DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN NO. D3 22-36-2003

ANTARA

N.Z. NEW IMAGE SDN. BHD.
(No. Syarikat: 187266-D) **... PLAINTIF**

DAN

LOH YOK LIANG
(NRIC No.: 5535667) **... DEFENDAN**

GROUNDS OF DECISION

1. The plaintiff, **N.Z. New Image Sdn. Bhd.**, claims against the defendant, **Loh Yok Liang**, for specific performance of clause 15 of an Agreement dated 2.3.1999 entered into between the plaintiff, the defendant and one Chua Nam Hoat. The defendant's defence is that the plaintiff's claim is frivolous and discloses no cause of action because there is no evidence to show that the option had been exercised by the plaintiff prior to the filing of this suit. The defendant further pleads that the plaintiff's option to sell their shares to the defendant had lapsed after they elected to file Kuala Lumpur High Court Companies (Winding Up) No. 28-73-2001.

The Plaintiff's Case

2. The plaintiff is a company incorporated in Malaysia and is involved, *inter alia*, in the sale of health food. **Chua Nam Hoat** (PW 1), the Chief Executive Officer of the plaintiff and the Vice-President for the New Image Group told the Court that he came to know about Amore Marketing (M) Sdn. Bhd. ("Amore Marketing") in 1998

when the defendant, who is a director of Amore Marketing approached him with a proposal that the resources of Amore Marketing and the plaintiff be combined in one single company in order to expand their interests in the direct selling business. Amore Marketing is only a holding company and runs its business through Amore Network (M) Sdn. Bhd. ("Amore Network") which runs a multi-level marketing business. Amore Network is wholly owned by Amore Marketing and is a trading company for Amore Marketing.

3. The plaintiff, the defendant, and PW 1 entered into an Agreement dated 2.3.1999 ("the Agreement") whereby the plaintiff was to purchase from the defendant 1,540,000 shares in Amore New Image (M) Sdn. Bhd. ("Amore New Image" formerly known as Amore Marketing (M) Sdn Bhd) at a price of 0.40 sen per share. Thus, the total purchase price was RM 616,000-00.

4. PW 1 testified that he was involved in the negotiation of the Agreement and had represented the plaintiff together with Alan Stewart, a director of the New Image Group, and the plaintiff's lawyer, Tan Chuan Yong. As such, he claimed to have knowledge of the details of the terms and conditions of the Agreement. However, the Court notes that during cross-examination, PW 1 admitted that there was no document in Bundle AB which shows that Alan Stewart is a director of the New Image group.

5. Reference was made to **clause 15** of the Agreement which reads as follows:

> "Should projected profits not be achieved within two (2) years from the date herein or irreconcilable differences occur between

the shareholders, New Image can at its option sell its shares in AMORE to LOH at cost of 40 sen per share or such higher figure as is arrived by dividing shareholders equity by the number of paid-up shares receiving as settlement all New Image stock held by AMORE and such fixed assets as are agreeable with a cash settlement for the balance and the right of access to all distributors and staff so as to operate again as a separate business. Unless a shorter period is agreed three months to be given.".

6. As such, it can be seen that clause 15 of the Agreement is an exit clause incorporated into the Agreement for the dissolution of the joint venture between the parties. In the event that the joint venture business fails to achieve projected profits within two years or if there were irreconcilable differences between the parties, the plaintiff was to be given an option to sell his share**s to** the defendant so as to enable the plaintiff to operate again as a separate business. The reselling price was fixed at either RM 0.40 per share or such higher figure as is arrived at by dividing shareholders equity by the number of paid up shares. The mode of payment of the reselling price was by firstly, returning to the plaintiff all New Image products held by the combined business plus any other assets as agreed between the parties, with any difference in the value to be paid in cash.

7. According to PW 1, after the execution of the Agreement, the plaintiff's business merged with the defendant's business in Amore Marketing. The name of the company was changed to Amore New Image (M) Sdn. Bhd. for the purpose of the combined business and PW 1 was appointed Managing Director and Chief

Executive Officer. PW 1 was also the Managing Director and Chief Executive Officer of Amore Network from the date of the Agreement until 15.4.2000 when he was dismissed by the defendant. During cross-examination, PW 1 admitted that after the merger, New Image did not cease operations. The Court records the following exchange during cross-examination:

> **Q:** According to the Agreement, New Image was supposed o cease operations. Do you agree?
>
> **A:** Yes.
>
> **Q:** New Image breached the Agreement by not ceasing operations?
>
> **A:** Disagree.

The Court confesses to being unable, initially, to understand PW 1's responses in this regard. However, during re-examination, PW 1 clarified that the defendant had agreed for the plaintiff to operate as a product distribution centre for the joint business so that members could purchase for the New Image office. It was intended that the facility would increase the sales of the new business.

8. PW 1 testified that he was aware that the projected profit that was discussed for the combined business was a Net Pre-Tax profit of no less than 10% of the paid up capital or RM 350,000-00 for the first year of operations.

9. After the Agreement was signed, Madam PH Ng reported as General Manager of Amore Network and carried out a due diligence exercise for the company. According to PW 1, Madam Ng had reported that the value of the stock as stated

in Amore Marketing's financial statement which was given to the plaintiff during the negotiations for the joint business was overstated by about RM 500,000-00. This was due to the balance of the year-end adjustment account (RM 215,732.13) being included in the closing stock when year-end adjustment is not an asset and also the inclusion of the value of the stock account for Head Quarter 1 at Subang (RM 215,699.38) when there was in fact no such warehouse there.

10. The plaintiff had raised this issue about the stock value being overstated with the defendant. However, the defendant had only recognised the value for stock overstated as RM 215,732-13. These values together with the values of some obsolete stock were reclassified as pending stock from the defendant. Reference was made to the balance sheet as at 30.4.1999 (pages 123 to 123B of Bundle AB) which was agreed to and signed by both the defendant and PW 1 on behalf of the plaintiff.

11. According to PW 1, the defendant was supposed to put in additional stock to the value of RM 320,019-05 but did not do so. Instead, the defendant ignored and excluded the value of the pending stock from the balance sheet as at 31.12.1999. PW 1's complaint is that the defendant did not do what he had agreed to do.

12. Another area of contention between the parties was when the plaintiff discovered that the defendant had made an order for 21,040 units of a "Man Yoo" product from the Korean supplier in December 1999 when there was still a balance stock of about 8,000 units. The average monthly sales figure for the "Man Yoo" product was about 540 units. As such, based on this projection, they would need 64 months to dispose of all the stocks when the lifespan of the product was only 2

years. As to why the defendant had ordered the "Man Yoo" product in such an aggressive manner, PW 1 testified that the defendant had told him that he would be paid a commission at a rate of 25% for any orders from that Korean supplier and that was probably the reason why the defendant had placed such a big order for the said product. When confronted, the defendant did not deny making the said order but retorted that since the company owed him monies, he could sell the "Man Yoo" stock to settle the outstanding amount.

13. There was a further problem of the defendant having assured his members in Amore that the marketing plan would not be changed. This was contradictory to the agreement before the merger to change to a different marketing plan after merger for the sake of better growth. However, because of the assurance the defendant had given to his members, they were reluctant to follow and implement the new marketing plan. Despite the defendant's assurance that he would persuade his members to accept the change in the marketing plan, this had affected the growth and sale of the combined business.

14. Yet another issue was the defendant asking PW 1 to lower his monthly salary. This was not agreed to by PW 1 because the sale of the New Image products constituted the substantial part of the total sales of the combined business.

15. According to PW 1, the differences between the plaintiff and the defendant were not reconcilable. The defendant proceeded to take steps to exclude PW 1 and Madam PH Ng from the management of the combined business. During the Chinese New Year holidays, the defendant changed the locks to the office and did not give them the new key. The defendant denied Madam PH Ng access to the

computer system. He changed the locks to the warehouse and removed all the stocks in the plaintiff's warehouse to an unknown place. He removed PW 1 and Madam PH Ng as cheque signatories without a proper company resolution.

16. On 14.2.2000, the defendant dismissed Madam PH Ng (see Notice of Termination of Employment at page 129 of AB). After that, the defendant forced the warehouse manager of Amore Network, who was formerly the warehouse manager of the plaintiff, to resign. Subsequently, on 15.4.2000, the defendant dismissed PW 1 was Chief Executive Officer and Managing Director of Amore Network (see Letter of Termination of Employment at page 130-132 of AB).

17. According to PW 1, the defendant was not justified in dismissing him and Madam PH Ng and the Industrial Court had ruled in their favour and ordered the defendant to pay backwages and compensation in lieu of reinstatement. However, the defendant had failed to pay the sum awarded by the Industrial Court against Amore Network amounting to RM 150,000-00 in favour of PW 1 and RM 72,000-00 in favour of PH Ng (Ng Peng Hyang).

18. PW 1 testified that the plaintiff had exercised its right under clause 15 of the Agreement. However, because the defendant had not given the plaintiff a copy of the Agreement, the plaintiff could not enforce the Agreement against the defendant. The plaintiff had only obtained a copy of the Agreement when the defendant produced a copy after the plaintiff had commenced winding-up proceedings against the defendant.

19. Sometime in mid-2000, before the plaintiff could enforce its rights under clause 15 of the Agreement, the defendant wrote to offer to contra the plaintiff's shares in Amore New Image with expenses which he claimed that the plaintiff had incurred without authorization and stock which he claimed that the plaintiff's agents had taken (pages 145-147). The plaintiff counter-offered on the value of the sale of its shares (pages 148-150).

20. No agreement was reached between the parties. According to PW 1, the plaintiff refused to complete the purchase of the plaintiff's shares knowing that the plaintiff could not enforce the Agreement as he held all the signed copies of the Agreement. The defendant was unreasonable in his terms and had once even offered one dollar in full and final settlement. During cross-examination, PW 1 agreed that the said offer was made on a 'without prejudice' basis.

21. PW 1 testified that since he and Madan PH Ng had been excluded from the management of Amore New Image, they were not in a position to know how much the combined business was making. However, the plaintiff was prepared to accept RM 0.40 as the minimum price per share as provided under clause 15. Based on RM 0.40 per share, the total price should be 1,540,000 x RM 0.40 = RM 616,000-00.

22. As regards the total value of the New Image products at the material time, PW 1 told the Court that the value should be RM 95,562-80 based on the work-out that was prepared by the defendant. The plaintiff was unable to verify that figure as it had no access to the accounts and the stocks. Similarly, it was no able to verify the value of the fixed assets as it had no access to the assets to ascertain the

condition of the assets. However, the plaintiff did not agree with the value of RM 73,298-80 as provided by the defendant and pointed out that based on the valuation of the fixed assets at pages 151 to 155 of AB, the value should be RM 77,241-69.

23. There was a further complaint that the defendant not only failed to return any of the New Image products and fixed assets to the plaintiff but that they had also refused to surrender the New Image data base which was kept and maintained in the computer system of the combined business. PW 1 maintained that the defendant was in breach of clause 15 of the Agreement by wilfully not surrendering the data base since the plaintiff should have the right of access to all its distributors and staff so as to be able to operate again as a separate business. Following the unreasonable conduct of the defendant, PW 1 claimed that the plaintiff had to go through considerable time and effort in order to build a new data base and restart the New Image business.

24. PW 1 testified that the New Image products were mainly consumable nutritional products with a shelf life of only 3 years which would have expired by now and would therefore have no value. The fixed assets would have depreciated and again have no value. Since the defendant had not returned to the plaintiff any of the New Image products and fixed assets, PW 1 took the position that the cash value for the shares should be RM 616,000-00.

25. PW 1 told the Court that despite the plaintiff giving notice to the defendant as early as July 2000 that it had exercised its option for the defendant to purchase the plaintiff's shares in Amore New Image, the defendant had failed to do so. Instead,

the defendant had failed to properly manage Amore New Image to the extent that the company was wound up on 2.9.2010. And after the company was wound up, the defendant argued that he was no longer required to purchase the shares from the plaintiff under clause 15. PW 1 argued that this action of the defendant was unconscionable because –

i. The Agreement was between the plaintiff and the defendant personally and not with Amore New Image;

ii. Clause 15 doers not state that the defendant's obligation to buy the shares was subject to the condition that the company was still in operation; and

iii. The RM 616,000-00 purchase price was credited into the account of the company and as such, the defendant could withdraw the funds from the company's account.

26. PW 1 informed the Court that as early as April 2000, he was no longer involved in the management of Amore New Image and was not allowed to discharge his functions as director. He resigned as a director of Amore New Image on 3.9.2008.

27. The plaintiff had filed an application to wind up the company based on just and equitable grounds. During cross-examination, PW 1 agreed that he had affirmed the affidavit verifying the Winding-Up Petition. According to PW 1, he was advised by his legal adviser that he could file the Petition and present it as a partner. He claimed that the application was dismissed by the Court on the basis that it was not a partnership and that the plaintiff should seek its remedy as provided under

clause 15. However, during cross-examination he agreed that there was nothing in the learned Judicial Commissioner's grounds to support what he said.

28. As such, the plaintiff sought an order from the Court to compel the defendant to honour his obligations to purchase the plaintiff's shares under clause 15 of the Agreement and in addition to order the defendant to compensate the plaintiff for loss and damage suffered by the plaintiff due to the defendant's breach of clause 15 since July 2000.

29. During cross-examination, PW 1 confirmed that after the March Agreement, the defendant took away all the copies of the Agreement and the plaintiff was not given a copy. He agreed that since he did not have a copy of the Agreement prior to January 2001, he did not know the precise terms of the Agreement. However, he denied that because of this he had made a mistake in filing the Petition for Winding-Up. He explained that he knew that there was an exit clause in the Agreement. The Court recorded the following exchange:

> **PUT:** It is your testimony that because the plaintiff did not have a signed copy of the March Agreement, so the plaintiff could not enforce the Agreement against the defendant?
>
> **ANS:** Agree.
>
> **PUT:** To enforce clause 15 of the Agreement, you would need to exercise the option?
>
> **ANS:** Agree.

PUT: Since the plaintiff could not enforce clause 15, it did not exercise its option.

ANS: Disagree.

30. PW 1 was referred to the two letters from Alan G Stewart which are seen at pages 136-142 and 148-150 of AB. PW 1 agreed that there was no mention of clause 15 in these two letters. He agreed that there was no letter in Bundle AB which shows that the plaintiff had exercised its option under clause 15. He also agreed that there was no document in Bundle AB in support of his contention that the plaintiff had exercised its option. PW 1 agreed that Stewart & Co was an independent third party at the material time and the letters at pages 136 & 148 were **NOT** issued by the plaintiff.

31. During cross-examination, PW 1 was referred to paragraph 12 of the Winding-Up Petition (page 32 of AB) in which he had stated that the petitioner (the plaintiff) holds 1,540,000-00 shares in Amore New Image. He agreed that if the plaintiff had sold his shares in Amore, he would no longer be a shareholder. He further agreed that if the plaintiff had been successful in the Winding-Up Petition, the assets would have to been distributed according to the Companies Act 1965 where the assets would first be used to pay the creditors with the balance to be divided amongst the shareholders.

32. Although the plaintiff claimed initially that he did not understand the term "mutually exclusive and independent", however when referred to paragraph 9 of the plaintiff's Reply to the Defence, he explained that the term means that he can do both things at the same time. However, upon further questioning, he agreed that if

he had succeeded in winding-up the company, he would not be able to sell its shares and *vice versa*.

33. During cross-examination, PW 1 admitted that the plaintiff had not stated the exact date that they exercised the option in either their Statement of Claim or their Reply to the Defence.

34. During cross-examination, PW 1 was questioned about the negotiations and the issues relating to the value of the stock, the year-end adjustment and the overstated stock, and he agreed that all these negotiations took place before October 1999. According to PW 1, what the defendant had not implemented was the pending stock which the defendant did not put back. However, he admitted that he had no documents to prove that the said stock was not put back by the defendant.

35. As regards the plaintiff's complaint about the changing of locks and denial of access to the computer system, PW 1 was referred to the Decision in respect of the Winding-Up Petition filed by the plaintiff where the learned Judge had dealt with this issue with the following passage:

> "Thus the allegations of exclusion from management, the question of denial of access to computer program and financial information appear to be unsustainable."

PW 1 agreed that the issue had indeed been decided.

36. In the course of re-examination, the Court notes that PW 1, when referring to the two Alan Stewart letters, claimed as follows:

> "When I started talking to the defendant about selling the shares, when we sent the Alan Stewart letters, we are already exercising our option."

37. The plaintiff also called **Ng Peng Hyang** (PW 2) in support of its case. She describes herself as the Chief Financial Officer of the plaintiff and is the person frequently referred to in the evidence of PW 1 as 'Madam PH Ng'. It would appear that she is in fact the wife of PW 1. PW 2 agreed with the defence suggestion that as a Chief Financial Officer of the plaintiff, she is holding a high position in the company.

38. According to PW 2, she only came to know about the Agreement dated 2.3.1999 when the defendant exhibited a copy with his affidavit in the Winding-Up petition that was filed by the plaintiff. She claimed that she was not involved in the negotiations of the terms and conditions of the Agreement and had no knowledge of them and when the Agreement was signed. She claimed that she was not aware of the letter from Stewart & Co (page 136) at the time when the parties were in negotiations. She agreed that from the letter, it was the defendant ("Mr Loh") who had initiated negotiations.

39. In 1999, PW 2 was the General Manager of the plaintiff and in charge of the daily operations of the company. However, she claimed that as General Manager she

was not aware of the Agreement that was signed by the plaintiff and was not given a copy of the said Agreement.

40. PW 2 claimed that she first came to know about Amore Marketing when 'Mr Chua' asked her to prepare the plaintiff's stock list for the purpose of using the plaintiff's stocks and assets as payment for the shares which the plaintiff purchased from the defendant.

41. PW 2 testified that she was the General Manager of Amore Network from 2.5.1999 to 13.3.2000. Amore Network is wholly owned by Amore Marketing and acts as the trading company for Amore Marketing. She claimed that as General Manager for Amore Network she was not aware of any projected profit being discussed for the business.

42. PW 2 testified that after she became the General Manager, she carried out a due diligence exercise during which she found that the value of the stock as stated in Amore Marketing's (which was subsequently known as Amore New Image) financial statement which was given to the plaintiff during the negotiations was overstated by about RM 500,000-00. This was because the balance of the year end adjustment account amounting to RM 215,732.13 was included in the closing stock. She also discovered that the balance of stock account for the Head Quarter 1 at Subang amounting to RM 215,699.38 was included in the value of the closing stock account when in fact there was no such Head Quarter.

43. This issue about the stock value being overstated was raised with the defendant and the defendant had, in turn, raised the matter with their Korean supplier in their

exchange of correspondences. However, the defendant subsequently only recognised the value for stock overstated as RM 215,732.13. This, together with the value of some obsolete stocks, was re-classified as pending stock from him. The balance sheet as at 30.4.1999 was agreed to and signed by the defendant and PW 1 on behalf of the plaintiff (see pages 123-123B). According to PW 2, the defendant was supposed to put in additional stock to the value of RM 320,019-05 but did not do so. Instead, the defendant excluded the value of the pending stock from the balance sheet as at 31.12.1999. During cross-examination. PW 2 explained why she said that the defendant did not do what he had promised to do. She claimed that she could not see the pending stock in the Consolidated Balance Sheet (pages 124-126). She agreed that the defendant did not sign this document and she did not know who had prepared the document. She also had no evidence whether it was the defendant who had submitted the document.

44. PW 2 also touched on the issue of the excessive order of the "Man Yoo" product, the change of locks to the office and the dismissal of herself and PW 1, the results of the Industrial Court cases, which evidence was similar to that of PW 1's.

45. On the Man Yoo products, PW 2 agreed that the stocks ordered would have cost more than RM 5000-00. She also agreed that since the stocks costs more than RM 5000-00, either she or PW 1 would have to authorize and sign the cheque together with the defendant. However she disagreed that she and PW 1 had approved the order of the Man Yoo stock prior to its arrival.

46. PW 2 was referred to the Commercial Invoice at page 127 of AB. PW 2 agreed that the document shows that the goods had been delivered. She claimed that she

did not know if the suppliers would have supplied the goods only if they were paid in advance. She agreed that the document shows that the terms of delivery and payment was by "T/T CIF Port Kelang, Malaysia" but she disagreed that it shows that payment was already made at the time the document was issued. Upon further questioning, she agreed that she did not know if the goods had indeed been delivered.

47. During cross-examination, PW 2 was asked whether there was any letter in Bundle AB which shows that the plaintiff had exercised its option to sell its shares under section 15 of the Agreement. To this question, PW 2 pointed to the last paragraph of the plaintiff's letter at pages 170-171. According to PW 2, this paragraph shows that there were negotiations. She conceded that there was no direct letter which shows that the plaintiff had exercised its option. However she disagreed that the plaintiff did not exercise its option to sell the shares. The Court notes with some amusement that PW 2 attempted to regain some lost ground when she testified that "I **think** the plaintiff exercised its option".

The Defendant's Case

48. The defendant, **Loh Yok Ling** (DW 1), referred the Court to the Companies Winding-Up Order dated 2.9.2010 against Amore New Image on the petition of Newlane Laboratories Sdn Bhd (page 58-59 of AB). *Vide* the said Order, Amore New Image was ordered to be wound up and the Official Receiver was appointed as Liquidator. It is his evidence that once the company is wound up, then following section 223 of the Companies Act 1965 the plaintiff could no longer transfer its shares to the defendant.

49. The defendant testified that he and the plaintiff had entered into a Joint Venture Agreement on 2.3.1999 to carry out a direct selling business. Under the said Agreement, "the Plaintiffs" became a shareholder and the defendant a director of Amore New Image.

50. Under the Agreement, the plaintiff would purchase 1,540,000 shares in Amore New Image. In the event that Amore fails to achieve the projected profits, namely not less than 10% of the paid up capital or RM 350,000-00 within 2 years from 2.3.1999, **or** if there were irreconcilable differences between the shareholders, the plaintiff may, at its option, exercise its right to sell its shares in Amore to the defendant. If the plaintiff exercised its option but the sale cannot be completed for some reason, then the plaintiff must wait for 3 months from the date that it exercised its option before it could proceed with any action to claim the price of the shares from the defendant. The Court confesses to some difficulty in comprehending the basis of the defendant's contention for the last portion of his evidence as regards the plaintiff having to wait for 3 months before it could proceed with any action to claim the price of the shares from the defendant.

51. After the Agreement, the defendant became a director and the Executive Chairman of Amore New Image. He claimed that before the merger, Amore had made profit after taxation of about RM 600,000-00 based on the profit and loss account as at 31.12.1998. However, the plaintiff's profit and loss account for the year ended 30.6.1998 shows a loss of approximately RM 477,000-00 after taxation (pages 180-184).

52. The plaintiff's representative, **Mr. Chua Nam Hoat** (PW 1) was formerly the Chief Executive Officer and Managing Director of Amore New Image whilst **Madam Ng Peng Hyang** (PW 2) was the former General Manager of Amore New Image. Mr Chua was appointed on 20.4.1999 and was dismissed on 15.4.2000 whilst Madam Ng was appointed on 20.4.1999 and dismissed on 14.2.2000. One of the reasons for the dismissals was that both of them had misused their power as the cheque signatories of Amore New Image for the amounts of RM 5000-00 and below.

53. Reference was made to pages 185-199 of AB. According to the defendant, these were extractions of cheques which were issued by Chua Nam Hoat and Ng Peng Hyang. They had issued cheques to each other on the pretext of payments to some distributors without the distributors having to perform "sales maintenance". According to the defendant, the recipients of all the cheques were either PW 1, PW 2 or they were cash cheques.

54. After PW 1 and PW 2 were dismissed, the parties entered into negotiations in relation to the selling price of the plaintiff's shares in Amore New Image. According to the defendant, the price of the shares was fixed at RM 0.40 per share. The price will have to take into consideration various contras and deductions such as the amount of the plaintiff's stock being held by Amore New Image and fixed assets. Thereafter there would be a cash settlement for the balance of the purchase price. However, the parties were unable to reach a consensus with regard to the contras and deductions.

55. With regard to the negotiations, the defendant had referred the Court to the correspondences at pages 135-147 of AB. The subject matter of these negotiations was with regard to the defendant's offer to buy back the shares and the list of contras to be considered. At RM 0.40 per share the price would be RM 616,000-00. However, after taking into account the proposed deductions, the net amount to be paid as per the defendant's offer of 12.7.2000 (pages 145-147) is RM 200,000-00. The defendant contends that the option to sell was never mentioned in any of these letters.

56. After the negotiations failed, the plaintiff proceeded to present a Companies Winding-Up Petition dated 22.1.2001 against Amore New Image *vide* Companies (Winding-Up) Petition No. D-28-73-2000 (pages 27-54 of AB). The plaintiff also filed various other applications to appoint a Provisional Liquidator and to obtain a Mareva injunction against Amore New Image. However, the Provisional Liquidator was discharged and the Mareva injunction was set aside *vide* an Order dated 14.8.2001. The winding-up petition was subsequently dismissed with costs on 15.1.2002.

57. The defendant contends that after the winding-up petition was struck out, the plaintiff did not take any further steps to exercise its option to sell its shares to him (the defendant). Instead the plaintiff had filed this present action against the defendant to claim for the price of the shares.

58. The defendant contends that the Companies (Winding-Up) Petition filed by the plaintiff against Amore New Image and the exercise of its option to sell its shares in Amore New image are mutually exclusive. This is because if the plaintiff had

elected to wind-up Amore, the natural consequences is that the shares cannot be transferred. The defendant contends that if the plaintiff had wished to sell its shares in Amore, it cannot file a petition to wind-up the company.

59. The defendant contends that after the plaintiff had filed the winding-up petition, it had retracted or forfeited its earlier option to sell the shares. Thus if it had wanted to sell its shares, it would have to exercise its option again.

60. During cross-examination, the defendant was referred to a corrective affidavit (pages 61-73) filed by him on 2.5.2001 in the plaintiff's winding-up petition. In paragraph 6 of the said affidavit, the defendant had annexed a stamped copy of the Agreement dated 2.3.1999 which is the Agreement in pages 1-5 of AB. The defendant agreed that clause 15 is an exit clause where he had guaranteed a minimum of RM 0.40 per share and that the buying of the shares was to be completed within 3 months. He further agreed that the value was to be paid by setting off against the New Image stock held by Amore New Image plus agreeable assets and cash.

61. When questioned about the Alan Stewart letters, the defendant denied that when Alan Stewart wrote to the defendant, he was representing the plaintiff. According to the defendant, Alan Stewart was recommended by Mr Graeme, the major shareholder of the plaintiff, to give his independent views on the value of the shares so that the shares could be sold to the defendant.

62. The defendant was referred to the letter dated 12.7.2000 at pages 145-147 of AB which he admitted was written by him. At that time, he was looking at ways to

resolve the relationship because the parties were unable to resolve their differences. In the letter the defendant had suggested to set off of the share price of RM 616,000-00 against the items in the list at page 143. The total in page 143 amounted to RM 446,751.45. In his letter at page 145, the defendant had suggested a balance payment of RM 200,000-00.

63. According to the defendant, the plaintiff responded *vide* the letter at page 148. The Court notes that this is a letter from Alan Stewart. According to the defendant, the plaintiff was prepared to sell the shares but subject to discussions about the set off. The discussions commenced in July 2000 but could not be completed right up to the end of 2000. The defendant agreed that the only reason why the sale of the shares could not be completed in 2000 was because the value of the set off could not be agreed to.

64. During cross-examination, it was put to the defendant that items (a), (b), (c), (e), (f), (g), (k), (l), (m) and (n) in the list at page 143 were neither New Image stock held by Amore New Image nor were they fixed assets which were allowed to be set off under clause 15. Initially, the defendant disagreed but subsequently agreed that under clause 15, only two items were allowed to be set off, namely New Image stock held by Amore New Image and fixed assets. Nevertheless he disagreed that by insisting on the set off as in page 143, he was acting in breach of clause 15.

65. The defendant agreed with the plaintiff's suggestion that whatever New Image stock held by Amore New Image in 2000 would be obsolete in 2011 and can no longer be used.

66. As regards the dismissals of PW 1 and PW 2, the defendant agreed that there are two Industrial Court awards which say that their dismissals were unjust. He further agreed that after the dismissals of PW 1 and PW 2, he was the only person in charge of the operations of Amore New Image. He agreed that after the plaintiff's petition for winding-up Amore New Image, the plaintiff was still a shareholder of the company. He also agreed that that the plaintiff was still entitled to enforce clause 15 because the defendant did not complete the sale under clause 15.

67. However during re-examination, the defendant made an about turn and claimed that the plaintiff cannot enforce clause 15 because it had not exercised its option. He also referred to the items at page 150 which forms part of Alan Stewart's letter and claimed that apart from items (d), (e) (f), (g), (j) and (l), all the rest of the items were not provided for under clause 15.

68. Whilst the defendant had initially stated that Alan Stewart was an independent investigator and impartial and fair, at the end of his evidence he again made an about turn when he stated that Alan Stewart was representing the plaintiff.

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Evaluation of the Evidence and Findings

69. In coming to a decision in this case, the Court has carefully examined the evidence adduced by both parties. The Court has also had the advantage of perusing the written submissions and replies prepared by both counsels.

70. At the heart of this dispute between the parties is a proper construction of clause 15 of the 2nd March Agreement. The Court has carefully perused clause 15 and find that clause 15 is very clearly an exit clause placed in the Agreement to enable

the plaintiff, who had bought 1,540,000 shares in Amore Marketing at a price of RM 0.40 per share amounting to a total purchase price of RM 616,000-00, to sell back to the defendant the said shares that it had purchased upon the occurrence of either of these two eventualities, namely -

i. Where projected profits could not be achieved within two years from the date of the Agreement; **OR**

ii. Where irreconcilable differences occurs between the shareholders.

71. Whilst the plaintiff's case is focussed on the irreconcilable differences which had arisen between the parties, the defendant, on the other hand, has raised as a issue that clause 15 of the Agreement requires an option to be exercised, that the date of exercise of the option and the date of the alleged breach by the defendant were not pleaded in the Statement of Claim and that there was no proper evidence to show that the option had been exercised by the plaintiff prior to the filing of the action.

72. Whilst it is true that the **date** of exercise of the option and the alleged **date** of breach of clause 15 by the defendant were not expressly pleaded in the Statement of Claim, the Court notes that the plaintiff had in paragraphs 10 and 12 of the Statement of Claim pleaded both the exercise of the option as well as the refusal of the defendant to purchase its shares. Paragraphs 10 and 12 of the Statement of Claim read as follows:

"**10.** *Memandangkan perkara tersebut di atas dan akibat daripada perselisihan/perbezaan yang tidak boleh diselesaikan, Plaintiff telah menuntut Defendant membeli syer menurut Klausa 15 dalam Perjanjian tersebut.*

....

12. *Defendan telah dan masih gagal untuk membeli syer Plaintif atau mengambil apa-apa langkah berkenaan."*

73. The case of **BPI International Finance Ltd v Tengku Abdullah Ibni Sultan Abu Bakar** [2009] 4 CLJ 599 cited and relied upon by learned counsel for the defendant can clearly be distinguished from the facts of our instant case. In **BPI International** (supra), the issue was whether the nature of the claim was based on indemnity or whether it was based on breach of contract and/or duty of care. The Court of Appeal held that the respondent did not plead an express or implied contract of indemnity and its claim was founded on breach of contract and/or duty of care. As the respondent's pleaded case was that he had suffered damages in consequence of the appellant's breach of contract and/or duty of care, the issue as to when the damage occurred was of paramount importance. The facts showed that the breach would have occurred before 1983 and as the suit was filed only on 20.8.2003, it was time barred under the Limitation Act 1953.

74. However, in our present case, the plaintiff's action is founded on the exit clause under the Agreement entered into on 20.3.1999. The suit was filed on 2.1.2003 and no issue of time-bar would arise. Whilst it is true that the exact date of exercise of the option was not pleaded, however, as this Court had stated earlier, both the exercise of the option by the plaintiff and the refusal of the defendant to

purchase the shares were in fact pleaded. In light of the fact that limitation would not arise in this case, unlike the case of **BPI International Finance** (supra), the Court is of the considered view that the failure to plead the exact date of exercise of the option should not be allowed to assume too big an importance.

75. The next question to consider is in relation to how the option is to be exercised by the plaintiff? The Court notes that clause 15 merely states that "**New Image can at its option sell its shares in AMORE to LOH**". The Court reads "at its option" to mean as it chooses, provided of course that the condition precedent before the plaintiff exercises its option is satisfied. The Court agrees with learned counsel for the plaintiff that clause 15 does not provide a mode or manner for the plaintiff to exercise its option. As such, the Court will look at the **actions of the parties** to decipher if indeed the option to sell its shares to the defendant had been exercised by the plaintiff.

76. Learned counsel for the defendant on the other hand has cited the Federal Court decision in **Subramanaiam Chettiar & Ors v J.C. Chang Ltd** [1969] 2 MLJ 176 for the proposition that a person exercising the option "has to do two things, he has to give notice of his intention to purchase, and to pay the purchase price".

77. In summary, it is the defendant's submission that the plaintiff did not exercise its option, that there were no documents adduced by the plaintiff to show that the plaintiff had exercised its option, that the plaintiff did not issue any letters for the purpose of negotiations with the defendant, that the two letters from Stewart & Co did not constitute an exercise of the plaintiff's option under clause 15 as Stewart & Co had stated that they were carrying out "an independent investigation". Learned

counsel for the plaintiff, on the other hand, has taken the approach that so long as the conditions precedent in clause 15 were fulfilled, the plaintiff is entitled to exercise its option and the defendant is obliged to buy back the shares from the plaintiff.

78. Based on the evidence as adduced by both parties, the Court is satisfied that irreconcilable differences had arisen between the parties such that it was no longer viable for the combined business or joint-venture business, by whatever name called, to continue. However, a number of questions arise in the Court's mind in respect various aspects of the evidence adduced from the plaintiff's witnesses such as-

    i. Why was due diligence carried out only **AFTER** the entering into of the Agreement and not before?

    ii. Why was the plaintiff not given a copy of the Agreement and why did the plaintiff not insist on being supplied with a copy of the Agreement?

    iii. How could PW 2, the then General Manager of the plaintiff, claim that she was not involved in the negotiations for the Agreement, that she had no knowledge of the terms of the Agreement and when it was signed?

79. The above questions remain unanswered. Be that as it may, the Court is of the considered view that following the dispute as to the stock value being over-stated, the defendant's failing to put in additional stock even after agreeing to do so as

evidenced by his signing the balance sheet as at 30.4.1999, the defendant's excessive purchase of "Man Yoo" products from Korea in excess of Amore New Image's ability to move the stocks before the expiry date of the products, asking PW 1 to lower his monthly salary, the defendant changing the locks to the office and the warehouse, and culminating in the dismissals of both PW 1 and PW 2, *albeit* on different dates, there was no conceivable way that the joint business could have continued. In the circumstances, the Court does not intend to go into an in-depth examination of each of these areas of dispute, or to determine which of the antagonists is at fault in each case, but merely to state that the condition set out in clause 15, namely that irreconcilable differences had arisen between the shareholders, would have been triggered.

80. Although clause 15 does not set out the manner in which the plaintiff is required to exercise its option, the Court does not agree with the submissions of learned counsel for the plaintiff that the filing of the Writ in this case constitutes the exercise of the option by the plaintiff. The Court finds this line of submission to be contrary to the plaintiff's pleaded case that "*Plaintiff telah menuntut Defendant membeli syer menurut Klausa 15 dalam Perjanjian tersebut*" and "*Defendan telah dan masih gagal untuk membeli syer Plaintif* " which points to the plaintiff having already exercised its option by asking the defendant to buy its shares and the defendant failing to do so, all this before the filing of the Writ.

81. Rather, the Court has looked at the actions of the parties in 2000 when there were concerted attempts to negotiate the price to be paid for the plaintiff's shares in Amore New Image. The Court notes the correspondences at pages 135 to 150 of AB. Notwithstanding that these letters do no emanate directly from the plaintiff,

however these contemporaneous documents shows that Stewart & Co were attempting to liaise between the parties in order to thrash out an acceptable solution in relation to the price that was to be paid for the plaintiff's shares. A proper scrutiny of the correspondences would show that Stewart & Co were receiving the offers and counter-offers of **both parties**. There was reference to "Loh offering to purchase" as well as "Offer by New Zealand New Image to Amore Network for transfer of shares". Whilst there did not appear to be much dispute over the fact the sale price of the shares would be RM 616,000-00, however there was considerable to-ing and fro-ing about the value of the contras which were to be offset against the sale price of the shares. The Court notes that all this would have taken place between June 2000 and July 2000 as evidenced by the dates of the correspondences.

82. The Court is of the view that the facts in the case of **Subramanaim Chettiar & Ors** (supra) cited by learned counsel for the defendant can be easily distinguished. In that case, there was an option agreement entered into between the parties. Vide the agreement, in consideration of a sum of $1 paid to the defendant by the plaintiff, the defendant granted to the plaintiff an option for a period of 4 months to purchase the lands free from encumbrances at a price of $ 782,306-00. There were other terms and conditions such as the defendant giving the plaintiff every assistance to obtain the necessary approvals from the relevant authorities. It was also stated that the option could be exercised any time within the option period by the plaintiff giving notice in writing to the defendant at the given address of its intention to purchase the said lands at the price of $782,306-00. Upon the exercise of the option, the plaintiff was to pay the defendant 10% of

the purchase price as deposit and the defendant was to deliver the documents of title to the said lands to the plaintiff's solicitors.

83. Unlike the case of Subramaniam Chettiar, in our instant case there was no option agreement and no specific term on how the option was to be exercised. There was nothing in the agreement which states what must be done by the plaintiff when it was exercising the option under clause 15. In light of the fact that clause 15 does not specify a precise mode for the plaintiff to exercise its option to sell its shares in Amore New Image to the defendant, the Court is satisfied that the very fact that the parties were actively negotiating with the assistance and help of Stewart & Co to resolve the issue of the sale of the shares to the defendant, with input being contributed by both parties would be indicative that the plaintiff had exercised its option, otherwise why should the parties be negotiating the price. The Court finds that the defendant knew that the plaintiff wanted to sell its shares to him. The defendant himself was aware that the joint business could not continue taking into account the sad state of the relationship between the parties. The Court is satisfied that in this case, the fact that the defendant did not purchase the plaintiff's shares was NOT because the plaintiff did not exercise its option but because the parties could not agree to the amounts that should be contra from the sale purchase price. Taking into account all the circumstances of the case, **the Court is satisfied that the plaintiff had succeeded in proving, on a balance of probabilities, that it had exercised its option to sell its shares to the defendant.**

84. The Court has also considered the defendant's argument that the plaintiff's right to enforce clause 15 of the Agreement and the plaintiff's presentation of a winding-

up petition were two mutually exclusive options and that by its action in presenting the winding-up petition, the plaintiff is now excluded from enforcing its rights under clause 15. Learned counsel for the defendant has referred the Court to the case of **Meng Leong Development Pte Ltd v J.I.P Hong Trading Co Pte Ltd** [1985] CLJ (Rep) 8, [1985] 1 CLJ 20 (PC) where the Privy Council had quoted from Spencer, Bower and Turner's "*The Law relating to Estoppel by Representation*" 3rd Edn. (1977) para 310 as summarising the doctrine of election as applied to the law of estoppel as follows:

> "Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice."

85. Does this argument of the defendant have merit?

86. In response to the defendant's submission on this issue, learned counsel for the plaintiff has submitted that it is the defendant who should be estopped from raising

such an issue since it was the defendant who had raised the argument that the plaintiff's winding-up petition on just and equitable grounds must fail because there exists a remedy as stated in clause 15 and that the plaintiff's remedy lies in clause 15 and the plaintiff must enforce clause 15. Learned counsel for the plaintiff further submitted that the Winding-Up Court had agreed and accepted the defendant's argument and had so ruled.

87. The Court is of the view that if that was indeed what had happened during the hearing of the winding-up petition filed by the plaintiff, and if indeed that was what the Winding-Up Court had ruled, that would be good basis to argue that it is the defendant who should be estopped from raising this issue. Unfortunately, before me, all that has been exhibited in Bundle AB on this issue is the winding-up petition at pages 27-54 and the Grounds of Judgment relating to that petition at pages 55-57. Regrettably, the Court does not have the benefit of viewing the affidavits or the written submissions, if any, that were filed in respect of the petition. As such, the Court is unable to determine if indeed the defendant had submitted that the plaintiff must resort to the remedy as provided by clause 15.

88. Further, the Court has carefully perused the Grounds of Judgment of the learned Judge but is unable to find that she had dismissed the plaintiff's application because of that ground. What the Court sees is that the learned Judge had found that the plaintiff's allegations of exclusion from management, denial of access to the computer programme and financial information appeared to be unsustainable. As such, the Court finds that the plaintiff's contention that the defendant is estopped from raising the issue about the plaintiff being estopped from raising and enforcing clause 15 to be without basis.

89. And what about the merits of the defendant's argument? The Court will state here that there is no evidence before the Court that when the plaintiff filed the winding-up petition, it was confronted with two alternative and mutually exclusive courses of action. There is also no evidence adduced that the plaintiff had conducted itself in such a manner that it had induced the defendant into believing that it was relinquishing its claim to enforce clause 15. The Court notes that the words "alters his position to his detriment" as stated in Spenser, Bower and Turner would, in the context of our present case, refer to **the defendant altering his position to his detriment** and not, as submitted by learned counsel for the defendant, the winding-up petition being allegedly detrimental to the business of Amore New Image.

90. For the reasons as stated above, the Court is of the considered view that the defendant's submission on this score must fail.

91. The defendant has also questioned whether in the circumstances where Amore New Image has now been wound up, the plaintiff can succeed in its prayer for specific performance. The Court will confess that out of all the issues which have been ventilated by the parties in this case, this is the issue which has given the Court the most difficulty.

92. There is no dispute as to the fact that Amore New Image was ordered to be wound-up on the petition of a company called Newlane Laboratories Sdn Bhd *vide* an order of the High Court made on 2.9.2010. In light of the fact that Amore New Image has now been wound up, can this Court make an order for specific

performance to require the defendant to buy the shares of the plaintiff in Amore New Image?

93. Learned counsel for the plaintiff has attempted to convince the Court that section 223 of the Companies Act 1965 does not invalidate the transfer of shares between the shareholders as between themselves. Since both the plaintiff and the defendant are shareholders in Amore New Image, section 223 does not apply to the transfer of shares from the plaintiff to the defendant and that no leave is required before this Court can so order.

94. For this proposition, reliance was placed on a number of authorities. In the case of **Theow Say Kow @ Teoh Kiang Hong & Ors and another suit** [2014] 9 MLJ 32, the High Court had held as follows:

> "(2) The words 'any transfer of shares' in s. 223 of the Act related to changes in the ownership of shares in a company. It was separate and distinctly different from assets or property of the company. The phrase 'any disposition of the property' in that section encompassed shares owned by the company, meaning assets or property of the company. Hence, 'any transfer of shares' or change in ownership of shares post commencement of winding up catered for a situation separate from 'any disposition of the property of the company' and those two phrases in s. 223 of the Act must be read disjunctively. Section 223 of the Act envisaged a moratorium on shareholding and status of members of the company post commencement of winding up unless there was a validation order by the winding up

court permitting any change to shareholding or status of members."

95. Further, in the case of **BIMB Musyarakah Satu Sdn Bhd v Lee Kik Hooi & Ors** [2009] 8 CLJ 529, the issue that came up for the consideration of the High Court was whether BIMB Musyarakah could enforce the put option agreement against the defendant shareholders when the company had been wound up and the date of commencement of the winding up preceded the date of exercise of the put option agreement. Would the exercise of the put option agreement amount to a contravention of section 223 of the Companies Act 1965? In that case Nallini Pathmanathan JC (as she then was) held that section 223 of the Companies Act 1965 serves to prohibit the improper alienation and dissipation of the property of, or belonging to a company made between the time when a winding up petition was presented and the order for winding up was made, unless the court otherwise orders. In that case, it was not the company's property that was the subject matter of the purchase and disposition but the property of BIMB Musyarakah. The court thus held that section 223 of the Companies Act 1965 was not applicable as the transfer of shares in that case did not involve the disposition or dissipation of the company's property.

96. On the other hand, learned counsel for the defendant has argued that based on the Court of Appeal case of **Hendricks International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & Ors** [2003] 3 MLJ 742, the agreement between the parties in this case can no longer be performed. In Hendrick's case, the respondents had applied to strike out the applicant's oppression petition under section 181 of the Companies Act 1965 in respect of a joint-venture company

(Trans-Pacific Hotels Sdn Bhd) set up by the appellant and the 1st respondent. The appellant had sought various reliefs, including an order requiring the 1st respondent to purchase the appellant's shares in Trans-Pacific Hotels at a price of RM 7,998,000-00 or at a fair value to be assessed by independent auditors. Prior to the oppression petition, the 1st respondent had on 18.10.1995 filed a winding-up petition against the company under section 218 (1) (i) of the Act. On 19.1.1996, the petition was heard and the winding-up order was granted.

97. On 26.3.1996, the respondents filed a summons-in-chambers (encl. 18) seeking *inter alia* for an order that the oppression petition be struck out. Encl. 18 was dismissed by the senior assistant registrar. The appeal by the respondents was allowed by the judge in chambers on the ground that the oppression petition was granted after the company had been ordered to be wound up. Upon appeal by the appellant, the appeal was dismissed by the Court of Appeal by a majority. One of the reasons for the decision, as per Abdul Hamid Mohamad and Richard Malanjum JJCA (as their Lordships were then) relate to their interpretation of section 223 of the Companies Act 1965. As stated by their lordships at pages 754:

> "Another compelling reason in our view why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator is the provision of s. 223 of the Act. The section reads:
>
> > Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the

commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Thus in view of this prohibition, prayers (a) and (b) of the said petition cannot be entertained unless sanctioned by the court."

98. From a reading of the afore-stated case, it is clear that the Court of Appeal in **Hendricks International Hotels** (supra) had read the words "disposition of the property of the company' and 'any transfer of shares or alteration in the status of the members of the company' disjunctively.

99. In light of the clear pronouncements of the Court of Appeal on section 223 of the Companies Act 1965 (*albeit* by a majority), the Court is constrained to find that since Amore New Image has now been wound up, this Court would not be able to grant the order for specific performance of clause 15 of the agreement as sought by the plaintiff. The order sought would require the transfer of shares from the plaintiff to the defendant and this would require the sanction of the winding up court now that Amore New Image has been wound up.

100. Finally, the Court has also considered whether it could give any other order which would have the effect of putting into proper perspective the intention of the parties when they entered into the agreement. Unfortunately, as the plaintiff had not prayed for damages in its Statement of Claim, the Court is consequently unable to grant any order as to damages.

101. In conclusion, and for the reasons as stated above, the plaintiff's claim against the defendant is dismissed with costs to be taxed, if not otherwise agreed between the parties.

(Amelia Tee Hong Geok bte Abdullah)
Hakim
KUALA LUMPUR

5.8.2014

Mr Gan Khong Aik with Ms Lim Bee San (Messrs Gan Partnership) for the plaintiff.

Mr Alex Chang with Ms Lim Soo Zee (Messrs Alex Chang & Co) for the defendant.