was prepared by the de facto financial controller of the plaintiff, ie Mr Soon Fook Kian, who failed to warn Tengku Ibrahim of the futility of the sale;

In this respect while I find that Tengku ought to have exercised greater caution and care and should have sought to ascertain the full extent or meaning of the letter, I accept his subsequent explanation that he signed the letter on it having been presented by Soon Fook Kian, without considering its effect. The evidence at trial discloses that Soon Fook Kian was in charge of finance and reported to both Tengku Ibrahim and Dato' Henry Kho Soon Fook Kian participated in the board deliberations in August 2009 and was or ought to have been fully aware of the proposed purpose of the second divestment. The minutes of meetings and the audio recording disclose that the directors generally, and Tengku particularly, relied upon him for advice on financial matters. Soon was also nominated in the facilities agreement with Hwang-DBS as the 'contact person'. Therefore while Tengku as the chief executive officer is answerable or primarily responsible, it was entirely reasonable for him to rely on a professional accountant such as Soon Fook Kian to provide financial data and relevant information. Section 132(1C) allows Tengku Ibrahim to rely on Soon. The fact that the sales proceeds could not be utilised to alleviate the cash flow is precisely the sort of advice and information that a finance manager such as Soon Fook Kian was expected to provide, particularly as it related to the facilities agreement that he had primary oversight of.

In relation to the issue of the impugned directors' purpose in effecting the second divestment, it appears to this court that it is in fact Soon who ought to have been called to explain the 'error' or mistake in concluding that the second divestment would resolve the cash flow problem.

However, as Soon Fook Kian was not called, it is not possible to conjecture why or how the fact that the proceeds could not be so utilised, was not highlighted.

In this context it was also put to Tengku Ibrahim that he failed to take any disciplinary action against Soon, to which he agreed, but it is in evidence from Tengku Ibrahim and Lawrence Wong that the former was not happy with Soon's failure to highlight the fact that the PEB shares were pledged to Hwang-DBS. Finally the minutes of 16 November disclose that Soon Fook Kian himself only highlighted this fact to the board well after the second divestment. He did not explain on the 16 November 2009 why he had not highlighted this fact at the August meeting.

Given the entirety of these circumstances it does not appear to this court that this letter to Hwang-DBS in itself detracts from the subsistence of a genuine cash flow problem. The fact that the sale could not alleviate the cash flow problem does not mean that there was in fact no cash flow problem;

(g) the fact that no formal letter of demand from Shin Yang was produced is relied upon by the plaintiff to maintain that there was no real cash flow exigency. However at the board level it is not to be expected that the other directors or the chairman produce a letter of demand in order to establish the existence of a cash flow problem. In any event Robert Lee testified that he was the one who had alerted Tengku Ibrahim about Shin Yang's demand. In this regard it is pertinent that Soon Fook Kian in several minutes of meetings refers to this 'cash flow' issue. Most importantly he refers to a serious cash flow problem in the August meeting pre-dating the second divestment and again at the 16 November 2009 meeting. This suggests that such a problem did exist. The first time he appears to have resiled from this position is at the EGM on 4 February 2010 when the impugned directors were removed. There for the first time he suggests, from the minutes that it was Tengku Ibrahim who was to blame for the cash flow because he had halted all further financing. This is not borne out by the minutes. It is also long after the divestment when the relationship between the parties had deteriorated considerably. As such it would not be prudent to rely on his subsequent statement but to focus on Soon's representations at the material time. For this reason I conclude that the lack of production of a formal letter of demand from Shin Yang does not detract from the existence of a genuine cash flow problem;

(h) the meetings with Datuk Bustari of Shorefield Resources Sdn Bhd and his representatives who had expressed an interest in purchasing PPB shares and subsequently PEB shares, does not in itself detract from the subsistence of a cash flow problem. The plaintiff however relies on the additional facts of the conduct of a due diligence and the execution of a

non-disclosure agreement by Tengku Ibrahim, coupled with a failure to make disclosure of these matters to the board, as warranting an inference that the sale of the shares in the second divestment was primarily to benefit Shorefield Resources to the detriment of the plaintiff, rather than to meet any cash flow problem. I have again considered these issues in the context of the factual matrix in which they occurred as set out in Part 1. While it would have been prudent for Tengku Ibrahim to have made formal disclosure of these matters to the board, there seems to me to be insufficient evidence of collaboration to warrant a finding that the dominant purpose was to divest the plaintiff of the PEB shares for the benefit of Shorefield Resources Sdn Bhd If indeed that had been the position, it would have been considerably easier for Tengku Ibrahim to have sold the shares under the second divestment directly to Shorefield Resources at a higher price directly, rather than to sell the 10.5m shares to TA Securities Holdings Bhd through Fiduciary Limited at a lesser price and suffer a loss. It was TA that subsequently sold these shares to Shorefield Resources Sdn Bhd at a higher price. As such it is difficult to conclude that there was a predetermined intention to so dispose of the shares to the benefit of Shorefield. The fact that TA Securities Holdings Sdn Bhd is not privy to the conspiracy further discourages such an inference;

(i) in the course of the cross-examination of the impugned directors it was sought to be suggested that the second divestment was undertaken for an improper purpose because the dominant reason for the sale was to divest the plaintiff of the PEB shares and propel those shares to Shorefield Resources, with a view to the impugned directors then leaving the plaintiff to join PEB;

There is, to my mind, insufficient tangible evidence to warrant such an inference from being drawn. In so concluding, I take into account the meetings with Datuk Bustari of Shorefield Resources Sdn Bhd, the due diligence exercise conducted in May 2009, the execution of the non-disclosure agreement and the non-disclosure of these facts to the board of directors of the plaintiff. While these matters show that Tengku Ibrahim may well have been considering the prospects of selling down the PEB shares to a willing buyer such as Shorefield Resources Sdn Bhd, these facts in themselves comprise insufficient evidence to warrant an inference that he and the other impugned directors were conspiring to definitively sell the shares to Shorefield Resources in its entirety with a view to injuring the plaintiff. Given that the due diligence was disclosed to many others as borne out by the evidence of Tengku Ibrahim, Robert Lee and the email correspondence between the relevant employees involved, it follows that there was nothing covert about the interest of Shorefield Resources Sdn Bhd.

The letter dated 11 November 2009 from one Nagendran, who was aligned to Dato' Henry Kho, written to Tengku Ibrahim in November 2009 also proposes the sale of the PEB shares 'en bloc' on condition that the Kho' brothers are appointed to the board of the plaintiff, and that Tengku Ibrahim disposes entirely of his shares in the plaintiff. So the possibility of a sale of the entire bloc of PEB shares was an issue that was well within the knowledge of the key management personnel of the plaintiff, and can hardly be described as clandestine. It is even alluded to in several newspaper cuttings as a long debated possibility and proposal.

In this context, Tengku Ibrahim's comprehensive explanation in the course of re-examination affords a full reply to this proposition. As he said, he was a founding shareholder and director of the plaintiff in conjunction with Dato' Henry Kho since 2000. He had built up the plaintiff with Dato' Henry Kho' and there did not appear to be any reasonable basis for him to 'kill' the company as is alleged, when he was the executive chairman and chief executive officer with a large personal shareholding. The plaintiff company then bore his name, 'Petra'.

When all these matters are considered in conjunction with the clear and consistent evidence of a cash flow problem as borne out by the contemporaneous documentary evidence, the inexorable conclusion that is to be drawn is that the impugned directors together with Ahmad Sharkan, Shamsul and Tengku Ibrahim's wife, made a decision to effect the second divestment in the genuine belief that they were alleviating a cash flow problem. To that end, they exercised their powers for a proper, and not an improper purpose. Their concern was in the best interests of the plaintiff. The fact that they were mistaken in so believing, does not detract from their bona fide and genuine belief that the second divestment would be beneficial to the plaintiff. And it is their perception or genuine belief that is relevant here. In *Re Southern Resources Ltd* (1989) 15 ACLR 770 Perry J emphasised that it is the perception of the directors, rather than the objective commercial justification, which determines their purpose. In this context it was also said that each director's position must be analysed separately, (see *Ford's Principles of Corporations Law* at para 8.230, p 334).

Test for directors' duty to exercise powers for a proper purpose

[290] In so concluding above, I have applied the legal tests enunciated below in several cases in order to determine whether the impugned directors exercised their powers properly. The High Court of Australia in the case of *Chew v R* (1991) 5 ACSR 473 (at 491) set out the test to be adopted in determining whether directors exercised their powers properly:

7/7 requiring a director to act honestly, s 124(1) imposed the common law obligation to act bona fide in the interest of the company, making it an offence to fail to do so. However, he expressed the view that for there to be a breach of this obligation imposed by s 124(1) there had to be 'a consciousness that what is being done is not in the interest of the company, and deliberate conduct in disregard of that knowledge ... '

[291] And in *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64 at p 77, Mohamed Dzaiddin FCJ adopted the reasoning in *Australian Growth Resources v Van Reesema* (1988) 13 ACLR 261:

> The relationship of a director to the company is fiduciary in character. The primary consequence of this principle is that a director is bound to exercise the powers and discretions conferred upon him bona fide in the interests of and for the benefit of the company as a whole: The exercise of a fiduciary power for a purpose beyond the legitimate scope of the power is invalid. The validity of the exercise of the powers of a director therefore depends upon the purpose of the exercise being for the benefit of the company as a whole.

[292] In *Pioneer Haven v Ho Hup Construction Co Bhd* [2012] 3 MLJ 616 the Court of Appeal at p 655, para 239 adopted the principle in *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62 as set out earlier.

[293] It must be said that even if I am incorrect in concluding that these directors were motivated to effect the second and third divestments for an entirely proper purpose, namely to alleviate and address the cash flow concerns of the plaintiff, and there was, in fact a mixed purpose for the Second and third divestments, this in itself does not and ought not to vitiate the fact that they were primarily driven by a proper purpose. In other words even if it is concluded from a perusal of the evidence that Tengku Ibrahim, Lawrence Wong and Tiong had more than one purpose in mind when deciding to undertake the divestments, this does not vitiate the fact that they acted primarily in good faith in the interest of the company to meet its cash flow problems. If for example it were to be concluded that Tengku Ibrahim was aware that this sale would result in a de-merger of PEB and the plaintiff, and that Shorefield was interested in purchasing PEB shares, this in itself does not vitiate or render nugatory, his primary goal of seeking to resolve the plaintiff's financial affairs because he genuinely and reasonably believed that the cash flow issue had to be addressed and resolved. In this context, the fact that no other resolutions were put forward to meet the imminent cash flow threat is important. What were the directors to do? Were they to remain entirely inert and do nothing?

[294] It might be argued by the plaintiff in this context that the cash flow problem was not real or genuine. That it was contrived solely for the purposes

of enabling a sale to Shorefield Resources Sdn Bhd But this again is contrary to the evidence available in this court. Secondly a substantive basis for the impugned directors' genuine concern for the cash flow problem were the representations made by senior personnel such as Shamsul Saad and Soon Fook Kian. In these circumstances it appears that even though Tengku Ibrahim, Lawrence Wong and Tiong were aware of Shorefield's interest in purchasing PEB shares at or around the time of the second and third divestments, on the facts of the instant case, this was merely an incidental effect following upon the pursuit of a permissible purpose, namely the resolution of the cash flow issues facing the plaintiff. In other words, the primary purpose was bona fide, proper and therefore permissible. The incidental effect, ie the acquisition of shares by Shorefield does not have the effect of vitiating the primary and proper purpose.

[295] Having dealt with the second divestment, I turn now to the evidence relating to the third divestment.

The third divestment

Shamsul's evidence in relation to the dominant purpose for the third divestment

[296] In his examination-in-chief, Shamsul Saad referred to the minutes of the board of directors' meeting of 16 November 2009. He claimed that he was 'taken aback' by the mention of a further disposal of the PEB shares. He states that it appeared to him that there was intent on the part of Tengku Ibrahim, Lawrence Wong and Tiong for this disposal to be agreed on that day itself and the disposal to be done in a rushed manner. Shamsul expanded on his impressions of the meeting, attributing intentions to the impugned directors particularly. He stated inter alia, as follows:' ... It was apparent to me that the whole meeting was contrived and orchestrated towards the objective of selling the PEB shares as fast as possible. The audacity and brazen acts' of selling-off firstly PPB vessel assets worth more than RM200m to PEB in one week and in the next week orchestrate in that meeting to impose a decision to sell the PEB shares was remarkable. I could not but be taken aback.' He stated that he did not agree to the further disposal of PEB shares during this meeting.

[297] It must first be pointed out that this version of events by Shamsul Saad is not borne out by a perusal of the full minutes of the meeting of 16 November 2009. I have set out at some length the purport of this entire meeting in Part 1. It is evident from the minutes that the board had considered the unaudited results of the plaintiff group and were concerned that a consolidated net loss of RM8.9m had been recorded for the first time in the plaintiff group's history. The net profits had decreased by 55%.

[298] Shamsul had in fact added to the already bleak picture by reporting at length on vessel utilisation and future prospects of the plaintiff. The picture he painted was gloomy and unpromising. The minutes disclose that Shamsul reported to the board that the overall vessel utilisation rate would only be around 50% for the next three months and was unlikely to change for the first quarter of 2010. He only expected improvement towards the fourth quarter of 2010. It was after this less than promising presentation by Shamsul that the directors sought cash flow projections from Soon Fook Kian based on a series of assumptions ranging from a worst case scenario to a feasible scenario.

[299] When Soon Fook Kian then joined this meeting he was then asked whether the plaintiff group would face any cash flow problems assuming a utilisation rate of 50% as presented by Shamsul. The minutes disclose that Soon Fook Kian commented that he thought a 60% utilisation rate was comfortable but that he needed to do a cash flow simulation. He suggested the sale of old vessels but again Shamsul stated that the disposal of old vessels was difficult at that time. The meeting then decided that they required the relevant simulations in order to make a decision.

[300] Later on in the meeting the board enquired, and Soon stated that if the entirety of the PEB shares were sold the plaintiffs cash flow problems would be resolved.

[301] A comparison of the minutes of the 16 November meeting and Shamsul's evidence in examination in chief therefore provide quite disparate accounts of the meeting of 16 November 2009. Shamsul's version suggests that the impugned directors simply rushed or forced a decision involving the sale of the entirety of the PEB shares, if possible with immediate effect. However the minutes show otherwise.

[302] With respect to the meeting on 18 November 2009, Shamsul accepted that all the directors present resolved and agreed to the third divestment, namely the sale of the entire 54.62% equity stake equivalent to 106.5 million shares in the plaintiff. It is not in dispute that the sale was subject to several conditions namely:

(a) sale en bloc;

(b) by way of an open tender;

(c) the appointment of placement agent and advisers;

(d) the availability of the valuation of PEB shares by an independent valuer;

(e) the net proceeds on the proposed disposal at a minimum of RM1.80 per share; and

(f) compliance with all rules and regulations.

[303] As is apparent from a perusal of the minutes these conditions were suggested not only by Shamsul but also by Lawrence Wong and Tiong. To that extent Shamsul's evidence in examination-in-chief is inaccurate.

[304] Shamsul explains why he agreed to a sale of the entire equity in PEB thus: '... Based on conduct of the directors especially D1, D2 and D3 during the 16 November 2009 board meeting as described earlier it does not take much analysis to conclude that their main objective is to sell the PEB shares and use whatever excuse they can to carry this out with as minimal oversight by shareholders or Bursa or the Securities Commission. Coupled with what appeared to me to be other obvious acts of betrayal of shareholders trust which I had since uncovered with access to information privy to only directors, there was no doubt in my mind of the above conclusion. I was mindful that had I objected, I would likely be out-voted by the other directors ...

[305] The audio recording of the meeting of 18 November 2009, which I heard in its entirety is otherwise than as represented by Shamsul. It is evident after hearing the audio recording which is consonant with the minutes of the meeting, that contrary to what Shamsul stated under oath in court, he had in fact fully supported and agreed with the decision made by the board collectively, that it had no option but to sell the entirety of the PEB shares to meet the plaintiff's austere cash flow problem. At no point in time during the meeting did Shamsul express reluctance, far less object to the proposal. The audio recording which provides contemporaneous proof of what was said in the meeting and which was introduced into evidence by the plaintiff, discloses that Shamsul was entirely in agreement with the views of the board, after presentations had been made by both himself in relation to operations and Soon Fook Kian in relation to cash flow simulations. The matter of cash flow had to be dealt with urgently in view of the losses suffered by the plaintiff for the first time in its corporate history. When all of this evidence is considered it is clear that Shamsul's evidence in court on this issue, particularly examination in chief, was unreliable and misleading. In fact the brevity of his evidence on the discussion of matters on 18 November 2009 appears to amount to a deliberate attempt to conceal/suppress salient and significant matters. In this context I refer to the extensive discussion of the cash flow problem as evidenced by both the minutes of 18 November 2009 as well as the audio tape recording of 18 November 2009.

[306] Shamsul went on to testify in examination in chief that that there was no cash flow problem and that the selling of PEB shares was a 'ruse'. Given:

(a) Shamsul's express presentations on 18 November 2009 to the effect that the outlook for the plaintiff was bleak;

(b) Soon's presentations which foretold of an imminent cash flow problem;

(c) Soon's oral comments in relation to the cash flow issues and his support or consensus to a sale of the entirety of the PEB shareholding as evidenced by the audio recording of 18 November 2009;

(d) Shamsul's express oral agreement with the other directors that the sale of the PEB shares was the only viable option to deal with the cash flow problem as evidenced by the audio recording of 18 November 2009; and

(e) The minutes of both the 16 November and 18 November 2009 meetings which were confirmed as correct the only reasonable conclusion that can be drawn is that Shamsul's evidence at trial was diametrically opposed to the documented evidence of his agreement in the minutes of meeting of 18 November 2009, as well as the audio tape recording of that same meeting, which affords contemporaneous evidence of exactly what he said. It is not possible to reconcile his contemporaneous comments at that meeting with his examination in chief. In other words, Shamsul was not, in my estimation, a witness of truth.

[307] A perusal of his evidence in the course of cross-examination on this issue discloses that he was evasive and sought to avoid answering questions directly put to him. It is not feasible for me to set out the entirety of his cross-examination. Suffice to say that as he was the first witness at trial, I formed the opinion at the time, that he appeared confused and unsure of the facts. Having however subsequently read the entirety of Shamsul's representations and statements at board meetings, and heard the audio voice recording of 18 November 2009 as well as his complete mastery of the facts at the EGM on 4 February 2010, it is clear to this court that Shamsul was deliberately unhelpful and evasive in the course of cross-examination. Be that as it may, it is not disputed that Shamsul himself agreed with the proposal to sell the entirety of the PEB shares on 18 November 2009. That decision of the board was reached after presentations on financial and operational data had been given by Shamsul himself and Soon. Shamsul cannot therefore now contend that he did not agree to the sale of the shares on that day.

[308] In this context I reject without hesitation Shamsul's attempt to suggest that he was in any manner deceived or hoodwinked into agreeing to the sale for the reasons I have set out exhaustively above. Shamsul's evidence has to be viewed with great caution, and certainly cannot be relied upon to warrant a conclusion or inference that the impugned directors were 'scheming' to sell the shares to the detriment of the plaintiff. Having heard the entirety of the evidence, including a perusal of the minutes of 4 February 2010, it appears to the court that it is in fact the impugned directors who have been adversely

affected by the diametrically opposing stances Shamsul and the other management staff took at different times.

[309] In the course of his evidence Shamsul focussed on the fact that the third divestment was not carried out in accordance with the precise mandate of the board. To this end he went on to challenge the failure of Tengku Ibrahim to return to the board with a valuation, to make an announcement and then proceed by way of an open tender. In other words the greater part of his evidence in relation to the third divestment related to the failure to comply with the terms of the board mandate. To my mind these issues arose post the grant of the mandate by the board. The failure (if proved) to comply with the terms of the mandate do not support the contention that there was no real cash flow problem at the time. If indeed there had been no cash flow problem at the time, it would be expected that Shamsul or Soon would have expressly said so. If Shamsul had really been reluctant about the third divestment this would have been apparent from the audio recording of 18 November 2009. There is simply no such evidence available. Shamsul's statements at trial are well after the event and clearly calculated to bolster the plaintiff's case, rather than providing a truthful factual account. Given the same it is difficult to conclude from Shamsul's evidence that there was no cash flow problem at the time, or that the cash flow problem was a 'ruse' created by the impugned directors. In summary Shamsul's evidence does not support the plaintiff's contention that the decision of the impugned directors was for an improper purpose in relation to the third divestment.

Tengku Ibrahim's evidence

[310] Tengku Ibrahim's evidence on this issue was clear and entirely consonant with the minutes of the 16 and 18 November 2009 meeting as well as the audio recording of the same date. There is no necessity for me to repeat the same here as I have set out the basis for the directors' consensus on the need to sell the entire stake in PEB to meet a genuine cash flow issue that was brought about by a series of events including a net loss in profits for that year.

[311] As I have stated earlier, the cross-examination of Tengku Ibrahim was drawn out and extensive. Similar questions were put to him in different ways, and given the breaks between the cross-examination sessions, it is now evident that the same areas were brought up in a multitude of ways in an effort to extract sufficient evidence to put together a case for conspiracy for the plaintiff. It is therefore simply not feasible to set out the entirety of his evidence during cross-examination in relation to the third divestment. However the same issues I have set out earlier in relation to the second divestment were brought up in relation to the third divestment, namely, the meetings with Datuk Bustari Yusof of Shorefield Resources Sdn Bhd, the due diligence conducted in May

2009, the non-disclosure agreement, Shorefield's interest in purchasing the PEB shares, all of which were combined together in the course of cross-examination to suggest that Tengku Ibrahim was bent upon selling the PEB shares to Shorefield as quickly as possible. In short the position was taken once again that the cash flow issue was not the real or dominant purpose for the divestment. In this context it was put to Tengku that the second and third divestments would be of no use in respect of the cash flow problem because the sales proceeds would all go towards settling the syndicated loan, the first instalment payment of which was only due and payable in the first quarter of 2010. Tengku Ibrahim responded by explaining at some length, as borne out by the minutes of meeting as well as the audio recording that the need to raise funds had come about primarily by reason of Shamsul's bleak forecast for the plaintiff for the following year. Two forecasts had been given at the 18 November meeting it will be recalled, one from Soon and the other from Shamsul. Soon clearly stated that if the shares were to be sold the entirety of the shares had to divested because the first RM150m would go to Hwang-DBS. But the sale would raise over RM200m leaving a balance of about RM40m available to the plaintiff. With the proceeds of sale coming in from PEB, the plaintiff would have about 100m at least in cash. And there would be interest savings of 12–13m from the loan.

[312] The other salient point that was put to Tengku Ibrahim was an unfinished statement relating to a de-merger between the plaintiff and PEB. Learned counsel relied on a transcript to put this to Tengku Ibrahim. It must be said at this juncture that the transcript is badly done, incomplete in parts and fails to provide a coherent or cogent view of matters. Nonetheless it was put to Tengku that this comprised a clear intention on his part to ensure the sale of the PEB shares to Shorefield after which Tengku Ibrahim would move to PEB with Datuk Bustari. This was denied by Tengku Ibrahim. This is the allegation that comprises the core of the plaintiff's case, namely that Tengku Ibrahim and the other two directors acted for an improper purpose. However having looked at the transcript it appears to this court to have been a statement made in the course of a discussion on various issues. It is simply insufficient to found the basis for a claim of an exercise of the power of sale for an improper purpose or to support an allegation of conspiracy. Having heard the advantage of the audio-visual evidence at trial, I accept, as stated by Tengku Ibrahim, that the statement was made in the 'heat of the moment' in the course of various discussions.

[313] Further I have earlier stated that the possibility of a sale of the entire bloc of PEB shares had in fact been raised by Nagendram through the letter of 11 November 2009 where he effectively proposed a de-merger of the two entities on behalf of Dato' Henry Kho'. Again therefore there was nothing clandestine about a proposal of this nature. However the issue that arises for

consideration here is whether Tengku Ibrahim together with Lawrence Wong and Tiong had crafted or created an illusion of a cash flow problem in order to effect a sale of the PEB shares to Shorefield Resources Sdn Bhd for their personal benefit, such benefit being their joining Datuk Bustari Yusof as the majority shareholder of PEB.

[314] As has been expressly considered several times before, this does not appear to this court to be a tenable proposition because the impugned directors relied on Shamsul Saad and Soon Fook Kian, in their capacities as senior management personnel in charge of finance and operations, to conclude that there was a cash flow problem. As such it cannot be said that the cash flow problem was crafted or created or contrived by these directors. If at all it had to be 'contrived' by the senior management personnel. That is not the case.

[315] It was also put to Tengku Ibrahim that he failed to disclose to the board that he had spoken to an advisor from Affin called Johan Hashim, DW3 ('DW3') about the proposed sale of the PEB shares. Tengku replied that several companies had approached him with a view to purchasing PEB shares and he had therefore asked Johan Hashim to meet up with Lawrence Wong and Tiong for the purposes of a general fact finding discussion on the sale of PEB shares. There appears to be no reason to doubt this statement. Tengku Ibrahim also stated that he kept Dato' Henry Kho advised on all matters including this.

[316] Numerous other issues were put to Tengku Ibrahim. Having considered Tengku Ibrahim's evidence in totality in relation to the third divestment, and having had the audio-visual benefit of watching this witness, it is clear to me that he is a witness of truth. His evidence was consistent with documentary evidence in relation to the third divestment. He did not attempt to shy away from difficult questions in relation to matters transpiring after the mandate to sell the shares under the third divestment had been procured from the board.

[317] It must be said that with regards to the third divestment it has been relatively easier to ascertain the dominant purpose of the sale, by reason of the audio recording of 18 November 2009. The impugned directors' version of events, including Tengku Ibrahim's are consistent with the contemporaneous evidence. In other words, to conclude that the third divestment was a ruse that was crafted by Tengku Ibrahim, Lawrence Wong and Tiong, it would be necessary to conclude that both Shamsul and Soon Fook Kian were a central part of the 'ruse'. This is because these directors relied on the advice of these two management personnel in arriving at a decision to sell the PEB shares.

[318] However, they explored several other options first. All these other options as are set out in the minutes of meeting and the audio recording, were determined to be untenable. Soon and Shamsul agreed that the sale of the

entirety of the shares was the best option to meet the cash flow problem. It must also be borne in mind that this consensus amongst the board members and Soon Fook Kian was arrived at after the full exploration of other possible solutions to the cash flow problem. The other resolutions were rejected. In this context it is pertinent that no other solutions on how to deal with the cash flow problem were put forward by either Soon Fook Kian or Shamsul, who now contends in court that he was reluctant about the sale of the entirety of the PEB shares. These matters all go to show that the parties treated the issue of the cash flow problem as a genuine issue requiring mature consideration and deliberation. That was indeed done at the board meetings on 16 and 18 November 2009. How then can it be said that the cash flow problem was contrived or a ruse? This is clearly not the case.

[319] The events post the meeting of 18 November 2009 are relied upon by the plaintiff to establish that the haste with which the shares were subsequently sold, culminating in the third divestment on 11 December 2009, suggest that the plaintiff wanted to ensure a sale to Shorefield with a view to joining the latter. However to conclude that that was indeed the intent of the impugned directors it would be necessary, as I have said above, to conclude that the minutes of meeting and the audio recording of the meeting of 18 November 2009 were all artificial and the brainchild of solely the three impugned directors, designed to hoodwink or trick Shamsul into agreeing to a sale of the same. As I have said earlier, even considering the other extraneous events, namely Shorefield's interest in the PEB shares and the meetings with Bustari etc, the combination of these matters does not outweigh the direct and clear documentary and audio tape evidence of a decision made to sell the PEB shares by reason of a serious cash flow problem in the plaintiff. This is supported by the losses sustained by the plaintiff during this period.

The evidence of Lawrence Wong and Tiong in relation to the dominant purpose for the third divestment

[320] The evidence of Lawrence Wong and Tiong individually considered in its entirety, was consonant with Tengku Ibrahim's evidence in relation to the need for the third divestment. I do not propose to repeat or reproduce their evidence in this regard here. Suffice to say that they both relied on the minutes of 16 and 18 November 2011 to maintain that the sale of the entirety of the PEB shares was necessary to meet the cash flow requirements of the plaintiff for the following year given Shamsul Saad's bleak projections for that period. They too maintained that they had relied on Soon and Shamsul.

[321] The cross-examination of these witnesses was equally long and circuitous. However in relation to the third divestment, the cross-examination was largely focussed on the seeming haste with which the third divestment had

A been undertaken. It also centred on the non-compliance with the 18 November board mandate for the sale of the PEB shares to be undertaken by way of an 'en bloc' sale, or an 'open' tender. The meetings between Lawrence Wong and Tiong and the advisor from Affin Bank, DW3 was examined at length as well as the choice of TA Securities Holdings Bhd as the placement B agent and valuer. It was suggested that the appointment of these advisors was done in haste and covertly. When considered in conjunction with the meetings with Bustari earlier on in the year, the due diligence and the non-disclosure agreement all of which were not disclosed to the board, it followed that the impugned directors were involved in a conspiracy to transact, inter alia, the C second and third divestments with a view to facilitating a sale of the PEB shares to Shorefield Resources, after which they would all join PEB. In effect a de-merger of the plaintiff and PEB to the detriment of the plaintiff.

D **[322]** When however the evidence is considered in its totality it appears to this court that the plaintiff has sought to piece together these various isolated events and suggest that cumulatively they show a conspiracy on the part of these directors in relation to the sale of the PEB shares. The plaintiff has failed however to produce any independent evidence of this fact by for example E calling salient witnesses such as Soon Fook Kian, Henry Kho, Francis Kho and Datuk Bustari Yusof. Instead the plaintiff has produced what in effect is only one witness of fact whose credibility is very much in issue as I have stated throughout this judgment. The plaintiff has sought to establish its case through the cross-examination of the impugned directors together with a piecing F together of various circumstantial evidence, which is both unsatisfactory and untenable.

[323] Having read the evidence of these two directors in its entirety I am satisfied that they are credible witnesses. As independent non-executive G directors they had even less direct knowledge of the day to day affairs of the plaintiff than Tengku Ibrahim. It is evident that they relied on Soon and Shamsul's representations. There appears to be no reason to fault their meetings with Johan Hashim, the contents of which were subsequently made available for all to see in the form of a written opinion. At the few meetings they attended H with Tengku Ibrahim and Datuk Bustari Yusof or his representatives, it is clear that they merely accompanied Tengku. There was insufficient evidence to show that they in conjunction with Tengku had 'masterminded' a scheme to sell down the shares of PEB to the plaintiff's detriment. It is clear to me that the decision to undertake the third divestment was part of a general scheme or I resolution arrived at collectively by the directors to resolve the plaintiff's cash flow problems by selling, not just 48.8 million PEB shares, but in fact the entirety of the shares. Only a sale of the entire block would resolve the plaintiff's problems, according to Soon. The third divestment was therefore a part of the entire resolution arrived at by all the directors. As such it appears to

this court that Lawrence Wong and Tiong, like Tengku Ibrahim exercised their powers as directors and determined to sell the PEB shares by way of the third divestment for an entirely proper purpose. They were not motivated by any improper concerns as the plaintiff now seeks to suggest.

[324] I therefore find and conclude that the dominant purpose for the sale of the shares effected vide the third divestment was entirely proper and in the best interest of the plaintiff.

[325] As such the finding of this court is that both the second and third divestments were undertaken by, inter alia, Tengku Ibrahim, Lawrence Wong and Tiong as directors of the plaintiff at the material time, for a proper purpose. To that extent therefore they acted bona fide in the best interests of the company. I am satisfied that with respect to each of these directors, there is insufficient evidence to show that there was a clear consciousness on their part that what they were doing was not in the interests of the plaintiff and that they nonetheless acted deliberately to sell the PEB shares in disregard of that knowledge. As the full scope of the facts reveals, if their plan to sell the entirety of the PEB shares had been allowed to come to fruition, the plaintiff would have resolved its cash flow problems. However this was not to be as Shamsul injuncted the further sale of the PEB shares. The purpose of the sale was therefore never achieved. In these circumstances it cannot be said that these three directors had acted to the detriment of the plaintiff. On the contrary they genuinely believed that they were acting in the best interests of the company.

[326] The documents support the existence of a cash flow problem. If indeed this was not the case, then this begs the question of why Soon and Shamsul would make untruthful or false presentations to the board. That is outside the scope of inquiry of the pleadings in this case. But the fact remains that given the documentary and contemporaneous evidence available at the time, there appeared to be a genuine cash flow problem which needed to be resolved. This the three directors sought to do. I therefore reject the proposition sought to be put forward by the plaintiff that there was a scheme in place, put together by these directors to facilitate a sale of the PEB shares to Shorefield and to then join PEB with Datuk Bustari Yusof as the majority shareholder. In this context it must be borne in mind that these directors were forcibly removed after the EGM of 4 February 2010. Where then was is the evidence to substantiate this alleged conspiracy or desire to sell down and leave the plaintiff to join PEB? In fact this issue is not even pleaded but was raised by learned counsel for the plaintiff in the course of the cross-examination of the three directors. It appeared to this court to amount to a clear attempt to build up a case where no real basis for the same subsisted.

[327] In concluding that the second and third divestments were in fact effected or transacted for a proper purpose, ie bona fide in the best interests of the plaintiff in compliance with s 132(1) of the Companies Act 1965, I have been mindful to apply the tests laid down in *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64 as well as *Fitrzsimmons v R* (1997) 23 ACSR 335 and *Smith (Howard) Ltd v Ampol Ltd* and importantly the standard to be applied as set out in *Pioneer Haven v Ho Hup Construction Co Bhd*.

[328] I have also considered the subjective intention of the impugned directors by considering their evidence as a whole as stated in *Pioneer Haven v Ho Hup Construction*:

> ... Nevertheless, although not conclusive the court can look at the deterred intentions of directors in order to test their assertions (which will often be self-protective) against the assessment by the court of what, objectively, was in the best interests of the company at the relevant time ... So long as they act bona fide and in the interest of the company and its members, the law will uphold them.

[329] Tengku Ibrahim, Lawrence Wong and Tiong acted in the interest of the company and its members in determining to undertake a sale of the plaintiffs assets to alleviate its cash flow problem. This conclusion may be drawn because on the evidence, the cash flow problem was genuine. It is significant that there was no statement or act by any of the other directors such as Shamsul or senior management personnel which indicated that there was absolutely no such problem. There was moreover, no other resolutions suggested to deal with this problem.

[330] In these circumstances, it appears to this court that an intelligent and honest man in the positions of either Tengku Ibrahim, Lawrence or Tiong could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the plaintiff. It is in fact the finding of the court, after a consideration of their evidence as a whole, that they did believe that the second and third divestments were for the benefit of the plaintiff. In short the three impugned directors appeared to this court to have exercised their powers and discretions in good faith and not for the improper or collateral purpose of injuring the plaintiff by propelling the shares to Shorefield Resources and thus divesting the plaintiff of its then subsidiary, PEB.

PART III

[331] I now turn to the various segmented allegations made by the plaintiff against the first to fourth defendants. This comprises in turn a consideration of the following matters:

(a) whether the second divestment was conducted pursuant to the general shareholders' mandate or the board mandate of 26 August 2009;

(b) whether Tengku Ibrahim breached his statutory or fiduciary duties by:

(i) proceeding with the second and third divestments;

(ii) failing to secure a better price for the PEB shares in the second divestment

(iii) appointing Fiduciary Ltd for the sale of the shares under the second divestment;

(iv) whether Lawrence Wong and Tiong are liable or breached their duties owed to the plaintiff in relation to the Second or third divestments.

(c) alternatively whether Tengku Ibrahim, Lawrence Wong and Tiong were negligent and breached the duty of care owed to the plaintiff in relation to the second and third divestments.

(d) whether Tengku Ibrahim, Lawrence Wong and/or Tiong breached their statutory or fiduciary duties in relation to the third divestment by:

(i) not selling the PEB shares en bloc as provided by the board mandate of 18 November 2009;

(ii) not ensuring that the sale was effected by way of an open tender;

(iii) appointing TA Securities Holdings Bhd as placement agent for the sale of the PEB shares as well as the independent valuer-the contention being that there was no independent valuation.

(e) the plaintiff's claim of a conspiracy between Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee to injure the plaintiff;

(f) alternatively whether Lawrence Wong and Tiong are guilty of dishonestly assisting Tengku Ibrahim in the aforesaid breaches of duty owed to the plaintiff; and

(g) whether the fourth defendant, Robert Lee is guilty of dishonestly assisting in the aforesaid breaches of statutory or fiduciary duties by the impugned directors of the plaintiff.

[332] Each of these matters will be considered in turn.

Whether the second divestment was conducted pursuant to the general shareholders' mandate or the board mandate of 26 August 2009

[333] The plaintiff submits that the second divestment was undertaken pursuant to the shareholders' general mandate and that accordingly there was a

breach of that mandate. The defendants maintain that Tengku Ibrahim undertook the second divestment pursuant to the board mandate of 26 August 2009 and that there were no breaches of the same. Alternatively it is maintained that Tengku was conferred with the power to sell shares vide both the shareholder's general mandate and the board of directors' mandate. As such, even if the second divestment fell outside the parameters of the shareholders' general mandate in relation to pricing, the sale was still mandated by reason of the decision of the board of directors of 26 August 2009.

[334] In this context the plaintiff points to the fact that the letter of 4 September 2009 and the number of shares sold, as well as the first announcement to Bursa all indicate that Tengku Ibrahim knew and intended to sell the shares pursuant to the shareholders' general mandate and not the board mandate. The plaintiff further maintains that the board mandate cannot 'override' the specific authority of the shareholders' mandate. Directors' powers are derived from the articles of association. It is contended that these powers may be circumscribed by shareholders' express or specific directions.

[335] Learned counsel for Tengku Ibrahim maintains otherwise. Reference is made to the August mandate which very specific and it is contended that this mandate was specifically accorded to Tengku to ease the tight cash flow position and ensure repayment to Shin Yang Shipyard.

[336] I have examined the facts exhaustively as set out above. It is clear to this court particularly from the oral evidence of Tengku Ibrahim and the minutes of the board on 26 August 2009 that Tengku effected the second divestment pursuant to the board mandate of 26 August 2009. The letter to Hwang-DBS of 4 September 2009, prepared by Soon and signed by Tengku, as well as the error in the first announcement to Bursa have been dealt with at length earlier. Given that Soon was present at the meeting on 26 August 2009 and was aware of the cash flow problem and the mandate of the Board to sell some PEB shares to resolve the problem it is inexplicable why he referred to the shareholders' general mandate rather than the board mandate. While it is true that Tengku Ibrahim could and ought to have corrected this error, it was clearly an oversight on his part at the time. Tengku moreover, like the rest of the board, relied considerably on Soon.

[337] It is also pertinent that even if the power of sale had been exercised pursuant to the shareholders' general mandate, the proceeds would still have gone in priority to Hwang-DBS. This went unnoticed by the shareholders. Their mandate which allowed the board to dispose of 10% of PEB shares for the purposes of the repayment for bonds was renewed on 25 June 2009, four months after the facilities agreement executed with Hwang-DBS on 27 February 2009. The disposal under the shareholders' general mandate was

intended to be free from 'all liens, pledges, charges and other encumbrances' and its purpose was for the repayment of bonds. But in view of the facilities agreement, the shareholders' general mandate could not achieve its purpose because all PEB shares would go to Hwang-DBS's escrow account and could not be used for the repayment of bonds as intended. It is therefore apparent that there was considerable oversight generally. Tengku ought not to be singled out to be faulted particularly when there were numerous senior management personnel, particularly Soon Fook Kian who ought to have been familiar with the terms of these agreements and advised the board and shareholders accordingly.

[338] The letter of 4 September 2009 referred to the shareholders' mandate instead of the board mandate. This was clearly an error in as much as the failure to recognise that the proceeds could not be utilised for the cash flow problem was also an error. I so conclude because of the timing of the second divestment, which so closely followed upon the mandate given by the board on 26 August 2009. The sale was effected on 12 September 2009. My conclusion is further bolstered by the rationale for the second divestment, namely to meet the urgent cash flow requirements of the plaintiff and the Shin Yang demand. This is borne out by the minutes of the August mandate, which bears repetition:

> In the light of the above, the Board considered the option to sell PPB's shareholdings in FEB. After some deliberation, the Board resolved that in view of the current tight cash flow position of PPB Group, the Company do hereby divest some of the ordinary shares of RM0.50 each in PEB to meet the cash requirements of the PPB Group. YM Tengku Dato' Ibrahim Petra bin Tengku Indra Petra be authorised to negotiate and finalise the price and sale of PEB shares.

[339] The shareholders' general mandate was procured by the then directors of the plaintiff, for the purposes of the 'part repayment of the RM400m nominal value secured serial bonds issued by PPB'. It was given to 'raise additional funds expeditiously for the repayment of the RM400m nominal value secured serial bonds'.

[340] It is therefore apparent from a reading of the shareholders general mandate and the board mandate of 26 August 2009 that the second divestment was specifically undertaken for the purposes specified by the latter mandate. It was expressly undertaken to meet the Shin Yang and cash flow problem.

[341] Further the minutes of the board of directors meeting of 18 November 2009 confirm that the 10% PEB shares under the general shareholders' mandate remained undisposed. There was no objection raised when this was stated by Tengku Ibrahim at that meeting. In short the factual matrix and the evidence at trial, to my mind, clearly shows that the second divestment was conducted pursuant to the board of directors' mandate of 26 August 2009.

[342] Alternatively even if I am wrong in so concluding, it is evident that Tengku was conferred with powers to sell under either of these mandates. As such even if Tengku acted in actuality under the provisions of the shareholders' general mandate and fell outside the parameters of that mandate in terms of pricing alone, the sale itself vide the second divestment was still mandated by the board of directors.

[343] In this context the power of sale accorded to the directors of the plaintiff is set out in articles 115(1) and 115(2) of the articles of association:

> 115(1) The business of the Company shall be managed by the directors who may exercise all such powers of the Company, and do on behalf of the Company all such acts as are within the scope of the Memorandum and Articles of Association of the Company and as are not, by the Act or by these regulations, required to be exercised by the Company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.
>
> 115(2) Any sale or disposal by the directors of a substantial portion of the Company's main undertaking or property shall be subject to ratification by shareholders in general meeting.

[344] It follows from the foregoing that the powers of management of the company, including the disposal of the company's assets, are vested with the board of directors. However, if such disposal amounts to a substantial portion of the plaintiff's property, the directors may proceed with the sale subject to subsequent ratification by the shareholders in general meeting.

[345] In this context the plaintiff appears to suggest that the directors' powers of management are subject to shareholders' supervision. However this is not the purport of article 115 as shown above. The powers of management are vested entirely in the board of directors, the exceptions to the exercise of such powers of management being that:

(a) the directors cannot exercise powers specifically provided to be exercised in general meeting;

(b) the directors' exercise of power is subject to 'these regulations' and the Companies Act 1965; and

(c) the directors' exercise of power is subject to 'such regulations' as may be prescribed by the plaintiff in general meeting provided 'such regulations' are not inconsistent with 'these regulations' and the Companies Act.

[346] In this context I concur with learned counsel for the defendant that 'regulations' here do not mean 'resolutions or directions' passed or given in general meeting by the shareholders. Article 72 utilises the word 'regulation' rather than 'regulation' in relation to the decision of the members in a general meeting. 'regulation' therefore refers to a provision in or of the articles. Article 115 of the plaintiff's articles of association adopt article 73 under sch 4 Tab A of the Companies Act 1965. Table A is called 'Regulations for Management of Company Limited by Shares'. Section 4 of the Companies Act 1965 provides that 'regulation' means a regulation under the Companies Act. As s 30 of the Companies Act 1965 provides for Tab A, the regulations in Tab A fall within the meaning of 'regulation under the Companies Act 1965, and by extension, the articles of association of the plaintiff'.

[347] As such the general shareholders' mandate is not a 'regulation' within the meaning of article 115 and cannot limit the existing power of the directors as provided under article 115. Put another way, the reference in article 115 to 'regulations' therefore means regulations as envisaged under the Companies Act, and not resolutions passed in general meeting.

[348] This is borne out by the cases of *Quin & Axtens Ltd v Salmon* [1909] AC 442 at p 44 where it was held that the term 'regulation' meant 'article'; In *Shaw John & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at p 143 where it was reasoned as follows:

> I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by the directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders ...

[349] See also *Scott v Scott* [1943] 1 All ER 582 at p 585 which held that a resolution in general meeting cannot be used to control the directors in the management of the business of hte company and *Rose v McGivern* [1998] 2 BCLC 593 which held that the words 'subject to such regulations as may be prescribed by the company in general meeting' does not enable the shareholders resolution passed at general meeting without altering the articles to give directions to the directors as to how the company's affairs are to be managed.

[350] In *Automatic Self-Cleansing Filter Syndicate Company Limited v Cunningham* [1906] 2 Ch 34 shareholders of the company passed a resolution compelling the company to sell assets against the will of the directors. It was held that the shareholders could not compel the directors to sell the property according to their wish. The English Court of Appeal held as follows:

> The effect of this resolution if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit. It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to revoke the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, of course, requiring a special resolution.

[351] It follows therefore that from a construction of article 115 and the foregoing case-law, the disposal of the PEB shares falls within the power of the directors as opposed to the shareholders. As such in accordance with the law and the relevant memorandum and articles of association of the plaintiff, Tengku Ibrahim correctly exercised his powers to proceed with the second divestment on the basis of the board of directors' August mandate, notwithstanding the confusion arising from his erroneous reference to the general shareholders' mandate in the letter of 4 September 2009 and the announcement to Bursa which was subsequently in any event corrected.

[352] In *Mills v Mills* (1938) 60 CLR 150 there were two different provisions in the articles which governed the allotment of shares. On the one hand there was provision that any allotment of shares required approval in an extraordinary general meeting. On the other hand there was also provision that the directors could allot shares. In other words identical powers were conferred by the articles on both the shareholders and the directors of the company. A question arose as to whether a director was wrong in allotting shares without approval pursuant to an extraordinary general meeting. Latham CJ held that as follows:

> ... I am of the opinion, though I confess not without doubt, that the former construction is that which should be adopted and that the articles which in terms authorise the directors to do what they have done should not be limited by requiring

an extraordinary resolution to the same effect under article 6. Accordingly, I am of opinion that the resolution of the directors was not invalid and that the action under it was effectively authorised.

[353] Applied to the current context it follows that Tengku at the material time in August enjoyed two co-existing authorities, enabling him to act under either one of them. It would appear however on a totality of the evidence that he acted under the board mandate of 26 August 2009 and he was not wrong to do so.

Whether Tengku Ibrahim breached his statutory or fiduciary duties by:

(a)*proceeding with the second and third divestments;*

(b)*failing to secure a better price for the PEB shares in the second divestment;*

(c)*appointing Fiduciary Ltd for the sale of the shares under the second divestment;*

(d)*whether Lawrence Wong and Tiong are liable or breached their duties owed to the plaintiff in relation to the second or third divestments.*

[354] The issues set out in (a) to (d) will be considered collectively under this head.

Issue 2(a): Whether Tengku Ibrahim breached his statutory or fiduciary duties by undertaking the second and third divestments

[355] This issue has been examined at length in Part II. I have concluded that in effecting the second and third divestments, Tengku Ibrahim acted for a proper purpose, bona fide in the best interests of the company. His dominant purpose was not improper. As such I adopt my reasoning there in determining that Tengku Ibrahim did not breach his statutory or fiduciary duties by undertaking the second divestment. This is primarily because in exercising his power of sale, he genuinely believed that it was necessary in the interests of the company, namely to address the cash flow and Shin Yang problem.

[356] In this context I reject the plaintiff's submission that the August board mandate was 'contrived' again for the reasons set out in Part II. The futility of the exercise was not realised, not only by Tengku Ibrahim and the entire board including Shamsul, but importantly, the de facto financial controller or officer responsible for the financing of the plaintiff and on whom Tengku Ibrahim relied. Nothing was said by Dato' Henry Kho who, Tengku testified, was kept advised at all times of all financial matters. In so concluding I have taken into

consideration Tengku Ibrahim's background, qualifications and management responsibilities. It is apparent from the evidence that he has no accounting background, and relied, from the incorporation of the plaintiff on Dato' Henry Kho and subsequently Soon Fook Kian in relation to financial matters. This is not unusual, particularly in a large public listed company where financial data is frequently complex and requires the expert attention of specially trained personnel. Soon Fook Kian was that person. As such s 132(1C) comes into play. It provides that:

> A director in exercising his duties as a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements and other financial data, prepared, presented or made by :
>
> (a) Any officer of the company whom the director believes on reasonable grounds to be reliable and competent in relation to matters concerned;
>
> (b) Any other person retained by the company as to matters involving skills or expertise in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;
>
> (c) (c) Another director in relation to matters within the director's authority; or
>
> (d) (d) Any committee to the board of directors on which the director did not serve in relation to matters within the committee's authority.
>
> (1D) The director's reliance made under subsection (1C) is deemed to be made on reasonable grounds if it was made :
>
> (a) (a) In good faith; and
>
> (b) (b) After making an independent assessment of the information or advice, opinions, reports or statements including financial statements and other financial data, having regard to the director's knowledge of the company and the complexity of the structure and operation of the company"

[357] In the present factual matrix therefore Tengku Ibrahim cannot be faulted for relying on Soon Fook Kian. Section 132(1C)(a) applies. It was not unreasonable for him to rely on the manager primarily responsible for finance in the plaintiff. Soon Fook Kian's competence and role in this regard is irrefutable. However s 132(1D) requires Tengku to have done so in good faith and after having made an independent assessment of such advice in relation to Soon's advice. To my mind both limbs (a) and (b) are met because the good faith element is made in view of my finding that the divestments were both undertaken for a proper purpose. In any event the minutes of meeting of 26 August 2009 and 18 November 2009 both bear out the fact that Tengku Ibrahim, like the rest of the board, relied on Soon before making the decision to sell the PEB shares. With respect to the second divestment although no financial data was produced specifically, the board did deliberate on the need to

raise capital before determining to sell the PEB shares. The deliberation amounted to an assessment of the need to sell the shares to meet the cash flow issue then represented as prevailing.

[358] With regards to the third divestment specific operational and financial data were provided in some detail by Shamsul Saad in his capacity as an operations manager, as well as Soon Fook Kian in his capacity as the finance manager. The board was able to undertake an assessment based on the charts and other financial data presented.

[359] This application of s 132(1C) is supported by case-law. As long ago as *In Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at p 429 it was held:

> Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest men.

[360] In *Norman and another v Theodore Goddard (a firm) and others (Quirk, third party)* [1991] BCLC 1028, Hoffman J held that a director is entitled to trust persons in positions of responsibility until there was reason to distrust them, and therefore he was not liable. Again this is precisely on all fours with the instant case where the three directors, particularly Tengku Ibrahim, trusted Soon Fook Kian implicitly to provide a full and honest picture of the plaintiff's financial status. Equally they trusted Shamsul Saad to provide a full and honest forecast in relation to the utilisation of vessels for the immediate future with a view to ascertaining income and thereby cash flow. Shamsul Saad and Soon Fook Kian did indeed provide the required information in their professional capacities at the material time but subsequently took glaringly divergent stands, the net result of which was to suggest that the three directors had acted for an improper purpose or collateral motive. The impugned directors were not to know this. They reasonably trusted these two senior personnel. They cannot now be faulted, particularly as the plaintiff made no loss. Significantly the plaintiff went on, after a time, to put into effect their decision to sell all the PEB shares. In this subsequent sale, the plaintiff sold the shares at a more depressed price than that under the third divestment.

[361] But in the context of s 132(1C), Tengku Ibrahim, Wong and Tiong were entitled to rely on Soon in respect of the second divestment for: (a) an assessment of the cash flow situation; (b) the effect of the sale of the PEB shares. In so far as the actual sale is concerned they were entitled to be told by him that such a sale would be futile as the proceeds could not be utilised for the intended

effect, as he was the person who was conversant with the facilities agreement and in fact the contact person specified.

[362] And the impugned directors were entitled to rely on Shamsul and Soon under s 132(1C) in respect of the third divestment for: (a) an assessment of the plaintiff's cash-flow issues for the following year; (b) an assessment of the plaintiff's vessel utilisation rate so as to assess income, again for cash flow purposes. This they did. They ought not now to be faulted for so doing.

Issue (2b)(c): Failure to secure a better price for the second divestment and the appointment of Fiduciary Ltd for the second divestment — the effect of the statutory business judgment rule as provided in section 132(1B) of the Companies Act 1965

[363] With respect to the issues set out in 2(b) and (c) respectively, namely the failure to secure a better price than RM1.53 for the second divestment, and the appointment of Fiduciary Ltd, it is necessary to consider the effects of *s 132(1B)* which is the statutory business judgment rule, as it is a wholly relevant section. It provides as follows:

> A director who makes a business judgement is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director :
>
> (a) makes the business judgment in good faith for a proper purpose;
>
> (b) does not have a material personal interest in the subject matter of the business judgment;
>
> (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances;
>
> (d) reasonably believes that the business judgment is in the best interest of the company
>
> Section 132(5) provides that: this section is in addition to and not in derogation of any written law or rule of law relating to the duty or liability of directors or officers of a company.

[364] Business judgment has been defined to mean 'any decision on whether or not to take action in respect of a matter relevant to the business of the company' (see s 132 of the Companies Act). In *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1 Austin J accepted a wide interpretation of the scope of 'business judgment'. The words 'in respect of, 'matter' and 'relevant' were accorded considerable breadth. As such it follows that an issue such as a shortage of cash flow and the disposal of assets falls squarely within this definition.

[365] The effect of the statutory business judgment rule in the current context is this: If the impugned directors can show that they made the decisions to effect the second and third divestments, as a business judgment within the scope of s 132(1B) of the Companies Act 1965, then they are deemed to have met their obligations and duties as directors under statute, common law and equity. In other words the requirements of s 132(1A) of due care and diligence in the exercise of their duties would have been met.

[366] How then is this to be ascertained? The courts do not undertake the exercise of assessing the merits of a commercial or business judgment (see *Smith (Howard) Ltd v Ampol Petroleum Ltd* [1974] AC 821).

[367] In the Australian case of *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1 ('the *Rich*'s case') the enquiry related to the managing director Rich and the finance director, Silberman's failure to advise the board of directors that the company was insolvent. It should be highlighted that the statutory Australian provision equivalent to s 132(1B) is similar to our provision save for the use of the words 'rationally believes' rather than 'rationally believes' in our section. While it has been argued by the American Law Institute that 'rationally believe' is considerably wider than 'rationally believe' I am unable to subscribe entirely to that construction. Rational by definition alludes to a decision based on reason or logic. Reasonable as a word has much the same effect, namely a decision premised on logic or sense. The distinction does not therefore appear to be as wide as is suggested.

[368] In the *Rich*'s case, Austin J set out a compendium of requirements that need to be satisfied in or order to satisfy this requirement of 'rational' belief. As 'rational' is not entirely dissimilar to 'reasonable' it appears that the criteria set out in *Rich*'s case are applicable under s 132(1B). Austin J held there that reasonableness should be assessed by reference to:

(a) the importance of the business judgment that is to be made;

(b) the time available for obtaining information;

(c) the costs related to obtaining information;

(d) the director's confidence in exploring the matter;

(e) the state of the company's business at that time and the nature of the competing demands on the board's attention; and

(f) whether or not the information is available to the director.

[369] The Supreme Court of Canada in *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCJ No 64 held as follows at para 64:

> Business decisions must sometimes be made with high stakes and under considerable time pressure in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of defence to business decisions called the 'business judgment rule'.

[370] Reference was made to *Maple Leaf Foods Inc v Schenieder Corp* (1998) 42 OR (3d) 177:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided that the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the 'Business judgment rule'. The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction.

[371] As I have said above, no other solutions were put forward to the board, which appeared to be clearly more beneficial than the sale of the PEB shares, both in respect of the second and third divestments. In fact no other solution was put forward. In addition to this, other alternatives were considered, particularly in respect of the third divestment where the minutes disclose clearly the consideration of several other alternatives.

[372] The business judgment rule comes into play in relation to the price procured by Tengku Ibrahim for the shares sold under the second divestment for a price of RM1.53 per share. Having concluded that the decision to sell was bona fide, it then falls to be considered whether he procured the best possible price. In this context it is pertinent that:

(a) the need to dispose of some PEB shares to meet the Shin Yang demand and ease the cash flow problem was pressing;

(b) timing was important. The sale had to be effected quickly to meet the problem;

(c) in Tengku Ibrahim's mind the state of the plaintiff's business at that time warranted a quick sale with no delay;

(d) as such there was no question of obtaining several quotes etc. He merely utilised the market price of the shares as a bench mark. Although the

offer was lower, it would appear that the urgency of the need for funding outweighed the need to source or wait for a better offer;

(e) the second divestment was undertaken in good faith;

(f) there was no alternative resolution to the cash flow problem put forward by anybody; and

(g) Tengku had no reason to believe that the broker would suppress the price, given that the broker's commission was commensurate with the price.

[373] It is not for this court to deem his decision to sell at RM1.53 imprudent or unreasonable in the light of the circumstances then prevailing. This court ought not to judge the act of accepting a price of RM1.53 in the light of post-facto information. As such it appears to this court that the decision to sell fell within the meaning of s 132(1B) of the Companies Act, ie the statutory business judgment rule.

Issue 2(c): Fiduciary Ltd

[374] The appointment of Fiduciary Ltd was explained in full by Tengku Ibrahim as having been recommended by a friend called Navi from Australia. The person he spoke to in Fiduciary Ltd was a man named Chris Moore whom he had never met nor had any form of dealings with. It is clear from Tengku Ibrahim's evidence that he did not check on either Chris Moore or Fiduciary Ltd.

[375] Fiduciary Ltd is not a licensed person under the Capital Markets and Services Act 2007. As such the sale of the shares under the second divestment contravened the provisions of the CMSA. Tengku Ibrahim was unaware of this fact. However he ought to have ascertained or checked the background of Fiduciary Ltd prior to undertaking the second divestment. He owed a duty of care to the plaintiff to do so. His failure to check or ascertain the status of Fiduciary Ltd appears to this court to amount to a negligent breach of the duty of care he owed to the plaintiff. In these circumstances it appears to this court that he should compensate the plaintiff for the pecuniary loss suffered by the plaintiff in this regard, namely by paying the plaintiff the costs of Fiduciary Ltd's bill in the sum of RM192,000 odd.

Issue 2(d): Whether Lawrence Wong and Tiong are liable or breached their duties owed to the plaintiff in relation to the second or third divestments

[376] It falls to be considered under this head whether Lawrence Wong and Tiong breached the duties they owed to the plaintiff in undertaking the Second

and third divestments. The answer must be no. I have made a finding earlier in respect of each of these divestments, that on a consideration of the entirety of the evidence, both Lawrence Wong and Tiong acted for a proper purpose, bona fide in the interests of the plaintiff in determining that the Second and third divestments had to be undertaken. I adopt my reasoning in Part II above in this respect.

[377] I also adopt the reasoning above with regards to s 132(1C) as well as the statutory business judgment rule in s 132(1B) of the Companies Act 1965, in relation this issue. In other words, I find that pursuant to s 132(1C) Lawrence Wong and Tiong were entitled to rely on the financial data and financial information provided by Soon Fook Kian on 26 August 2009 as well as 18 November 2009.They cannot also be faulted for relying on the operational forecasts provided by Shamsul Saad on 18 November 2009. Like Tengku Ibrahim they too made these decisions in good faith. Their knowledge of the company must necessarily be less complete or coherent than Tengku Ibrahim's as they were both non-executive directors. As such, they did not, and cannot be expected to have a full working knowledge of the day to day operations and finances of the plaintiff, a large public listed company. Accordingly, to my mind, they clearly meet the requirements of s 132(1D) too.

[378] With regard to the business judgment rule in s 132(1B) it is clear to this court that they both:

(a) agreed to the second and third divestments in good faith and for a proper purpose. The decision to undertake these divestments, as I have said earlier, clearly falls within the scope of a 'business judgment';

(b) had no personal interest in these divestments. No such interest has been established in the course of the evidence. Neither, as I have found were they privy to or party to any conspiracy to sell the PEB shares as alleged by the plaintiff;

(c) were reasonably informed about the sale of the PEB shares and the cash flow problem. This follows from a consideration of the chronology of events and the time expended in the deliberation of whether or not to undertake these divestments;;

(d) reasonably believed that the sale of the PEB shares was in the best interest of the plaintiff. I so conclude on a consideration of the entirety of their evidence, much of which has been considered earlier. Their evidence points to the fact that they genuinely believed that the sale of the PEB shares was an urgent necessity in order to resolve the cash flow problems the plaintiff was facing. I do not accept that they consciously knew that there was no cash flow problem and participated in a contrivance or any scheme designed to hive off the PEB shares to

Shorefield Resources Sdn Bhd There is simply insufficient evidence to establish this as I have found earlier.

[379] Finally, I conclude that even if I am incorrect in my conclusions above, and it transpires that on the facts it would appear that these directors were guilty of a breach of duty or a breach of trust or can be said to be negligent this is a fit and appropriate case for the application of s 354 of the Companies Act 1965 which provides as follows:

> (1)if any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
>
> (3) the persons to whom this section applies are:
>
> (a) officers of a corporation;
>
> (b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation
>
> (c) experts within the meaning of this Act; and
>
> (d) any persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.

[380] The use of this provision has been held to be available to the aid of directors by the Court of Appeal in *Pioneer Haven v Ho Hup Construction Co Bhd* [2012] 3 MLJ 616.

[381] As I have said there is no necessity for me to invoke the section here in view of my findings. But if I have erred and a 'technical' breach of these directors duties is found established, then it appears to this court that *s 354* ought to be applied on the facts of this case. This is because Tengku Ibrahim, Lawrence Wong and Tiong acted honestly and without any intention to deceive or defraud. There is no evidence to suggest any conscious impropriety or the gain of any improper benefit or advantage. Neither was there the degree of imprudence associated with negligence or a lack of care (see *Australian Securities and Investments Commission v Healey* [2011] FCA 717; *Re Duomatic* [1969] 2 Ch 365, at p 376; *Double Acres Sdn Bhd v Tiarasetia* [2006] MLJU 477; [2000] 7 CLJ 550).

Issues 3: Alternatively whether Tengku Ibrahim, Lawrence Wong and Tiong were

negligent and breached the duty of care owed to the plaintiff in relation to the second and third divestments

[382] I do not propose to set out the entirety of the arguments above in relation to the plea of negligence. Suffice to say that I adopt my reasoning above to conclude that there was no negligence on the part of Tengku Ibrahim save in relation to the appointment of Fiduciary Ltd. There was no negligence on the parts of Lawrence Wong and Tiong.

Issues 4: Whether Tengku Ibrahim, Lawrence Wong and/or Tiong breached their statutory or fiduciary duties in relation to the third divestment by:

(a) Not selling the PEB shares en bloc as provided by the board mandate of 18 November 2009;

(b) Not ensuring that the sale was effected by way of an open tender

(c) Appointing TA Securities Holdings Bhd as placement agent for the sale of the PEB shares as well as the independent valuer — the contention being that there was no independent valuation

[383] Issues 4(a)–(c) will be considered collectively under this head. However it is evident that the thrust of the plaintiff's complaint in respect of the third divestment is the mode of sale of the subject shares, rather than the decision to sell the said shares. This is because it is irrefutable from the minutes and the audio recording of 18 November 2009 that all the directors agreed in principle to the sale of the entirety of the PEB shares, not only the third divestment. And in the course of his evidence Shamsul Saad stated that his main complaint with respect to the third divestment was that the shares were not sold in accordance with the conditions of the mandate given by the board of directors.

[384] The fact that the plaintiff was suffering from a cash flow problem as of November 2009 was exacerbated by the fact that the plaintiff had suffered its first loss of profits in its corporate history. The minutes of 18 November when read through carefully, particularly in conjunction with the audio recording show definitively that:

(a) the plaintiff had suffered a loss of RM8.9m, Tengku Ibrahim had to reply to queries from bankers arising from this consolidated net loss position for the third quarter of 2009;

(b) vessel utilisation rates was down for the next 12 months with the result that income for the following year was bleak, according to Shamsul Saad;

(c) Soon Fook Kian, as has been discussed earlier at length, briefed the board on the effect of the sale of the entirety of the PEB block which would leave the plaintiff with approximate free cash of RM116m together with interest savings of RM13.5m following upon full repayment of the Hwang-DBS RM150m loan. It is important to note that the entirety of the block had to be sold to achieve this purpose. The third divestment in itself would be ineffective;

(d) the board of directors considered and listed four options to manage the cash flow situation including a rights issue, increased borrowing, disposal of assets and the disposal of PEB shares. The pros and cons of each option were considered. Each of these options was then discarded leaving only the option of the sale of the entirety of the PEB shares.

(e) the genuineness of the cash flow problem in the plaintiff is evident from a perusal of the board minutes well before the 18 November 2009, stretching back to late 2008 and early 2009, as I have set out in Part 1. A perusal of the same discloses that the board was concerned about cash flow and borrowings and repayments from that time. It cannot therefore be said, given the clear factual matrix of this case, that financial issues suddenly cropped up only between August 2009 and November 2009. That is not borne out by the minutes.

(f) the decision of the board was only arrived at after careful, lengthy deliberation. The unanimity of the decision is not in doubt, given the minutes and the audio recording. Tengku Ibrahim was accorded a board mandate to dispose of the entirety of the PEB shares en bloc, after an independent valuation and at a minimum price of RM1.80, in compliance with all rules and regulations.

Issue 4(a): Failure to sell the PEB shares en bloc

[385] However the plaintiff's grievance is that instead of ensuring a sale en bloc, the sale of the PEB shares was undertaken in two tranches. This, the plaintiff maintains deprived the plaintiff of the 'premium' which the plaintiff maintains it would have earned if the bloc had been sold in its entirety.

[386] Tengku Ibrahim was given the conditional mandate to sell the entirety of the PEB shares to meet the plaintiff's cash flow concerns. It will be recalled from the chronology of events that on the evening of 18 November 2009, he wrote to TA Securities Holdings Bhd. in respect of two matters: (a) to request for an independent valuation of the PEB shares; (b) to appoint the company as the broker or placement agent for the sale of the PEB shares. It must be borne in mind that in accordance with the board mandate this appointment was in respect of the entirety of the 106 million PEB shares. It is pertinent that at this juncture Tengku Ibrahim did not appoint TA Securities Holdings Bhd as the

broker or placement agent for only 48.8 million shares under the third divestment. He was therefore adhering to the terms of the mandate accorded to the board.

[387] However the sale of the PEB shares in two tranches, rather than by way of an en bloc sale, was prescribed by several professional advisors. These included:

(a) Affin Investment Bank — where Johan Hashim, DW3 advised a two tranche disposal;

(b) Messrs Chris Koh & Chew — legal advisors; and

(c) Richard Yap — the Director of Business Development of TA Enterprise Bhd, who acted as a facilitator in respect of the placement mandate granted to TA Securities Holdings Bhd.

[388] On 23 November 2009, Johan Hashim, the Head of Corporate Finance in Affin Investment Bank Bhd provided a written opinion to the board of directors of the plaintiff. He testified at trial that he had had a meeting with Lawrence Wong and Tiong on 27 October 2009, and a second meeting on 20 November 2009, after the board meeting of 18 November 2009. He was requested to provide his advice in respect of two options being considered by the plaintiff to sell the PEB shares, namely an en bloc disposal of the entire 54.62% equity interest in PEB by way of an open tender process ('Option 1') and secondly by a staggered disposal in two tranches of 25% and 29.62% respectively ('Option 2'). The advice provided, inter alia, as follows:

(a) reference was made to the meetings in relation to the proposed disposal of PEB shares. The letter is prefaced by the understanding that the board of directors of the plaintiff was exploring the possibility of disposing of its PEB shares to a non-related party of the plaintiff with the intention of raising cash proceeds to strengthen the plaintiff's financial position. It goes on to provide the options available to the plaintiff in undertaking the proposed disposal of the plaintiff's equity interest in PEB;

(b) in the course of his evidence, Johan Hashim testified that he was not given the exact terms of the conditional mandate of the board. However he understood, he said, that the sale was to proceed on an en bloc basis or by way of a staggered sale. He therefore provided advice in respect of a sale en bloc as well as a two-stage disposal. This latter option was suggested by Johan Hashim in response to the query of the implications of a staggered sale;

(c) both alternatives were considered, namely a one-time disposal of the entire bloc and a two-stage disposal which envisaged the sale of a first tranche without shareholders' approval of 25% of the shareholding

which would not trigger the threshold for shareholders' approval under the listing requirements, and a second disposal of 29.62% which envisaged the procurement of shareholders' approval vide an EGM where there would be disclosure of the earlier sale. It was further advised that a one-time disposal by way of an open tender of the 54.62% of PEB shares would trigger the Malaysian Code on take-overs and mergers, requiring the prospective purchaser to acquire the remaining shares in PEB not held by the buyer. Johan Hashim also advised that under the one-time disposal option, there was the risk of the perception of uncertainty in relation to the future direction and management/control of PEB unless clear indications were provided prior to the announcement. There was concern that the uncertain outlook may have an adverse impact on the market price and the business of PEB. Affin cautioned however that explanations would have to be given to shareholders for the disposal of a valuable subsidiary; and

(d) Affin's recommendation was that the staggered two-stage disposal should be undertaken because the plaintiff would be able to complete the first stage of the sale in a shorter timeframe as the approval of the shareholders of the plaintiff was not required. As such the plaintiff would be able to raise cash proceeds faster to benefit the plaintiff in line with the board's objective of undertaking the disposal. Secondly, it was pointed out that the one time disposal by way of an open tender where a buyer was not identified at the outset was subject to uncertainties because there was no guarantee that the disposal price desired would be able to be obtained.

[389] The plaintiff's concern with this report was primarily that it was part of the scheme 'contrived' by Tengku Ibrahim together with Lawrence Wong and Tiong to facilitate or ensure a disposal of the entirety of the shareholding to Shorefield. In other words, the thrust of the cross-examination was that this meeting was manipulated by these impugned directors so as to ensure that the advice from Affin Investment Bank would be a two stage sale process rather than an en bloc process. In other words it was sought to suggest that the advice was incomplete, in that the advisor had not been accorded full disclosure of:

(a) the conditional mandate of the board of 18 November 2009; and

(b) the fact that a sale of less than the complete number of PEB shares would result in limited proceeds which would go towards reducing the Hwang-DBS loan.

[390] Johan Hashim explained in the course of his somewhat lengthy cross-examination, that the two directors had informed him of the board mandate. He recalled that it related to a sale of the PEB shares en bloc, or on a staggered basis. This latter information is not entirely correct as the sale was to

proceed en bloc, according to the board mandate. However this in itself does not mean that Lawrence Wong and Tiong were conspiring to sell the PEB shares to Bustari on a staggered basis. They had merely sought an opinion as to the best mode of selling the PEB share given the objective sought to be achieved, namely a quick realisation to enable the plaintiff to procure sufficient cash funding to take it through the following year.

[391] In this context it is relevant that the proposal to sell in two tranches emanated from Affin Bank and not the two directors. They did not propose that the sale proceed by way of two tranches.

[392] It should also be noted that it was not suggested at any time that the Affin Investment Bank opinion was anything other than independent. In short no suggestion of collusion was made between Johan Hashim and the three impugned directors. The suggestion was merely that Lawrence Wong and Tiong had tried to 'skew' the expert's opinion by failing to provide full disclosure as stated above. Having considered the entirety of the evidence it is this court's finding that Lawrence Wong and Tiong were not guilty of non-disclosure nor bad faith in procuring this advice. They had merely been asked by Tengku Ibrahim who was away on leave at the time to attend a meeting with Affin Bank to procure their advice on the best possible means of selling the PEB shares with a view to achieving the board's collective objective of alleviating a cash flow position that had been represented by Shamsul Saad and Soon Fook Kian to be grim. There is no evidence that they attempted to influence or mould the opinion in any way.

[393] Given this advice, with a clear recommendation from an independent advisor, namely Affin Investment Bank, Tengku Ibrahim followed the advice given. It must be noted that the mandate from the board was only to return to the board if the sale price was below RM1.80.

[394] Additional factors to note are as follows:

(a) Affin's primary concern was that a sale en bloc would trigger an MGO which in turn would give rise to uncertainty and concern in the market about the direction and control that would be taken in PEB;

(b) more importantly it would be difficult to control or obtain the desired price given the uncertainties of an open tender en bloc.

(c) it would be extremely difficult to procure a buyer knowing that an MGO would be triggered; and

(d) in this respect Affin's advice is supported by the comments of Soon Fook Kian as shown in the minutes of the board meeting on 18 November 2009. He pointed out that a share price of RM1.80 would ensure profits

to the plaintiff. He went on to point out that from an investor relations point of view, if a general offer was triggered, investors like Tabung Haji might be upset with a share price of RM1.80 per share. If there were no general offer then this would not affect them. In short, the minutes indicate that Soon Fook Kian, like Affin, also took the view that it would be prudent not to trigger a MGO.

[395] In these circumstances Tengku Ibrahim acceded to the advice of experts and proceeded with the third divestment which comprised a tranche of 48.8m or 25% of the shareholding of PEB. This is what he said:

> ...To my mind, the staggered disposal as advised by Affin was in line with PPB's objective of raising cash urgently. In addition, the staggered disposal as advised by Affin may not trigger the mandatory offer to acquire the remaining shares not held by the proposed buyer. In my mind, this would cast a wider net to procure more potential buyers.

[396] It should also be borne in mind, as explained by Robert Lee in the course of his evidence, that for the provision of brown field services, the primary business of PEB, a Petronas licence was required. Petra Resources Sdn Bhd, a wholly-owned subsidiary of PEB held such a licence. The licence required a 35% bumiputera shareholding. At the time in December 2009, some 40% of the shareholding was held by non-bumiputeras. This left a 60% bumiputera shareholding. If 54.62% were to be sold to anyone but a bumiputera, there was the risk of Petra Resources Sdn Bhd losing its Petronas licence which would sound the death knell to PEB's business. As such the sale of shares en bloc had to be taken up by a bumiputera. Given the uncertainty of ensuring this in an en bloc open tender scenario, this option was the less feasible option to be adopted.

[397] The only remaining reason for a sale en bloc was the possibility of recouping a 'premium' on the sale price.

The sale price

[398] With respect to the third divestment the minimum price set by the board was RM1.80. The market price at the time was RM1.84. The sale of the shares under the third divestment was closed at RM1.91. As such there can be no question of selling at an undervalue. Tengku Ibrahim did not therefore breach his duty of care and diligence when he sold the shares at RM1.91.

[399] However the thrust of the plaintiff's complaint is that, as stated by Vincent Chew, the expert proffered by the plaintiff, the shares ought to have been sold at RM2.54. In other words it is contended that a premium ought to

have been procured by Tengku Ibrahim as the bloc mandated to be sold under the November mandate was a controlling bloc.

[400] As against this Tengku Ibrahim relied on the price mandated by the board of no less than RM1.80, the market price and the fairness consideration report in selling the shares at RM1.91.

[401] While the plaintiff now attacks the fairness consideration report as being inaccurate and fallacious, it is pertinent that this was the report that Tengku Ibrahim had at the material time. He did not have the benefit of the two expert opinions procured for the purposes of this trial, namely the covenant report for the plaintiff and the sage report for Tengku Ibrahim. A sum of RM52,500 was paid for the fairness consideration report. Shamsul Saad agreed that the plaintiff would not have paid for something without value. It cannot be said that the fairness consideration report is negligent. No such charge was made. In these circumstances it appears to this court that Tengku Ibrahim was entitled to rely on the advice of Robert Ti in the fairness consideration report.

[402] *In Re National Bank of Wales, Limited* [1899] 2 Ch 629 at p 655 it was held that even where an account was subsequently discovered to be incorrect, the director was not at fault in relying upon it. In any event even the plaintiff's expert, Vincent Chew conceded that he could not say that the fairness consideration report was 'so unreasonable that no reasonable valuer would have come to that conclusion.' Therefore it follows under s 132(1C) that Tengku Ibrahim was justified in relying on the fairness consideration report.

Issue 4(b): Failure to ensure that the third divestment was effected by way of an open tender

[403] While the conditional board mandate of 18 November 2009 stipulated that the entirety of the PEB shares comprising some 106m shares were to be sold by way of open tender, Tengku Ibrahim was advised by PW6, Richard Yap (the Director of Business Development of TA Enterprise Bhd, who acted as a facilitator in respect of the placement mandate granted to TA Securities Holdings Bhd) that a sale by open tender given the mandate period of one month was simply not feasible. This is what he said:

> As I was facilitating the deal, I informed the first defendant that I had initially considered the open tender process. However given that the mandate was valid for only a month, the option was not a feasible one with only one month period. Hence in considering other options, I suggested that a 'Dutch Auction' tender would be the fastest and most cost-effective method to gain numerous bids from genuinely interested parties for the PEB shares. I informed the first defendant that nothing in the mandate specified the method by which the tender should be carried out ...

[404] This is borne out by an email which he sent to Tengku Ibrahim on 22 November 2009 at 4.04am. This what he said:

> All your board members including your goodself are fully covered as the placement mandate clearly gives me the discretion as to what is the best placement method to use.
>
> I have considered using the open tender process and in my opinion this is *not* the best method to secure the best offer in pricing and terms.
>
> Given the mandate validity period of one month from 18th November, I really don't have enough time to arrange for an open tender. Moreover, a tender is not only time consuming but also more costly compared with the direct placement approach. Therefore I conclude that the fastest and cheapest method is to invite numerous genuinely committed parties for negotiations. This is also know as a 'Dutch Auction' which in itself is a form of tender.
>
> *I stress that you & your board members cannot be accused of not using the tender process since the responsibility solely lies on me*. Neither can any of your board members accuse me of not using a tender as nothing in the mandate specifies that I must use this method. I am taking full responsibility for this decision and will face anyone who may dare to accuse me of any indiscretions. As a seasoned corporate warrior I will not back down from this battle. If a fight ensues, then I will take on the adversary and kick his or her ass! (Emphasis added.)

[405] In short Richard Yap strongly insisted on a Dutch auction as opposed to an open tender, citing, inter alia, that the one month mandate accorded to him was simply insufficient to conduct an open tender.

[406] In the course of his evidence, Richard Yap maintained his stance as per the email of 22 November 2009.

[407] Tengku Ibrahim replied stating that ' ... What we want to avoid is to be accused that the shares were placed out proportionately to two or there parties without any kind of 'bids'. In this case you must invite a minimum of six to eight parties for the process to work ... am I right?'

[408] And Richard Yap in turn replies that at least six parties were being invited to negotiate and put in their bids. He had already prepared the invitation list. His email further specified that pricing was not the sole criterion as speed was equally crucial. He set out further details with a view to facilitating a speedy and effective sale.

[409] Several matters emanate from this series of events and emails. Tengku Ibrahim was advised by his professional advisors that an open tender was simply not feasible and that a restricted tender or Dutch auction was the only

feasible way of effecting a quick sale. Tengku Ibrahim, it is to be noted, did not simply accede to Richard Yap's suggestion immediately. As stated by Richard Yap in his statutory declaration:

> The first defendant seemed anxious and worried about being accused of rigging the tender and of having placed the shares. He was adamant that the process should appear to be through open tender. ...

[410] He also testified in evidence that:

> ... The first defendant seemed anxious to avoid placing the third divestment shares proportionately to two or three parties without any form of bids, hence the requirement of six or eight parties to work ...

[411] Tengku Ibrahim was still trying to comply as far as possible with the 18 November mandate and not deviate from it. He sought and procured a legal opinion on this issue of a restricted tender and it was only upon receipt of Chris Koh's legal opinion that it was in the best interest of the plaintiff to thus proceed that Tengku agreed to the restricted tender. He said as follows:

> Because when one of the things, I had this conversation with Richard Yap was about the tender and he was saying about best efforts and so forth. So there were difference in opinion. And I said I will still stick to the tender unless I get some legal opinion or something. And I think that's why I sent to Chris Koh on the legality of the legal standing or so. So when I got Chris Koh's letter and I went through it, and before I left, as I've said I also signed the other letter also. Also dated same time after the meeting. So when I was satisfied with Chris Koh's opinion, then I called my secretary for her to send out the other letter to TA Securities. Hence that is why there are two letters.

[412] Tengku Ibrahim and Richard Yap therefore afforded a full explanation as to why the third divestment was undertaken by way of a Dutch auction rather than an open tender. It appears to this court upon a consideration of the evidence that Tengku acted bona fide in the interests of the plaintiff in making this decision. He was hesitant to initially accede to Richard Yap's aggressive mode of conduct of the sale. It was only when he was afforded comfort from the legal opinion by Chris Koh that he agreed to proceed as advised. Although the plaintiff has sought to establish in the course of the cross-examination of Tengku Ibrahim that he acted with unholy haste, in a manner calculated to ensure that the shares would be sold to Shorefield, a careful scrutiny of the chronology of events and documents shows otherwise. The sequence of events instead discloses that Tengku Ibrahim did act with haste, but only the purposes of meeting the board's objective, and after having procured advice from professionals in the industry. He was guided by them.

[413] There is nothing, as I have said before, to suggest that Tengku Ibrahim, Lawrence Wong and Tiong were in collusion or collaboration or acted in concert with Johan Hashim or Richard Yap to ensure that the shares would go to Shorefield. The reality of the matter is that Shorefield was the only interested purchaser, as the events ultimately showed.

[414] In this context the fact that there had been meetings with Shorefield earlier on in 2009, the conduct of a due diligence exercise and the execution of a non-disclosure agreement in relation to PEB affairs considered cumulatively with the events leading up to the third divestment, do not to my mind amount to evidence of a clear plan or scheme to deprive the plaintiff of its PEB shares. This is because:

(a) the evidence of the three directors, namely Tengku Ibrahim, Lawrence Wong and Tiong does not warrant inference of such devious dealings. I found them to be credible witnesses who acted for a proper purpose. This fact obviates the possibility of their acting to assist Bustari Yusof of Shorefield in the acquisition of the PEB shares, after which the three directors move to PEB;

(b) any such devious scheme or plan would require the collusion of Johan Hashim of Affin Investment Bank and Richard Yap. There is no such evidence of collusion, collaboration or even of their advice having been induced or manipulated in any such manner;

(c) the genuine needs of the plaintiff as represented by Soon Fook Kian and Shamsul Saad could not have been created or 'contrived' by Tengku Ibrahim, Lawrence Wong and Tiong. These representations emanated entirely independently from these two senior management personnel in charge of finance and operations respectively;

(d) as testified by Tengku Ibrahim, at all material times the possibility of the sale of the PEB shares was not a covert matter, kept under wraps by these three directors. He testified that from the inception of the plaintiff all financial matters were handled by Dato' Henry Kho and Soon Fook Kian. In the course of cross-examination by learned counsel for Lawrence Wong and Tiong he was asked:

> Q My instructions are also this that apart from D2 and D3 as independent directors, the fact that there were people interested, parties interested to purchase shares was not a covered secret from the knowledge of senior management in the plaintiff company. Is that true?
>
> A Yes it was. As I've said Henry and I go way back to 1988 since we formed the company. And then since it got listed, we have always disclosed. Likewise, during 2009. Even 2008, I and Henry were also thinking of selling our personal shares in Petra Perdana and to some extent, we had given Mr Richard Yap as a broker for that. To the extent that we even opened up a private bank

account in Singapore anticipating if this buyer would buy our shares, the money would be sent in that bank account. So as to Datuk Bustari, Navis Capital Rothschild, Kenchana etc. Dato' Henry and I think maybe Francis Koh and of course Soon Fook Kian would be fully aware of all this. It's no secret. As I've always said, it's not a seret about meeting Bustari and so on because Dato' Henry is fully aware. And My Lad, I can even say that almost if I have a meeting with anyone of the parties, the first person to know would be Dato' Henry because that's how close I was with him. And at the same time, Dato' Henry was also always discussing with I think, one or two other companies on its own and he was also trying to raise some funds from ECM about buying some shares or something. So we, like I said it's not a secret. So I don't know what the conspiracy is all about.

There is nothing to refute Tengku Ibrahim's evidence on oath because neither Henry Kho or Soon Fook Kian were witnesses at trial. There is therefore no reason to doubt the veracity of this evidence,

(e) The fact that it was no secret nor a clandestine scheme on the part of Tengku Ibrahim, Lawrence Wong and Tiong to sell the entirety of the PEB shares and that it was in fact well known to personnel within the plaintiff is borne out by the letter of 11 November 2009 issued to Tengku. This was well before the mandate was accorded to him to sell the entirety of the PEB shares. Vide this letter, an individual called Nagendran who is a shareholder in Perisai Petroleum Bhd where Dato' Henry Kho was also a shareholder offered to purchase Tengku's shareholding in the plaintiff. The offer was subject to the sale of the entirety of the plaintiff's equity in PEB, ie the 54.52% shareholding on an en bloc basis at a price of RM1.80 per share. This further supports Tengku Ibrahim's evidence that Dato' Henry Kho was fully informed of the possible disposal of the PEB shares. When considered in conjunction with Tenkgu Ibrahim's evidence that he in fact kept Dato' Henry Kho fully informed about the meetings with Bustari of Shorefield, the plaintiff's allegations of 'conspiracy' and of mandates being induced or contrived by the three impugned directors, are unfounded.

[415] It is pertinent, although after the event, that the plaintiff itself sold the remaining shares in PEB by way of a private placement in 2012. The plaintiff also accepted the advice of an investment banker to adopt a 'restricted' tender rather than an open tender where only selected potential purchasers were invited. The plaintiff in other words did exactly what Tengku Ibrahim did in respect of the third divestment. Given this, their grievances in respect of the third divestment appear, at best, artificial. When coupled with the conduct of both Shamsul and Soon Fook Kian in resiling from the clear factual advice they had tendered at the 18 November 2009 meeting in relation the plaintiff's cash flow issues, it can only be said that the plaintiff's claim is less than genuine.

[416] For these reasons I am unable to conclude that Tengku Ibrahim breached any of his duties as a director in proceeding with the third divestment by way of a restricted tender. In this context the legal arguments I have set out in relation to ss132(1C) and (1B) would apply.

Issue 4(c): Appointing TA Securities Holdings Bhd as placement agent for the sale of the PEB shares as well as the independent valuer — the contention being that there was no independent valuation

[417] The grievance of the plaintiff in this context is that of a conflict of interest. This is because TA Securities Holdings Bhd provided the fairness consideration report and was also the broker or placement agent for the third divestment. Robert Ti, DW2 who prepared the fairness consideration report however testified that he was merely acquainted with Richard Yap, the primary facilitator for the third divestment. He had been unaware of the mandate accorded to Richard Yap in respect of the third divestment when he prepared the fairness consideration report. He testified that he had commenced work on the fairness consideration report in May or June 2009. Tengku Ibrahim had asked him to prepare the report. He confirmed that he had no communication with Richard Yap on the content of the valuation report. He stated that he had met up with the management of PEB, although not Robert Lee in Miri. Members of staff had made presentations on the operations of PEB. It is therefore evident that there was again nothing covert about the valuation of the PEB shares by TA Securities Holdings Bhd. Robert Ti was clear that apart from a valuation of shares, the purpose of which he was not advised, he had no further communication about the sale of the PEB shares. He was unaware of the appointment of TA Securities Holdings Bhd as the placement agent. Given the complete absence of a factual nexus in relation to the third divestment between Richard Yap and Robert Ti, no conflict per se arises on the facts of this case.

[418] In conclusion under this head it must also be pointed out that as a consequence of the third divestment the plaintiff made a profit of RM13.7m. No loss ensued as a consequence of this sale. In fact, if Tengku Ibrahim had been allowed to proceed with the entirety of the mandate accorded to him on 18 November 2009, and proceeded with the second tranche of selling (having procured shareholders' approval as advised by Affin Investment Bank) then the plaintiff would have stood to enjoy a total of RM103m in cash. The plaintiff would also have enjoyed its RM13.5m interest savings as envisaged by Soon Fook Kian at the 18 November 2009 Board meeting. Ultimately this would have improved the plaintiff's cash flow position. And that was the issue these three impugned directors had been trying to resolve together with the other board members. As against this is the plaintiff's contention that its 'jewel in the crown' had been dissipated. However going back again to the board mandate of

18 November 2009, it is apparent that the Board took into account that despite being a valuable subsidiary, PEB's profit to the plaintiff after tax was 29.2% and the actual cash inflow contribution was RM2.34m. The cash flow problem the plaintiff was then facing far outweighed the benefit brought by PEB, hence the collective board decision to sell PEB. Therefore it is clear that the decision to sell was not, and could not be mala fide.

[419] In fact it was Shamsul Saad, who filed a derivative action, unknown to the board and procured an injunction which caused the plaintiff to have to halt its rescue plan. The perceived failure of the divestments therefore are not attributable to Tengku Ibrahim, Lawrence Wong and Tiong but Shamsul Saad

IS THE FAIRNESS CONSIDERATION REPORT RELIABLE?

[420] It should be stated at the outset that as I have concluded that Tengku Ibrahim, Lawrence Wong and Tiong did not breach their fiduciary duties, nor were negligent that it is not necessary for this court to consider the issue of damages arising from any such alleged breach. Accordingly the competing opinions provided by the two experts vide the covenant report and the Sage report do not have to be considered in any detail for there is no question of awarding damages that arises for consideration here.

[421] Nonetheless, I have proceeded to consider, in brief, the expert opinions relating to the valuation of the PEB shares for the limited purpose of ascertaining whether the fairness consideration report which Tengku Ibrahim relied on, was in fact, safe and reliable, or whether it inherently unreliable such that the PEB shares were sold at a gross undervalue.

[422] In other words, given the evidence of two expert opinions procured for the purposes of the trial, namely the covenant report and the sage report, does it follow that the fairness consideration report is unreliable or unsafe?

[423] The fairness consideration report was prepared by Robert Ti at the time when the subject shares were sold, ie in 2009. It was not prepared in anticipation of litigation as an expert opinion. Robert Ti utilised what is known as the Price/Earning Ratio method ('PER')as well as the Discount Cash Flow method ('DCF'). He averaged the valuation derived from these two methods. He referred to a total of seven years earnings, namely four past years and three forecasted years, then adopted the weighted basis to average the earning up to RM40.9m to the current year of 2009. Given the combination of these two methods he valued the PEB shares at a range from RM1.63 (without a control premium) to RM1.99 (with control premium).

[424] The covenant report was prepared by Vincent Chew who utilised the PER method as well as forecasted earnings. He selected nine companies based on their historical earnings and arrived at 8.8 as the PE ratio/multiple as well as a forecasted profit of RM56.317m for 2010. His valuation of the PEB shares was RM2.54 per share as at 19 November 2009 based on those figures.

[425] The sage report was prepared by Ravindran who utilised the higher of the DCF and NRV method for valuing PEB. He considered that any premium would be subject to the buyer's perspective and to impose one would have been speculative on the part of the expert.

[426] The DCF method depended upon PEB's financial projections. Based on the consolidated income statement provided in the covenant report, Ravindran derived the terminal value of PEB at RM717,791,000 (a future value). This terminal value was discounted to a present value of RM474,659,000. After adding fixed deposits of cash, and deducting debts and minority interest, the discount value of PEB was RM260,435,000.

[427] The net realisable value ('NRV')taking into account the total assets and liabilities was RM385,855,000. A discount was set for time value and the NRV arrived at was RM349,140,000.

[428] Based therefore on the DCF method the value of PEB's shares was initially stated in the Sage report to be RM1.28 and later corrected to RM1.67 per share. Based on the NRV method above, the value of the PEB shares was RM1.79. Accordingly Sage adopted the higher of the two and took the position that the value of the PEB shares at the material time was RM1.79.

[429] It is evident from the foregoing that given the fairness consideration report and the sage report, the price at which the PEB shares were sold by Tengku Ibrahim is fair, namely RM1.91. However the covenant report opines that the shares comprising the third divestment should have been sold at RM2.54, on the basis that the plaintiff should have benefitted from the imposition of a control premium.

[430] The principles of valuation are set out in the case of *Capricorn Diamonds Investments Pty Ltd v Catto and Others* (2002) 41 ACSR 376 at p 392:

> first, fair value of an asset is its fair equivalent in money ascertained by a supposed sale by voluntary bargaining between vendor and purchaser, each of whom is both willing and able, but not anxious, to trade and with a full knowledge of all he circumstances which might affect vale; *Holt v Cox*; *Gregory v FCT*; *McCathie v FCT*. Second, the fact that the units must be disposed of at a fir value should not be a factor leading to a discount or lower valuation than would otherwise obtain; *Holt v Cox*. Conversely, it should not be a factor leading to a premium or higher valuation.

A third, a fir value does not require taht any amount should be included in respect of ransom value or a power of veto; *Edwards v Ministre of Transport. fourth, the value of special benefits to the acquirer is not properly to be included in the calculation of the value of the company as a whole:* Pauls Ltd. Fifth, generally, apart from s 667C, *fairness requires that the value of any special benefits should be allocated pro rata among securities in the same class.* Winpar. Sixth, if the value of special benefits is to be inclused under s 667C, their value should be allocated pro rata under s 667C: Winpar; Pauls Ltd.

The seventh principle to be extracted from the authorities is that when deciding whether the consideration is fair the proper approach is to consider *whether it is fair to all shareholders, rather that whether it is fair to a particular shareholder or class of shareholders in the peculiar circumstances of the case*; *Elkington v Vockbay Pty Ltd*. Consequently, a shareholder's individual taxation position and like matters said to give rise to a premium for forcible taking are not relevant to the value of the company as a whole. Nor are the acquirer's individual circumstances relevant. Further, the market price cannot be a safe indicator of fair value as the market may not provide a fir indication of the value of shares in circumstances of limited trading; *Catto v Ampol*. In addition, the market may not be a fair indicator of value because of the effect of a takeover offer on the market; *Kingston v Keprose Pty Ltd (No 2)*. Finally, the eighth principle to be extracted from the cases is that fir value may require a more liberal estimate of value within a range of possible values where there is a compulsory acquisition of property; *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of SA Ltd*. Nevertheless, it does not permit or require a premium for forcible taking; *Holt v Cox*. The Australian authorities have not adopted the Canadian concept of a forcing out premium (instead applying a more liveral estimate of value), and indeed that concept has more recently lost support in Canada. (Emphasis added.)

[431] Ultimately then the remaining question that remains to be considered is whether the fairness consideration report is so flawed that it cannot be relied when considered in conjunction with the covenant report. In this context the sage report places the price of the PEB shares at RM1.79, which is lower than the price at which they were sold. Clearly from Ravindran's point of view as an expert, the fairness consideration report provides a feasible and reasonable value for the PEB shares.

[432] I have read the competing submissions of learned counsel for the plaintiff and the defendants, as well as the evidence of Vincent Chew and Robert Ti (as well as Ravindran). I conclude, upon a consideration of the same, that the covenant report ought not to be preferred over the fairness consideration report for the following reasons:

(i) Vincent Chew did not or refused to consider or take into any account, the audited accounts for 2010. In this context his report was prepared in 2011 and those accounts were in fact available. He took the position, not entirely erroneously, that he would not take the benefit of hindsight.

His instruction was to consider the value of the shares as at November 2009. However the entire basis for his valuation was that the forecast profit of RM56m was achievable by PEB. However the actual profit was only RM2.681m according to the financial statements. In other words, his valuation was premised on an entirely theoretical figure.

[433] In *Re a company (No 002708 of 1989) ex parte W and another* [1990] BCLC 795, Knox acknowledged that it was a difficult line to draw 'between the occurrence of contingencies such as a change in the market which are not admissible if they occur after the valuation date on the one hand and evidence of a fact or event later in point of time than the valuation date which enables the valuer to assess a state of affairs which actually existed at the valuation date'.

[434] The gross reduction in the profits of PEB for 2010 as forecasted, and in actuality, clearly falls within the latter limb of the foregoing. In other words, given the fact that Mr Chew had access to and knew that the figure of RM56m was hugely inflated in comparison with the actual profit in 2010 of RM2.681m, he chose to wholly ignore it. He ought to have given some consideration to this fact to at least mitigate the figure he relied upon. He ought to have considered or questioned the appropriateness of simply adopting the forecasted figure as being an entirely reliable basis on which to value the PEB shares. This he did not do. It is clear beyond dispute that if Mr Chew had adjusted the forecasted figure to take into some account the vastly reduced profits, he would not have arrived at a valuation of RM2.54 per PEB share.

[435] Given that the trend of the earnings of PEB was on a downward trend from 2007 onwards, and given the decrease in the earnings of PEB for the third quarter of 2009 which also demonstrated a loss, the use of a forecast which showed an increase of more than 100% from 2009 was unrealistic. It was overly optimistic in the context of PEB's performance during that period.

[436] When considered in conjunction with Robert Lee's evidence, namely that the forecast was prepared on the 'optimistic side' for the purposes of obtaining financing from financial institutions for vessels, the reliance on the figure becomes arguably, doubtful or fallacious.

[437] The covenant report also adopted the stance that there would be a cost saving of RM83.98m when in fact the audited accounts for that period show that there was, on the contrary, an increase in costs amounting to some RM61,429,000. This is again therefore less than accurate.

[438] In relation to the utilisation of the forecast figure of RM56m rather than RM2.681m, it is apparent that no real enquiries were made with the relevant officers of the company to ascertain whether the said figure was a reliable

forecast. In the course of his evidence, Vincent Chew answered as follows:

Q11	Who did you enquire with?
A	My staff enquire with the relevant officers of the company.
Q112	So it was not you who enquired?
A	Not me personally.
Q113	Not you personally?
A	No, not me personally.
Q114	So if I asked what were the documents shown to you, what was the question asked, to whom your staff referred to, you are unable to answer?
A	Yes
Q115	Would you consider your review as a thorough review or a superficial review?
A	We were told that there was no basis. They can't find the basis of assumption to us. But that is why we note in our report.
Q116	So there is nothing that will challenge as at Nov 2009? You were told that there was nothing to challenge and therefore?
A	We were told that there was no basis of assumption available to us.
Q117	To review?
A	To review.
Q118	So you reviewed nothing in that sense?
A	Yes

[439] Vincent Chew maintained that notwithstanding the large difference between the forecasted figure and the actual profits, he saw no reason to question the forecasted figure because in instructions were to value the shares as if it were 2009. He did not also see reason to 'suspect' the figure notwithstanding that he was in possession of the real audited figures for that year which showed a large difference. While it may be argued that it was not incorrect for him to rely on the forecast given that he was supposed to step into the shoes of a valuer in 2009, it follows that even at that stage, a prudent valuer would try and ascertain the vasis for the forecasted figure particularly when it was significantly different from the generally deteriorating financial position of PEB between 2007 and 2009. This Vincent Chew refused to do. Robert Ti, on the other hand had in fact gone to Miri and spoken to officers in PEB in the course of preparing his report. Vincent Chew's absolute refusal to accept that the forecasted figure could be questioned or ought to have been verified prior to adoption leads me to agree with learned counsel for the defendants that the covenant valuation is not to be preferred over the fairness consideration report.

[440] Additionally the covenant report is confined to earnings for one year. This appears to be a limited basis on which to undertake the entire valuation. Neither was any discount given for its uncertainty.

[441] In *Buckingham v Francis and others* [1986] BCLC 353 at p 357: A

> In my judgment the approach of Mr Burns is in principle correct. The value of the company was he capitalised sum representing future profits. But there are two unknowns; what the future profits would be, and what price/earnings ratio would commend itself to a purchaser as appropriate for capitalisation. It is possible to make an allowance for risks in calculating either figure. What one must guards against is making allowance for the same risks twice over, that is, in the assessment of future profits and also in the choice of a price/earnings ratio. In order to avoid that, the assessment of future profits can be made on a best-guess basis, allowing for risks but without either undue caution or exaggeration, and a price/earnings ratio can then be chosen on the basis that the figure for future profits is the probable answer. That seems to me the best method for the present case in other cases the converse method could be adopted, and the allowance for risk could be incorporated in the ratio rather that the profits figure; or part of it in one and part in the other. B C

[442] In the covenant report, a discount was not given on either the forecast profit or its PE ratio. D

Control premium

[443] The contention put forward by covenant, ie Vincent Chew was that the market price of the PEB shares reflects only the non-controlling minority stake, where else, the PE Multiple method, it was contended, factored in the premium for a controlling stake. As such it was argued by Chew that the difference between the market value and his valuation was due to 'control premium'. E F

[444] Chew calculated the price of RM2.54 per PEB share from the total value of PEB. He then took the difference between his valuation of RM2.54 and the five day WAMP of RM1.86 to arrive at a 'control premium' of RM0.68. He confirmed that there was a total premium of RM72m out of the total value of the 54.62% of PEB shares at RM270,691,040 (which is the value of the company). In other words, there was a premium element in the value of the company. G

[445] However 'control premium' belongs to the shareholders. It cannot belong to the company. However the methodology adopted to derive the premium indicates that premium was included in the 'value of the company'. This was put to him and he replied that he did not know how to answer counsel. He essentially disagreed. H I

[446] Further and in any event I concur with learned counsel for the defendant that the court ought not to encourage or enforce any 'control premium' offered by the vendor to ppress the minority. In the Sage report Ravindran referred to the article 'The Value of Control: Control Premiums, Minority Interest Discounts and the Fair Market Value Standard' and opined that there is no basis for control interest premium because it represents 'value that can be diverted from minority interest to the controlling interest by fraud'. He went on to discuss 'acquisition premium' but maintained that such a premium is only evaluated from a vendor's perspective. A share valuer is unable to determine what premium an acquirer would subscribe to (if any). He also pointed out that leading authorities suggest that acquisition premium does not represent any intrinsic value of control in a company.

[447] Judicial opinion also supports the contention that it is not appropriate to include 'acquisition premium' in the valuation of shares for the purposes of a sale, (see *Capricorn Diamonds Investments Pty Ltd v Catto and Others* [2002] 41 ACSR 376). There is in any event no known method to compute or calculate the 'acquisition premium' or 'control premium'.

[448] The covenant report also failed to take into account the effect of triggering a mandatory general offer. Chew agreed that by offering to sell the entire 545.62% shareholding, an MGO would be triggered. The proposed buyer would have had to purchase the entirety of the PEB shares at RM2.54, approximately 36.5% above market price at a total cost of RM495,589,600. One of Shorefield's concerns was not to trigger such an MGO. As the market for the purchase of these shares was limited, there is no reasonable basis to conclude that selling the entire block of 54.62% at a price of RM2.54 was feasible or even possible, given the triggering of the MGO. No potential buyer at this price was ever identified. In effect it would appear that the valuation given by covenant was somewhat theoretical.

[449] The covenant report also did not take into account the effect of the requirement of a bumiputra quota in the shareholding of PEB to maintain the Petronas licence.

[450] Considering the entirety of the factors which were not considered or which were exaggerated, it appears to this court that the covenant report is not to be preferred above either the fairness consideration report or the sage report. As such The fairness consideration report cannot be said to have provided a valuation of the PEB shares that was undervalued. It therefore follows that Tengku Ibrahim was neither negligent nor in breach of his fiduciary duties in relying upon the fairness consideration report in selling the PEB shares vide the third divestment.

Issue 5: The plaintiff's claim in the tort of conspiracy against Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee

[451] The plaintiff alleges that there is proof on a balance of probability of the existence of an agreement or arrangement or a combination of efforts on the part of the foregoing defendants for Tengku Ibrahim to sell the plaintiff's shares in PEB to Shorefield Resources Sdn Bhd

[452] I have earlier dealt in some detail with the evidence of Tengku Ibrahim, Lawrence Wong and Tiong in the context of whether they had undertaken their statutory, common law and fiduciary duties as directors for a proper as opposed to an improper purpose. Having done so I have concluded earlier that they acted for a proper purpose or in other words that the dominant purpose for which they undertook the divestment of PEB shares was bona fide in the best interest of the plaintiff. This has direct bearing on this claim of conspiracy. This is because directors who have acted in the best interest of the company cannot then be said to have conspired to cause detriment by the same acts. In short, as the impugned directors acted for a proper purpose and in the interest of the company, it follows that they could not have conspired to cause injury to the plaintiff. Acting in the best interest of the plaintiff and conspiring to cause injury to the plaintiff are two mutually exclusive contentions that cannot subsist simultaneously.

[453] In the instant case the plaintiff alleges conspiracy to injure, not only between the three directors of the plaintiff, but also Robert Lee, the fourth defendant. Robert Lee's evidence was not considered earlier when the issue of the primary purpose for the divestments was discussed, because he was never a director of the plaintiff, only PEB. It does however become necessary to consider his evidence in the context of the claim of conspiracy made by the plaintiff against him in conjunction with the other three impugned directors.

Robert Lee's evidence

[454] Robert Lee was never a director of the plaintiff, only PEB. He therefore did not take part in any of the deliberations or discussions by the board of directors of the plaintiff relating to the sale of the PEB shares, albeit on 26 August 2009 or the November meetings.

[455] The allegations against Robert Lee centre on his role in assisting Tengku Ibrahim, namely:

(a) that he was present at meetings between Tengku Ibrahim, Datuk Bustari Yusof, one Hafidz and Zaidee, PW5 in the first quarter of 2009. In this context, Robert Lee only recalls being present at one meeting;

(b) in his capacity as Executive Director of PEB, permitted Ernst & Young to conduct a due diligence exercise on PEB;

(c) he had met and knew Richard Yap;

(d) he had met Robert Ti; and

(e) he was involved in a series of emails between the parties.

[456] In the course of his evidence Robert Lee explained that he met Datuk Bustari Yusof with Tengku Ibrahim in the first quarter of 2009 together with Lawrence Wong. He denied that the purpose of the meeting was to discuss Shorefield purchasing or taking over PEB. He stated that it was a meeting about the oil and gas business in general. He also agreed that there was another subsequent meeting he arranged between Datuk Bustari and AWT in Perth Australia. This company was a joint-venture partner of PEB and Datuk Bustari had indicated that he was interested in finding out more about its business. Robert Lee happened to be in Perth for the Gawai holidays and as Datuk Bustari had earlier evinced an interest in AWT, had taken the opportunity of arranging for a meeting in Perth. He stated that only the business of AWT was discussed at this June meeting.

[457] The plaintiff has sought to suggest that Robert Lee's presence at these meetings with Datuk Bustari and his representatives is evidence of a pre-meditated scheme on the part of the three impugned directors and Robert Lee to divest the plaintiff of its PEB shares. However the evidence shows that that there was nothing sinister or covert about the meetings with Datuk Bustari. There is no evidence to show that these meetings were purely for the purposes of devising a scheme to buy-out the entirety of the PEB shares from the plaintiff with these defendants' assistance. In relation to Robert Lee specifically, there is nothing to indicate or evidence his participation in any scheme. He was there primarily to answer questions pertaining to the operations of PEB. Ultimately, as is the case with the other defendants, I am unable to conclude that these meetings comprise evidence of a sinister or devious scheme to injure the plaintiff.

[458] The plaintiff also alleges that Robert Lee was aware of and involved in facilitating a due diligence exercise conducted by Ernst & Young on behalf of OBYU Holdings and this too comprised a part of the scheme concocted by the defendants to dispose of the PEB shares to Shorefield Resources Sdn Bhd However Robert Lee explained in his evidence that he was asked by Tengku Ibrahim in or around May 2009 to assist in the proposed due diligence by Ernst & Young on behalf of OBYU Holdings. Robert Lee was not advised of the purpose for the due diligence exercise. It will be recalled that the actual due diligence exercise was not undertaken until September 2009.

[459] Robert Lee therefore instructed his subordinate, the financial controller of PEB, one Chong Chie Ming to assist as necessary. The financial controller duly sent out emails to several members of the accounting department advising that a due diligence would be conducted by external auditors Ernst & Young and assistance was to be given to them. Learned counsel for the plaintiff sought to take issue with the words 'Internal Review' that was the title of these emails, and suggested that Robert Lee was therefore trying to mislead or conceal the fact that a due diligence exercise was being conducted by Ernst & Young. This was to substantiate an intention to suppress or conceal relevant information. However it is evident from a perusal of these emails that the writer was not Robert Lee but the financial controller. He was never called as a witness. Moreover the content of the email made it sufficiently clear that external auditors were going to undertake the exercise. In other words, there was nothing covert about the due diligence, or Robert Lee's part in it, as counsel for the plaintiff sought to suggest. On the contrary these emails support the defendants' contention that there was no attempt to hide or disguise the fact of the due diligence. All personnel in Miri and Shah Alam were aware of the due diligence exercise and there is no evidence that they were told to keep this matter a secret. Therefore Robert Lee's nominal participation in this due diligence exercise cannot be considered to be part of a covert scheme as suggested by the plaintiff. There is simply insufficient basis for this contention.

[460] With regards to Richard Yap, Robert Lee testified that he had met him once towards the end of 2008 and knew he was a placement agent or broker. Robert Lee advised that with respect to the third divestment he was advised that Richard Yap would be the placement agent by Tengku Ibrahim in late November 2009.

[461] It is not disputed that Robert Lee was privy to and responded to emails between Richard Yap and Tengku Ibrahim in relation to the third divestment. Here the plaintiff contends that the series of emails shows a sequence of events designed by the defendants with a view to dispose of the PEB shares to Shorefield Resources Sdn Bhd to the detriment of the plaintiff.

[462] Robert Lee testified that he could not be certain that he received all the emails but could remember receiving some of the emails. This is a useful juncture at which to consider the email exchanges. The email exchanges between Richard Yap and Tengku Ibrahim were considered earlier in relation to the utilisation of Dutch auction rather than an open tender. I had concluded that Tengku Ibrahim had accepted Richard Yap's advice as placement agent or broker in this regard.

[463] There are subsequent emails between Richard Yap and Robert Lee. Robert Lee explained that during this spate of email exchanges, Tengku Ibrahim was abroad and had asked Robert Lee to help him to liaise with the relevant parties with regards to the sale of the PEB shares. So that was the reason he was in contact with Richard Yap, primarily to convey Tengku Ibrahim's views and comments.

[464] He explained each of the email exhibits in the course of his evidence.

[465] Vide email dated 30 November 2009 marked exh P42, Richard Yap wrote to Robert Lee updating him on the sale process. It is evident from a perusal of Richard Yap's email that he was in contact with Datuk Bustari Yusof and was targeting him as the potential buyer of the shares comprising the third divestment. However it must be borne in mind that these communications were between Richard Yap and Bustari and not Tengku Ibrahim and Bustari nor Robert Lee and Bustari. Robert Lee responded to Richard Yap merely thanking him for the update.

[466] Subsequently on 1 December 2009, Robert Lee confirmed that he had inserted comments on this email based on feedback from Tengku Ibrahim which he conveyed to Richard Yap.

[467] On 30 November 2009, Richard Yap again wrote to Tengku Ibrahim and copied the mail to inter alia, Robert Lee. The email reports back on Richard Yap's communications with Maybank and Bustari's representatives. It appears to be feedback on how Bustari intends to raise funding to purchase the PEB shares. At the end, Richard Yap asks whether Tengku Ibrahim or Robert Lee could be persuaded to agree with the strategy he has outlined. In the course of his evidence Robert Lee denied being actively involved in the disposal to Datuk Bustari and explained that again, the comments emanated from Richard Yap. Robert Lee confirmed that he was not able to call Datuk Bustari and had no capacity to do so. Neither did Tengku Ibrahim.

[468] Next, much was made by learned counsel by the plaintiff of an email dated 3 December 2009 from Robert Lee to Richard Yap. In that email, Robert Lee stated as follows:

> Richard, Our plan will be to have Kamarul as CEO of P Resources and at most on PEB board as one VP. I am discussing with Tengku to take the role of PEB Ex Chairman/CEO. This will be better as it does not look good to have major changes in our current set up since they are not seen as majority shareholder in public eye. Tengku may need to resign as CEO ofPPB and will do this once timing is ok.

[469] It was put to him that this was clear evidence of a scheme to have Shorefield in place in PEB. Robert Lee explained in the course of his evidence that this email was issued by him to Richard Yap in response to an email from the broker himself relating to representation on the board of PEB for Shorefield Resources Sdn Bhd, the potential purchaser. Robert Lee testified as follows:

> Tm not certain but I do remember he asked me a question about this Shorefield. If they are successful, they have this person called Kamarul, who they want to represent their interest, so that was my reply to Richard to say that this is my view as a director of Petra Energy. I said the plan would be to have him as CEO of PEB/was worried because if somebody who is not experienced in oil and gas coming in, then you know, that's why my opinion is that Tengku to be the chairman and CEO. H still maintain chairman of PPB to protect hte interest of 2 companies. That was my opinion So that was my opinion in reply to it. It is not the email that I generated out from myself. It is actually a question asked to me, If you look at it, it's an outcome of a meeting.

[470] In other words, Robert Lee clarified that he had sent this email in response to a query posed by Richard Yap immediately prior to the sale of the 48.8 million shares in PEB to Shorefield Resources Sdn Bhd Richard Yap had wanted to know if Shorefield could have its representative, Kamarul as the CEO of PEB to represent its interest. Robert Lee explained that he replied as above because he was concerned that if the person appointed as CEO (meaning Kamarul) did not have experience in oil and gas, this would affect PEB. Therefore his opinion was that Tengku ought to be appointed CEO or executive Chairman of PEB. This was his explanation in relation to the email which the plaintiff asserts to be evidence of a conspiracy.

[471] The one other email concerning Robert Lee is his response to Richard Yap again on 4 December 2009. Richard had written to Tengku Ibrahim and copied Robert Lee advising that one of the bidders who had indicated an interest in the PEB shares, namely KNM, had withdrawn, leaving only one bidder. Richard Yap concluded that the sale under the third divestment was expected to be concluded by 11 December 2009. Robert Lee replied saying 'Good'. In the course of his testimony he explained that he replied thus as it appeared that the deal would be completed by 11 December and he was pleased the whole process could be completed. He confirmed that again he was relaying Tengku Ibrahim's message.

[472] In summary I concur with learned counsel for Robert Lee that the totality of these emails establish that he was liaising with Richard Yap to facilitate the sale while Tengku Ibrahim was overseas. It will be noted that all references to Datuk Bustari etc originated/stemmed from Richard Yap's queries. It was Richard Yap who was updating Tengku Ibrahim and Robert Lee on Datuk Bustari and his ability to comply with the requirements of the tender.

There was nothing emanating from Tengku Ibrahim or Robert Lee in this respect. To my mind the most that can be made of these email exchanges is the fact that Richard Yap was aggressively targeting the party most keen on purchasing the PEB block, namely Datuk Bustari Yusof of Shorefield Resources Sdn Bhd

[473] Given the exchange can it be said that it comprises evidence of a conspiracy initiated by Tengku Ibrahim and aided by Lawrence Wong, Tiong and Robert Lee? It would appear not. At best it can be said as of early December it was becoming apparent to Tengku Ibrahim, Robert Lee and the other directors that the party most likely to purchase the PEB bloc under the third divestment would be Shorefield. This too, was largely by reason of the information provided by Richard Yap. The emails comprise evidence of discussions and comments being made by the directors and Robert Lee in respect of the efforts made and steps being taken to dispose of the PEB shres. There is however nothing in the emails that establishes that Tengku Ibrahim and the other impugned directors were, or had been acting in concert with Datuk Bustari to ensure that the shares would go only to Datuk Bustari.

[474] It is the finding of this court on a consideration of Robert Lee's evidence that he was a witness of truth. It is evident from a consideration of the evidence as a whole that Robert Lee's involvement in this case is relatively small. There is no evidence of his involvement in the second divestment. Even with regards to the third divestment his involvement is largely with regards to the emails exchanged in respect of the third divestment.

[475] As such this court would be hard put to conclude that he was party to any conspiracy or wrongdoing, as there is insufficient evidence to warrant such a finding being made. I so conclude having considered his evidence in totality.

Conspiracy

[476] As has been set out extensively in the course of this judgment this contention of conspiracy turns on, inter alia:

(i) the meetings between Tengku Ibrahim, Lawrence Wong and Tiong with Datuk Bustari Yusof of Shorefield Resources Sdn Bhd or his representatives in the first quarter of 2009 where Shorefield Resources expressed an interest initially in the plaintiff's shares and subsequently some part of the PEB shares;

(ii) the due diligence conducted by Ernst & Young on behalf of Shorefield Resources and the execution of a non-disclosure agreement, which was not reported to the Board of directors of the plaintiff;

(iii) the exchange of emails involving Tengku Ibrahim, Lawrence Wong, Robert Lee and Richard Yap (as above) which, it is contended by the plaintiff, warrants the inference of a conspiracy subsisting between the parties, the purpose of which was to sell the PEB shares to Shorefield;

(iv) the fact that Datuk Bustari Yusof through Shorefield Resources and an entity known as OBYU owns a 30% shareholding in PEB. Kamarul Baharin bin Albakri was appointed as PEB's executive director and subsequently chief executive officer;

(v) the emails between Richard Yap, Lawrence Wong, Tengku Ibrahim and Robert Lee, according to the plaintiff amounts to a manifestation of the intention to split the sale of the PEB shares and to stage manage a tender, on the basis that all along they intended to ensure that the shares would be sold to Shorefield Resources Sdn Bhd; and

(vi) to this end it is submitted by the plaintiff that notwithstanding the mandate of the board on 18 November 2009, there was no intention to conduct a sale en bloc.

[477] In short the plaintiff maintains that a consideration of the foregoing facts within the factual matrix of this entire case, coupled with the evidence of Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee establishes unequivocally an unlawful means conspiracy (although again this is not expressly pleaded). In this context it is material that initially, the plaintiff had included the fifth, sixth and seventh defendants as parties to the conspiracy but later withdrew the claim against these selected defendants. The fact of the suit being discontinued against these defendants in itself does not wholly answer the plea of conspiracy.

[478] As matters stand the claim of conspiracy is brought against the first to fourth defendants only, namely Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee. It is the finding of this court that the plea of conspiracy, (albeit unlawful means or lawful means) is not well-founded and therefore fails. The reasons are as follows:

(a) it follows from my finding that these directors exercised their powers and duties for a proper purpose, bona fide in the interest of the plaintiff, that the plea of conspiracy, albeit by lawful or unlawful means cannot stand. Such a finding excludes the possibility of conspiracy;

(b) this court has made a finding that the evidence of Tengku Ibrahim, Lawrence Wong and Tiong is credible; Shamsul's evidence has been rejected as being inherently unreliable for the reasons set out before. The net result of these findings is that the defendants' version of events as to why they undertook the second and third divestments with the consent of the other directors of the plaintiff must prevail. In this context I have also rejected the contention that Robert Lee was party to any scheme or conspiracy designed to injure the plaintiff;

(c) there is no clear independent evidence of a conspiracy. As I have stated earlier, the plaintiff has sought to link or should I say contrived to find a nexus between the events I have set out above in items (i) to (vi) so as to substantiate the plea of conspiracy. As I have stated in *Deepak Jaikishen a/l Jaikishen Rewachand v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437 at p 473:

> ... The established/acknowledged series of cases which have defined the salient characteristics of the law of conspiracy may be summarised as follows:
>
> > The tort of conspiracy to injure is delineated into two categories, namely 'unlawful means' conspiracy and 'lawful means' conspiracy. The label 'unlawful' signifies that unlawful means comprises an element in the cause of action. However, central to this tort, albeit 'unlawful' or 'lawful' means conspiracy is the continuing requirement of a demonstration of an intent by the defendant to injure the claimant. In 'lawful' means conspiracy the requirement is that such intent be predominant in the mind of the defendant whereas in 'unlawful means' conspiracy that requirement is replaced by the requirement to show that unlawful conduct has been the means of the intentional infliction of harm to the claimant.

(d) It is clear to this court that this element of 'intent' has not been proved. On the contrary the directors acted to try and avert what they perceived to be injury to the plaintiff, arising from a drastically reduced cash flow position that had arisen in conjunction with the plaintiff's first loss in its corporate history.

[479] The plaintiff centres its claim of conspiracy particularly in relation to the third divestment as follows at para 70.6(ii) of the statement of claim:

> Setting and/or imposing terms which appear to be onerous so as to eliminate such bidders who were unable to comply. However such terms were waived and/or revised in more favourable terms for Shorefield Resources. Further Petra Perdana contends and will contend that Shorefield Resources were earmarked, by Tengku Ibrahim as the intended purchase of the third divestment from the outset.

[480] The first part of this plea has not been made out. Neither is there evidence that Tengku Ibrahim 'earmarked' the 48.8 million shares for Shorefield Resources. It is evident that the business of PEB is a specialised area of business, with only a limited group of companies expressing interest in the purchase of the same. It was in fact Richard Yap who insisted on a 'Dutch auction' as he was of the view that there would be very few parties interested in purchasing the same. There was nothing emanating from Tengku Ibrahim in relation to this, until Richard Yap proposed the same. Even then it is clear from Tengku's response that he was concerned that he would be seen as 'rigging' the tender. Given these factors it cannot reasonably be concluded that Tengku Ibrahim colluded with Lawrence Wong and Tiong and Robert Lee to sell the shares to Shorefield. Where is Shorefield's participation in this conspiracy? And importantly where is the injury to the plaintiff?

[481] In this context it must be remembered that the plaintiff enjoyed a profit as a consequence of the third divestment. And although Shamsul obtained an injunction to preclude the further sale of PEB shares as had been decided by the directors at the 18 November 2009 meeting, it is in evidence that these same shares were sold in 2012 by way of a restricted tender, akin to the third divestment, and resulted in a loss. In other words the plaintiff ultimately sold further PEB shares and chose to do so in exactly the same manner as had been undertaken by Tengku Ibrahim on the advice of TA Securities Holdings Bhd and Affin Investment Bank.

[482] Given the entirety of these circumstances, it is evident that the key ingredients of conspiracy are not made out:

(a) the scheme or agreement or combination of acts — There is no evidence of any form of agreement between the parties to sell or dispose of the PEB shares to the detriment of the plaintiff. Although this can be inferred without being expressly made out, it is the finding of this court that such an inference is not warranted on a consideration of the totality of the evidence. No form of pre-meditated scheme has been established or can be inferred or made out from the scant evidence adduced by the plaintiff.

(b) intent to injure — this has not been made out. As stated in *Deepak*'s case (above):

> As stated at the outset in relation to the law in this area particularly in *OBG v Allen per Lord Nicholls*, a key ingredient of this tort that must be established, be it lawful or unlawful means conspiracy is intent. The evidence must show that the defendant, ie Intrared intended to harm the claimant.

In the instant case it has not been shown that Tengku Ibrahim, Lawrence Wong and Tiong intended to harm the plaintiff. Such intent cannot be inferred from items (i) to (vi) set out above, (iii) damages — the plaintiff has failed to show

that it suffered loss and damage because the sale of the shares was only effected pursuant to a valid mandate of the board on 18 November 2009 and resulted in a profit to the plaintiff.

[483] In this context it appears to this court that the plaintiff has essentially sought to establish a case from the cross-examination of the defendants. There was simply insufficient evidence adduced by the plaintiff to discharge the burden of proof it bore in respect of the causes of action pleaded in the claim, including conspiracy. The flawed evidence of its primary witness coupled with a failure to produce important witnesses of fact has resulted in the plaintiff being unable to prove its case. The fact that the defendants proved to be credible and consistent witnesses sounded the death knell to the plaintiff's claim.

[484] I concur with the submission by learned counsel for Tengku Ibrahim that the whole theory of conspiracy appears to be premised on hearsay, namely the report in *The Edge* on 16 November 2009. The plaintiff appears to have been persuaded by this hearsay report without substantive evidence to support the allegation.

Issue 6: Alternatively. whether Lawrence Wong and Tiong are guilty of dishonestly assisting Tengku Ibrahim in the aforesaid breaches of duty owed to the plaintiff

Issue 7: Whether the fourth defendant, Robert Lee is guilty of dishonestly assisting in the aforesaid breaches of statutory or fiduciary duties by the impugned directors of the plaintiff

[485] Issues 6 and 7 are taken in conjunction as they deal essentially with the same subject matter, namely dishonest assistance in breaches of statutory or fiduciary duty by Lawrence Wong, Tiong or Robert Lee.

[486] It is trite that any party dishonestly assisting a breach of fiduciary duty by a company director is liable under case-law to account to the company for all loss suffered as a consequence of the said breach.

[487] In order to succeed under this head, it is incumbent upon the plaintiff to establish that each one of these three defendants, namely Lawrence Wong, Tiong and Robert Lee had each assisted with knowledge in a dishonest and fraudulent design designed on the part of the other two in conjunction with Tengku Ibrahim, (see *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming Philip* [1995] 3 MLJ 74; [1996] 2 CLJ 380).

[488] In the instant case it is clear from all my conclusions above that there was no breach of fiduciary duty by Tengku Ibrahim, or Lawrence Wong or Tiong. As such it follows that there can be no question of 'dishonest assistance' by either Lawrence Wong, Tiong or Robert Lee as the plaintiff seeks to suggest. This contention is wholly without merit and is therefore rejected.

CONCLUSION

[489] I therefore conclude that the plaintiff's claim against the four defendants, namely Tengku Ibrahim, Lawrence Wong, Tiong and Robert Lee fails. In this context I find that:

(a) Tengku Ibrahim who was then the executive chairman and/or director of the plaintiff acted properly in effecting the second and third divestments. There was no breach of his fiduciary, statutory or common law duties. He was not negligent in effecting these divestments;

(b) Tengku Ibrahim was properly conferred with the power to dispose of PEB's shares under the second divestment by reason of the mandate accorded to him by the board of directors of the plaintiff on 26 August 2009;

(c) the rationale for the second divestment, namely the need to meet the cash flow or liquidity problems of the plaintiff, coupled with the demand from Shin Yang Shipyard for payment of the balance purchase price due for the vessel known as Petra Galaxy due to be delivered urgently to Shell to fulfil a contract valued at RM1.1 billion were all genuine concerns and were not 'contrived' reasons as suggested by the plaintiff. In other words these matters were not fabricated or put up by the impugned directors with a view to facilitating the sale of the PEB shares to Shorefield Resources Sdn Bhd and causing injury to the plaintiff;

(d) in view of the urgency of the liquidity problem Tengku Ibrahim was justified in selling the shares under the second divestment at the depressed price of RM1.53;

(e) as such Tengku Ibrahim, Lawrence Wong and Tiong exercised their powers as directors bona fide in the best interest of the plaintiff. None of these directors exercised their powers for an improper purpose or with ulterior motives;

(f) there is no evidence of personal gain by any of the impugned directors. Neither is there any evidence explaining why they would wish to inflict 'injury' on the plaintiff;

(g) given the complexity of the circumstances prevailing at the time, the impugned directors, particularly Tengku Ibrahim exercised due care and diligence in effecting the second and third divestments. In this regard it is pertinent that the board of directors offered no other alternative to the liquidity problems faced by the plaintiff apart from the sale of the PEB shares;

(h) the decision to undertake the second divestment was a business judgment made by Tengku Ibrahim, Lawrence Wong and Tiong. In making the judgment they relied on representations made by Soon Fook Kian. They did not err in relying on him;

(i) if my conclusions above are incorrect and it is concluded that these impugned directors did breach their duties albeit statutory, common law or fiduciary, then the fact that they acted honestly and in good faith warrants the invocation of s 354 of the Companies Act 1965;

(j) with respect to the third divestment, it is the finding of this court that none of the three impugned directors acted in breach of their duties. This is because they were advised by Soon Fook Kian and Shamsul Saad that the cash flow problem for the following twelve months, ie 2010 would deteriorate and that the plaintiff would face serious liquidity problems;

(k) the board of directors of the plaintiff including the three impugned directors collectively considered all other options and dismissed them after deliberation, concluding that the sale of the entirety of the plaintiff's PEB shares was the only means of resolving the cash flow problem which was exacerbated by the fact that the plaintiff had suffered its first loss in corporate history for that particular quarter. Hence Tengku Ibrahim was given a conditional mandate to sell the entirety of the PEB shares;

(l) Tengku Ibrahim was unable to comply in full with the conditional mandate accorded by the board. However in effecting the third divestment he was at all times advised by, and therefore entitled to rely on the advice of professional advisors. The mode of sale of the PEB shares under the third divestment was ratified by the board of directors at their meeting on 22 December 2009;

(m) the disposal price of the shares under the third divestment was higher than the mandated price of RM1.80 and the market price. It fell within the valuation range of the fairness consideration report procured by Tengku prior to effecting the sale. As a consequence the plaintiff made a gain from the third divestment. There was no personal gain to any of the three directors or Robert Lee as a consequence of the third divestment;

(n) the three directors did not act for an improper purpose in exercising their power to give effect to the third divestment

(o) in effecting the third divestment, Tengku Ibrahim made a business judgment and was entitled to rely on the advice of professionals such as Affin Investment Bank and TA Securities Holdings Bhd.

(p) even if there were any technical breaches, the entirety of the factual matrix surrounding these divestments warrant invoking s 354 of the Companies Act 1965.

(q) the allegation of conspiracy fails because there is insufficient evidence to establish this cause of action, albeit lawful means or unlawful means conspiracy. Intention and damage are key elements that have not been established. On the contrary in light of the court's finding that Tengku Ibrahim, Lawrence Wong and Tiong acted in the best interest of the plaintiff, this cause of action must fail. The two contentions are mutually exclusive; and

(r) the evidence establishes at best that Tengku Ibrahim was aware that the most likely potential purchaser for the PEB shares was going to be Shorefield Resources Sdn Bhd This fact, taken and considered cumulatively within the chronology of events both prior to and after the divestments, do not form the basis for a cause of action in conspiracy. Instead the evidence taken as a whole establishes that the primary reason for the divestments was to protect the interests of the company, rather than endanger it.

[490] The plaintiff has therefore failed to prove its claim. The plaintiff's claim is therefore dismissed in its entirety save for one exception.

[491] The one exception is the appointment of fiduciary limited to sell the shares falling within the purview of the second divestment. I have earlier concluded that Tengku Ibrahim alone was negligent or breached his duty of care in appointing a placement agent or broker that was unlicensed under the CMSA. Accordingly it is ordered that Tengku Ibrahim pay the sum of RM192,780 being the costs of appointment of Fiduciary Ltd to the plaintiff.

[492] The costs of this action are to be borne by the plaintiff. Such costs will be quantified after hearing submissions from counsel.

A *Order accordingly.*

Reported by Kanesh Sundrum

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