IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 116

Suit No 770 of 2013

Between

(1) Heinrich Pte Ltd
(2) Kor Yong Koo

… *Plaintiffs*

And

(1) Lau Kim Huat
(2) Li Cunkou
(3) JHY Marine and Offshore Equipment Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Directors] — [Duties]
[Contract] — [Breach]
[Contract] — [Misrepresentation Act]
[Tort] — [Misrepresentation] — [Fraud and deceit]
[Tort] — [Misrepresentation] — [Negligent misrepresentation]
[Trusts] — [Accessory liability] — [Dishonest assistance]
[Trusts] — [Accessory liability] — [Requisite mental state]
[Restitution] — [Restitution for wrongs] — [User principle]

TABLE OF CONTENTS

Heinrich Pte Ltd and another
v
Lau Kim Huat and others

[2016] SGHC 116

High Court — Suit No 770 of 2013
Aedit Abdullah JC
22, 23, 25, 28 and 29 September 2015; 1 December 2015;

21 June 2016

Aedit Abdullah JC:

Introduction

1 The departure of a long-standing associate or employee is sometimes a matter of disappointment; sometimes a matter of joy. Perhaps more often than not, messes are left behind with skeletons stuffed in the deep recesses of filing cabinets and closets. Sometimes, criminal conduct is uncovered; sometimes, it is misconstrued.

2 In the present case, the 2nd Plaintiff, Mr Kor Yong Koo ("Kor"), unhappy with his former director, the 1st Defendant, Mr Lau Kim Huat ("Lau"), pursued personally, and also through the 1st Plaintiff, Heinrich Pte Ltd ("Heinrich"), a company controlled by him, a wide range of claims against Lau; the 2nd Defendant, Mr Li Cunkou ("Li"), an associate of Lau; and the 3rd Defendant, a company belonging to Li, JHY Marine and Offshore Equipment

Pte Ltd ("JHY"). Though the claims were founded on allegations over a wide series of transactions, none of them were made out, and the action was dismissed in its entirety. The Plaintiffs have now appealed against my decision.

Background

3 The 2nd Plaintiff, Kor and the 1st Defendant, Lau, had known each other since about 1995 and had worked with each other. For present purposes, what was material was that Lau came to work for Kor in Heinrich in about 2006. In 2013, Lau left the company, setting up a new company with Li. Kor subsequently filed the present suit against Lau alleging:

(a) breach of a joint venture agreement dated 18 October 2006 (the "JV Agreement");

(b) misrepresentation made by Lau in causing Kor to enter into an investment in Macmacor Engineering, which was later incorporated as Macmacor Engineering Pte Ltd ("Macmacor");

(c) breach of duties owed by Lau as a director of Heinrich in various transactions; and

(d) knowing assistance by Li and JHY in respect of Lau's breach of duties.

The Establishment of Heinrich and the JV Agreement

4 Heinrich was established in 2006 following a proposal made by Lau to Kor. This proposal involved two other persons, one Lim Keng Leng ("Lim") and one Yasmin Binte Mustaffah ("Yasmin"). The JV Agreement was entered

into by Kor, Lau and these two other persons with Heinrich also a party to the agreement. This proposal arose as Lau, Lim and Yasmin needed funds to start a business providing container lashing. This business was to be carried out by Heinrich. While initially a sum of S$1 million was sought by Lau, eventually Kor agreed to invest S$300,000 as an interest-free shareholder's loan. Under the written JV Agreement entered into between the parties, Lau, Lim and Yasmin would be given a 10% share each if the S$300,000 was repaid by the end of three years. The Plaintiffs claimed that there was a breach of Clause 1.4: as the loan had not been paid in full within the stipulated 3 years, Lau, Lim and Yasmin were each jointly and severally liable for repayment of 10% of the outstanding loan. The claim before the Court was only for Lau's liability, but there was a dispute as to what this amounted to.

Purchase of Macmacor

5 The business of Macmacor was purchased in 2006 by Kor. Various statements allegedly made by Lau were alleged by Kor to have constituted misrepresentation.

Breach of Duties

6 Another set of allegations arose concerning the duties and responsibilities owed by Lau to Heinrich as a director of Heinrich. These covered various duties, including those under statute as well as common law.

7 The various allegations concerned (a) the purchase of ropes from JHY, a company connected to Li, and (b) transhipment, courier and miscellaneous transactions (allegedly) for Li's benefit:

(a) Lau attempted to sell these ropes from JHY to a Singapore company, Gaylin International Pte Ltd ("Gaylin"), but did not proceed with the transaction in the end. Other buyers for the ropes, or parts of the ropes, were eventually found. The Plaintiffs alleged that these transactions breached the duties owed by Lau.

(b) Lau also made arrangements for the transhipments of various items for the benefit of Li. Courier transactions were arranged by Lau for the benefit of Li, using Heinrich's resources. Various other transactions including the sourcing of products, and arrangements for the delivery of items were also allegedly conducted for Li's benefit by Lau.

The Plaintiffs' Case

8 The main plank of the Plaintiffs' case was that Lau had over a long period of time conducted himself in a manner that breached his fiduciary duties, as well as common law and statutory duties owed by him as a director to Heinrich. Additionally, the two other defendants had, with dishonesty or with knowledge of such breach, assisted Lau in the breach of his duties to Heinrich, and were thus liable to account as constructive trustees or for unjust enrichment. In addition, Lau had committed misrepresentation in relation to the purchase by Kor of the Macmacor business and had breached the JV Agreement with Kor in 2006 which accompanied the establishment of Heinrich.

The Establishment of Heinrich and the JV Agreement

9 Under the JV Agreement in 2006, the loan remained unpaid in 2009, three years after the date of the agreement. By 2009, Kor had made further loans and the total sum amounted to some S$1.3 million. Some of the loans were then capitalised into share capital to pay for allotment of shares to Lau and Kor, reducing the amount outstanding. Kor had waived the condition that there was to be repayment of the loans before share allotment could occur. The conduct of the parties was on the basis that the loans were unpaid. Lau's liability was thus either at 30% of the sum outstanding on the basis of joint liability or at least 10% of that amount. As Kor had used his loan of S$29,999 to pay for Lau's 10% allotment of shares, and the condition for such allotment had failed, either that sum or the shares had to be returned.

Purchase of Macmacor

10 In the purchase of the Macmacor business, Lau had made a number of representations, namely:

(a) that the business was a good acquisition;

(b) that it was profitable and would complement Heinrich's business; and

(c) that sales of Macmacor were close to S$1 million a year.

11 Lau had admitted in testimony that Kor had relied on these representations. There was inducement and reliance. These representations were made fraudulently, with knowledge of falseness or at least with

recklessness. Even if these were not fraudulent misrepresentations, they were misrepresentations actionable under s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) or were negligently made, and thus actionable in tort.

Breach of Duties

12 The various breaches of duties showed that Lau was acting for Li's benefit rather than for Heinrich. The transhipments involved items purchased from companies in the United Kingdom and the United States by JHY, which were delivered to Heinrich's warehouse; the items were unloaded or unstuffed from containers by Heinrich's employees, forklifts and facilities, as well as the services of Heinrich's usual freight forwarder. These items were then exported by JHY to Li's company in China. In carrying out these transactions, Lau had breached duties to act for the proper purpose of Heinrich, and to serve Heinrich faithfully and dutifully; he had promoted other interests to the prejudice of Heinrich. He was also in breach of the duty not to place himself in a position of conflict of interest.

13 Lau, at the request of Li or Li's company in China, had sourced for products, arranging for such products or samples of such products to be sent to China. Li benefited from these activities, which consumed significant amount of resources and time: primarily Lau's services as an employee of Heinrich which had to bear the cost of such activities. These again constituted a breach of Lau's duties to act for the proper purpose of Heinrich in relation to its affairs; to serve Heinrich faithfully and dutifully; and to avoid conflicts of interest.

14 As for the Gaylin ropes, these were unwanted ropes. Once they were sold, Lau had arranged for payments by Heinrich to JHY within just a short

period of time. In contrast, Heinrich's other suppliers were left unpaid for about six months, showing that Lau had prioritised payment to JHY over the cash flow of Heinrich. This was thus another instance in which Lau allowed himself to be put in a position of conflict of interest. A further breach arose when Lau had arranged for one 'Ah Siong' to sign payment vouchers for payments made by Heinrich in relation to the ropes; the monies paid out were credited into Lau's accounts. Lau had used Heinrich's resources to obtain a profit for the benefit of Li and JHY. In comparison, losses were caused by the payment to 'Ah Siong', as rejected ropes were purchased without obtaining further discounts to maximise Heinrich's profits.

15 The Gaylin rope transactions involved breaches of the following duties by Lau owed to Heinrich: to act for the proper purpose of Heinrich; to ensure proper use of Heinrich's assets and resources; to serve Heinrich faithfully and dutifully; to advance and promote the business of Heinrich; and to avoid putting himself into a position of conflict of interest.

16 Lau had used Heinrich's money to pay for courier charges for Li's benefit, arranging the shipment of personal effects for Li and thus exposing Heinrich to legal consequences by making a false or untrue declaration in an import permit for the benefit of Li, and from the evasion of Goods and Services Tax ("GST").

17 Lau had also prepared for his subsequent directorship and role at Hai Yuan Marine and Offshore Equipment Pte Ltd ("Hai Yuan") by printing name cards and arranging GST registration for Hai Yuan while still being employed at Heinrich. He also allegedly misappropriated confidential information, indicating an intention to divert business from Heinrich. It was submitted

again there these amounted to breaches of Lau's director's duties, in failing to act for the proper purpose of Heinrich, serve Heinrich faithfully, and avoid conflicts of interest.

Knowing assistance and user

18 It was submitted that the various transhipment arrangements had in effect enabled Li to move funds out of China, using JHY as the instrument of transfer.

19 Li was shown by documentary evidence to have known and to have been involved in the transhipment and sourcing transactions. The evidence showed on a balance of probabilities that Li knew of and was involved in the various transactions in which Lau breached his duties. As Li was the directing mind and will of JHY, JHY was also implicated.

20 As Li and JHY had used the resources and services of Heinrich, they would be liable on the basis of the restitutionary user principle for: use of Lau's services; use of Heinrich's warehouse and forklift; services of Heinrich's employees to manage the transhipments; use of Lau's services in sourcing goods and products for Li and the JHY; use of Lau's services to manage Li's personal matters; and the use of Lau's services to source for products.

Credibility

21 It was also alleged that there were significant issues with the credibility of Lau and Li.

The Defendants' Case

22 The Defendants argued that the allegations raised were made *ex post facto*. The Plaintiffs had only made these allegations because Lau had chosen to leave Heinrich in 2013. There were no complaints while Lau was still serving in Heinrich.

The JV Agreement

23 Taking first the JV Agreement, the amount owed was only in respect of the initial S$300,000. The JV Agreement did not cover further loans, as alleged by the Plaintiffs. The contractual terms were clear in their scope. The initial loan of S$300,000 under the JV Agreement was fully repaid by 18 October 2009, leading to the share capitalisation in April 2009, which was effected by a directors' resolution. This capitalisation led to the issuing of 29,999 shares to Lau (bringing his shareholding to 30,000 or 10% of the share capital). Kor had admitted that the capitalisation was from the initial loan, though he later denied this in re-examination. In addition, Heinrich's general ledgers showed that there were amounts recorded as being paid in, which would have discharged the initial S$300,000 loan.

24 In any event, even if the loan was not fully repaid, Lau was liable only for 10% of the amount of S$300,000 under the JV Agreement, and not 30%. The clause that purported to impose joint and several liability was not operative as it was ambiguous, and such ambiguity should be resolved in Lau's favour.

Misrepresentation

25 As to the claims of misrepresentations, Lau denied making any of the alleged misrepresentations, and that if any were in fact made, there was no inducement and reliance. A high standard of proof was required where the allegation was that there had been fraudulent misrepresentation, as the Court of Appeal had said in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hick Seng, deceased) and another* [2013] 3 SLR 801 ("*Wee Chiaw Sek*") at [30]. The alleged misrepresentations were all made orally, without any documentary proof. The allegations also only arose in 2013, after Lau had left the company. As it was, many of the misrepresentations were not operative as there were either statements of opinion, or were no relied upon by Kor. At least one allegation was clearly contradicted by the facts or was conceded by Kor to be true—Macmacor was in fact profitable in the first year after the acquisition, but the business was short of funds. The allegation that the misrepresentations were made fraudulently was also withdrawn on the stand by Kor.

Breach of duties

26 Regarding the various alleged breaches of duties owed by Lau as director of Heinrich, they were not made out. In respect of the Gaylin ropes' transaction, there was no financial impact on Heinrich. Heinrich was not out of pocket. The rejection of the ropes did not cause any loss to Heinrich at all. Even with the sale to Gaylin being aborted, Heinrich had in fact made a profit. No secret profit was made by Lau. What Lau did was to act as the agent of Li and JHY. Had the transaction been brought to fruition, Heinrich would have made 15% in commission.

27 The ropes were rejected not because they were defective, but because they were unsuitable. The ropes (a total of nine coils) were then kept at Heinrich's premises, meeting Li's request to leave the ropes there, and for Lau to sell the ropes on consignment. Thereafter, one rope was sold to Transvictory Marine and Offshore Pte Ltd ("Transvictory"), for S$4,500 of profit; another rope was sold to PT Bumi Aranda, for about S$1,000 of profit. The other seven coils of rope were sold to Impa Marine Pte Ltd ("Impa") in two transactions. While there was an allegation by Impa's representative that he would not have bought the ropes had he known that these was previously rejected and did not belong to Heinrich, Impa did also sell the ropes for a profit itself. Furthermore, while Li and JHY made profits, so did Heinrich.

28 Allegations were also made in respect of cheques received for payment by Impa. Though Lau signed the payment vouches and encashed the cheques himself, there was no misconduct. The monies were paid over to Kor. While the payment vouchers stated that payment was made in cash to 'Ah Siong', 'Ah Siong' was one of the employees of Heinrich, one Lin Yong Siang. Ah Siong's name was used on the payment voucher simply pro forma, as some name had to be provided. There was no sinister intention. Neither was there any such intention in the description on the voucher as such rope being from a "scrap supplier"—that was just Lau's way of describing it.

29 Next, the transhipment and courier transactions were made by Lau with the intention of providing a service to Li for the benefit of Heinrich, as a potential supplier of goods. Just as customers would need to be wooed, so would suppliers. The courier transactions, and the other transactions including various activities for the benefit of Li, were intended to provide a service to Li

to entice him to be either a supplier or customer, and not for any personal financial gain.

30 Kor's various allegations show that he was too ready to find fault with Lau. The previously strong relationship became bad in 2012, causing Lau to look for alternatives: it was at that point that he and Li decided to team up. Kor had only wanted to find fault with Lau after Lau left, after Lau had revealed that he was joining Li in a new venture. Kor's credit and credibility had to be doubted.

31 No claim in damages could be made out for the alleged breaches of duties relating to the various transhipments. What was being claimed by the Plaintiffs was not supported by the evidence. No damage or harm was suffered by Heinrich. No evidence was given as to the possible losses suffered, if any. At the most, in any event, there would have been only about nine hours spent by Lau on these transhipments over the seven years he worked at Heinrich.

Knowing assistance and user

32 Knowing assistance would also not be made out if the claims of breaches of duties by Lau as director of Heinrich were not established. In any event, it was not shown that Li or JHY knew or ought to have known of Lau's supposed breaches of duties. Similarly, the claim based on the user principle was not made out too as this principle was applicable only in relation to claims where goods were used wrongfully (which was not the case here as it was alleged that Lau's time and services were being made use of wrongfully).

The Decision

33 I found that none of the Plaintiffs' claims were made out on the evidence adduced before me. First, in relation to the allegation of breach of the initial JV Agreement, I found that there was in fact no breach. Lau had fulfilled his side of the bargain, and the transaction was completed, with the S$300,000 repaid. Second, as regards the purchase of the Macmacor business, no misrepresentation was committed by Lau. A number of the statements were in fact true. Others were not in fact relied upon. Finally, as regards the broadest set of claims (that Lau had committed breach of his various duties as a director), Lau had the objective of cultivating Kor as a customer or supplier. While it may be that what he did go beyond what some directors would have done in the circumstances, there were no breaches of fiduciary duties, statutory duties or common law duties owed by him as a director of Heinrich.

34 The claims made spanned many years, covering various transactions by and activities of Lau. The single connecting factor linking all the various allegations was the fact that Kor found Lau's past conduct wanting. The great variety of the allegations made, the small value involved in several instances, and the passage of many years since some of the incidents made it clear that Lau's departure from the company caused great consternation to Kor. However, whatever disappointment and betrayal Kor may have felt did not translate automatically into legal liability on Lau's part.

35 It should be noted that the Statement of Claim identified a great number of transactions, particularly in respect of the alleged breaches of directors' duties by Lau. It seemed that the Plaintiffs took issue with a great many things. Not all of these were however pursued with equal force at the

hearing, and in view of my conclusions, I have dealt with some of them fairly compendiously.

Analysis

The Agreement

36 There was no breach by Lau of the JV Agreement. The obligation was to repay S$300,000 within three years only. It was not shown that the JV Agreement captured other further loans that may have been made subsequently. Whatever money was owed under the JV Agreement was in fact repaid. In any event, Lau's liability was only restricted to 10% of the initial S$300,000, and not the other further amounts that may have been given as loans as well.

The scope of the obligation

37 The obligation owed by Lau was to repay the S$300,000 originally extended to the other persons and him. There was no basis for the Plaintiffs' contention that the loan covered a larger amount. The contract was expressly limited: the agreement referred to an interest-free shareholders loan, which was expressed to be of the amount of S$300,000. Nothing in the plain words in the contract would extend the scope of Lau's obligation to all monies outstanding.

38 The contractual clauses did not stipulate liability for other further loans that may have been made. The contract relied upon by the Plaintiffs clearly only referred to the initial S$300,000. The obligation to repay was in Clause 1.4, which referred to non-repayment in full of the "Loan". The term "Loan"

was not expressly defined, but its meaning in the context of the Agreement is clear. Clause 1.1 reads:

> 1.1 Kor has agreed to provide an interest free shareholders' loan ("Loan") to the Company for the company's working capital on the following terms:
>
> > 1.1.1 It shall be in the sum of not more than Singapore Dollars Three Hundred Thousand (S$300,000/-) spread out over a period of twenty-four (24) months commencing on 15 October 2006;

The other sub-clauses of Clause 1.1 did not seem to assist in its interpretation. What could be gleaned was that the term "Loan" referred to the sum of S$300,000 initially lent, and not anything else. Furthermore, nothing else in the JV Agreement appeared material to the construction of the term "Loan".

39 Other possible arguments that the loan was for a greater sum could not be accepted either. It was not pleaded, nor was there any evidence led, that there was any variation of the JV Agreement. Thus, while other amounts may have been lent by Kor, these amounts were not part of the Loan given under the JV Agreement. There was also the fact that Clause 1.1.1 did refer to the S$300,000 payment being spread out over 24 months. This could not create an obligation for a sum larger than S$300,000; it only allowed the amount of S$300,000 to be split up into tranches, which was not in any event what had actually occurred.

40 From all of these, the only conclusion that could be drawn was that the loan under the JV Agreement was for a sum of $300,000 only.

The loan had been repaid

41 The evidence showed that the loan had indeed been repaid. A strong point supporting this was the share capitalisation that occurred in April 2009 by way of a directors' resolution. As noted by the Defendants, this capitalisation resulted in Lau and the other persons involved receiving the 10% allotment that was promised upon the loan being repaid under the JV Agreement.

42 Against this, there was the concession by Lau that the payment had been made separately, and that the capitalisation was a follow-up to the loans. This would have supported the Plaintiffs' assertion that the JV Agreement covered a whole spectrum of loans beyond the amount of S$300,000. I note that, on the other hand, there was also the testimony from Kor that the repayment had led to capitalisation. Although he subsequently attempted to clarify that there was no repayment, it was clear that the recollection of both sides was not strong. Given this inconclusive testimony, the best evidence before me was the documentation adduced.

43 First, as relied upon by the Defendants, there was a directors' resolution that led to an allocation of shares. I accepted that this indicated that there had been compliance with the JV Agreement. Second, Heinrich's books also showed repayment: *i.e.* that there were various amounts paid into the company that would have paid off the S$300,000. I accepted the Defendants' arguments that Heinrich's general ledgers showed payments totalling some S$494,066.63 in the three-year period between 18 October 2006 and 18 October 2009, which were listed as payments out to Lau. As these were payments recorded in the books, showing sums to the credit of Lau, these

should be taken as payments going to the S$300,000. The evidence before me did not show that these payments were for any other purpose.

44 The Plaintiffs argued that construing the ledger entries in this manner was not justified, asserting in particular that the first-in, first-out flow of funds was not applicable in the present case. But the Plaintiffs did not substantiate why this would be—it would appear that the argument was that the sums in question were coming in from various other transactions. But the simple fact of the matter is that these sums were recorded and booked as repayments to Lau, and the Plaintiffs have not established that the payments should not be counted as such, nor that the source of the funds mattered. What was to be construed was whether payment was made, and that was in fact shown.

Extent of liability

45 In any event, even if the loan had not been repaid, such liability as there was would only be for 10% and not 30% of the loan. While there was reference to joint and several liabilities in the relevant clause, that contractual clause specified subsequently that the liability was *10% each*. The Plaintiffs' arguments that Lau's liability was for 30% could not be accepted.

46 The clause in question, Clause 1.4, reads:

> In the event that the Loan is not repaid in full by the Company within three (3) years from the date hereof, Lau, Lim and Yasmin hereby agree jointly and severally to be liable for the repayment to Kor of the balance of the loan outstanding in the following proportion:
>
> | | | |
> |---|---|---|
> | Lau | = | 10% of outstanding loan |
> | Lim | = | 10% of outstanding loan |
> | Yasmin | = | 10% of outstanding loan |

If the clause had really been drafted to entail joint liability, at 30% against any one of them, it should have been phrased more clearly. The imposition of joint and several liability was at odds with the later specification of liability at 10% each. It would have been possible to have liability for each share, and joint liability for the total outstanding, but this should have been expressed as such.

47 The Defendants sought to invoke the *contra proferentum* rule, arguing that any ambiguity should be taken against Kor. The better approach to my mind would have been to consider whether any interpretation, taking into account the context of the contract including any prior negotiations, would have thrown light on the issue. However, there was scant evidence of this, so Kor was not aided at all by this.

Misrepresentations

48 The alleged misrepresentations made by Lau in respect of the acquisition of Macmacor were not made out. The various statements were either not misstatements as such, or were not actionable misrepresentations on the basis of fraudulent or negligent misrepresentations, or under the Misrepresentation Act.

49 In the pleadings, Kor claimed that the investment in Macmacor was made on the basis of several misrepresentations made by Lau:

(a) Regarding the state of Macmacor:

(i) Macmacor was profitable and would complement Heinrich;

(ii) sales of Macmacor were close to $1 million a year; and

(iii) Macmacor attracted business but needed funds to expand.

(b) Regarding the benefits to Heinrich:

(i) Macmacor was a good business to acquire;

(ii) sales should increase to $1 million after the injection of funds;

(iii) the profit margin was high; and

(iv) Macmacor should grow together with Heinrich.

In arguments, Kor's claims narrowed: Kor argued that the Lau induced him to acquire Macmacor's business by representing first, that the business was a good one to acquire; that it was profitable and would complement the business operations of Heinrich; and that the sales of Macmacor was close to S$1 million a year. These misstatements, it was argued, founded a range of different claims of misrepresentation ranging from fraudulent or reckless misrepresentation; statutory misrepresentation under s 2 of the Misrepresentation Act; and negligent misstatements. It was argued that Lau was liable because he had introduced the then-owner of Macmacor to Kor specifically for the purchase by the latter; Lau knew the nature of the transaction that Kor had in mind; the representations were made in the context of the purchase by Kor; and Lau knew that Kor trusted him, and that Kor would rely on the representations made by Lau in the purchase of Macmacor.

50 The broad allegations of misrepresentation failed at the start in respect of those based on the Misrepresentation Act. What must be borne in mind is that the alleged misrepresentations did not lead to the conclusion of any

contract or agreement between Kor and Lau. That precluded any actionable misrepresentation on the basis of the Misrepresentation Act. s 2(1) of the Misrepresentation Act reads:

> When a person has *entered into a contract* after a misrepresentation has been made to him *by another party thereto* and as a result he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect therefor had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. [emphasis added]

Thus, an action under s 2(1) must not only be in relation to a misrepresentation that led to the formation of the contract, but must also be in respect of the other party to the contract. Lau was a stranger to any contract entered into in respect of the acquisition of Macmacor by Kor. While Lau was given 10% of the shares in Macmacor, this did not transform the relationship between the Plaintiffs and Lau into a contractual one in this context.

The misrepresentation claims

51 The forms of misrepresentation that survived an initial assessment were fraudulent misrepresentation or deceit, and negligent misstatement. In pleadings and arguments, the Plaintiffs did not sufficiently establish the elements of either. The allegations thrown out were that the statements were false, but little was done to bring home the liability of Lau for such statements in respect of the specific causes of action alleged, in terms of his state of mind. The nature of the Plaintiffs' case with regard to their claims of misrepresentation was thus unclear all the way to the conclusion of the matter.

Fraudulent misrepresentation or deceit

52 For fraudulent misrepresentation or deceit to be established, there has to be: a false statement; of existing fact; with knowledge of its falsity with the intention that the claimant should act; and the claimant did act to his detriment: *Langridge v Levy* (1837) 2 M&W 519. The standard of proof for deceit is that of the civil standard, but the fact of fraud is not easily established—as noted by Lord Hoffman in *In re B (Children)(Fc)* [2009] 1 AC 11 at [14], the more serious the allegation, the stronger the evidence required to show that something occurred on the balance of probabilities. A similar position was also noted in the Singapore Court of Appeal decision in *Wee Chiaw Sek* at [30]–[31] in the context of fraudulent misrepresentation.

53 In the present case, the evidence fell short. Fraudulent misrepresentation was not made out. There was nothing in the evidence which would support a finding of fraud or deceit. At no point was there anything to show that there was an intentionally false representation, or a representation made with reckless disregard as to its truth, intending that Lau was to act on it. In addition, any misrepresentation of opinion would not be actionable in deceit unless it could be shown that the maker did not in fact hold the opinion complained of. Again, there was nothing of that sort here.

Negligent misstatement

54 A negligent misstatement in tort may cover the giving of advice or opinion. But it must be shown that there was a duty of care, breach of that duty and harm: *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("*Caparo*"). The Defendants took issue with some of the statements being statements of opinion. A negligent misstatement may be of fact or of opinion. In *Hedley*

Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 and *Caparo*, both cases involved statements of opinion.

55 The Plaintiffs did not make substantive arguments to show the existence of such a required duty of care. It was not clear in what capacity Lau had a relationship of proximity to Kor: whether as a director of Heinrich, or de facto employee of Kor, or as a friend or advisor to Kor. But even assuming a duty of care, there was little evidence to support any finding of a breach of duty, for similar reasons that underlay the findings in respect of fraud or deceit above. In other words, Kor did not show that he relied on anything that was said by Lau.

56 I do note that the Defendants contended that the representation had to be one of fact. It is true that in respect of deceit and statutory misrepresentation, the misrepresentation had to be of fact rather than opinion. This requirement did not apply to negligent misstatement in tort.

57 Guidance on dealing with misrepresentation claims was given by the Court of Appeal in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia Zhengyan*"):

> 99 Before we leave this issue, we wish to emphasise that trial judges dealing with misrepresentation claims need to analyse the facts carefully, going through the process of considering such matters as (a) whether the representations were made, (b) what the representation in question was exactly, (c) whether it was untrue or not, (d) if untrue, how on the evidence it may be characterised (*ie*, as innocent or negligent or fraudulent), and/or (e) whether there was reliance – although this list is obviously by no means exhaustive. While in a given case a trial judge may decide that it is not necessary to do that, in general this discipline enables the appellate court to analyse the case appropriately. In this case, the Judge, with respect, did not always approach the case in this

> way and this hampered our ability somewhat to deal with the issues raised in the present appeal.
>
> 100 To be fair to the Judge, though, his task was not made easier by the fact that no fewer than 22 alleged misrepresentations had been put forward by the Appellant. We would observe that it is not necessarily beneficial for a litigant to adopt what is, in effect, a scatter-shot or kitchen-sink approach of this sort: there is a risk that the truly material facts and evidence will be lost in, or at least be diluted by, the morass of relatively peripheral matters. In the present case, several of the alleged misrepresentations contended for by the Appellant were clearly of a rather trifling nature; the wisdom of pursuing such points with any vigour may well be doubted. It is of course the prerogative of parties to advance their case as they see fit, but it is salutary to remember that one's prospects of success do not always increase in proportion to the number of claims or allegations that one makes.

58 Taking this guidance from *Xia Zhengyan*, the specific alleged misrepresentations will be considered in turn, save that in respect of whether they were each made, which will be dealt with first.

Common points

WHETHER THE REPRESENTATIONS WERE MADE

59 Lau denied making any of the representations. There was no objective evidence that would support the conclusion that Lau had indeed made these representations. Everything was conveyed orally. It was entirely possible that such representations were made, but when it was further considered that a considerable amount of time had passed, as well as the lack of any complaint in the interim, it could not be concluded on the balance of probabilities that these representations were indeed made at the time.

RELIANCE AND INDUCEMENT

60 In addition, nothing showed that Kor acted to his detriment on the basis of the representations made to him. While Kor maintained that he had made the investment because of the representations, this was doubtful. His contention that there was inducement and reliance goes against the inherent probabilities of the situation. Kor was supposed to have invested simply on the say-so of Lau. Even if Lau was in a position of trust given the years they were together, Kor would presumably have spoken over matters with the counterparty to the transaction. Reliance and inducement vis-à-vis that counterparty would be expected. Reliance on and inducement by his director would be less likely in the circumstances.

61 The Plaintiffs pointed to Lau's acceptance that Lau knew there was reliance on what he said:[1]

> Q: I put it to you that Mr Kor relied on your representations as to the profitability of Macmacor Engineering on or around 2006, and its sales at close to $1 million a year.
>
> …
>
> A: That's what I heard from Mr Joe Tye and I guess in---er, inform him that---
>
> Court: No.
>
> …
>
> The question is, Mr Kor relied on your representations as to the profitability of Macmacor for 2006 and sales of close to $1 million.
>
> …
>
> Do you agree with that?

[1] NE Day 4, page 43, lines 1–14.

A: Yes, Sir, yes, Sir.

That would seem to indicate that Lau knew that Kor relied on his statements. However, shortly after, when a further put was made, Lau denied reliance.[2]

Q: And I put it to you that is the reason why Mr Kor invested in Macmacor Engineering.

A: Er, I disagree, Sir.

And an earlier answer relied upon by the Plaintiffs to show reliance was, in its context, a general answer about the relationship between Kor and Lau:[3]

Q: You would know also that Mr Kor Yong Koo is quite--- is of a trusting nature.

A: Er, yes, Sir.

Q: He relies on you---

…

A: Yes, Sir.

62 But later, Lau adds:[4]

A: Er---

Q: ---in the wo---in matters---among others. So if you say this is good, he will take it at face value. You agree?

A: That I disagree, Sir, because he still have other partners like Mr Tan or whoever to discuss and then Joel Ang, his cou---er, brother-in-law---

Q: Sure.

A: ---also in the very---(indistinct) business to discuss with.

---

[2] NE Day 4, page 43, lines 16–18.

[3] NE Day 4, page 39, lines 11–15.

[4] NE Day 4, page 39, lines 19–25.

Taken in context therefore, the answers given by Lau did not show anything of acceptance or knowledge that Kor relied upon him in the specific manner required by a claim in misrepresentation. All that was shown was an acknowledgement that Lau was a source of advice generally. That is insufficient for reliance to be made out with regard to the specific statements.

63 The Defendants pointed to an admission by Kor in cross-examination that he had not relied on Lau. However, Kor subsequently clarified his answer in re-examination otherwise. Therefore, I could not find that there were sufficient grounds in the testimony to find one way or another based on the answers given in cross-examination.

64 Lau maintained that he was only an introducer of an investment opportunity. I accepted in the end that this was all that Lau was. He only brought the two parties together. His statements and opinion did not appear to have played any material role in Kor's decision to make the investment in Macmacor.

The specific alleged misrepresentations

THAT MACMACOR WAS PROFITABLE AND WOULD COMPLEMENT HEINRICH.

65 As it was, Macmacor was in fact profitable in the first year. This was admitted by Kor in his cross-examination.[5] This, thus, put down any claim that there was a misrepresentation that Macmacor was a profitable business. It may be otherwise if its profitability was a mask or camouflage of some sort, but these were neither pleaded nor disclosed in the evidence. Complementarity between businesses is a matter of opinion, but aside from that, there was

[5] NE Day 1, page 126, lines 28–31.

nothing in evidence one way or another, and it would have been hard to show that any profitable business did not in a broad and general sense complement another business.

MACMACOR WAS DEMONSTRABLY SHORT OF FUNDS TO INCREASE ITS STOCKS AND SALES, THOUGH BUSINESS WAS GOOD.

66 This was borne out in evidence from Kor himself, who accepted that Macmacor was short of funds to increase its stocks and sales.[6] Thus, the statement that Macmacor was in need of funds to grow was true. Taken with the earlier statement about Macmacor's profitability, it was true that Macmacor had business but was short of funds. As this was a true statement, no misrepresentation at all arose, and no damages could be claimed on the basis of this alleged statement.

SALES OF MACMACOR WERE CLOSE TO $1 MILLION A YEAR

67 As the sales of Macmacor were not close to S$1 million, if this statement had in fact been made, it would be a misrepresentation. But even so, there was, on the balance of probabilities, no reliance or inducement (see above at [60]–[64]). It was not conceivable that a person would have made an investment merely on the say-so of even a trusted friend or confidante, or a director, without checking the books and numbers.

MACMACOR WAS A GOOD BUSINESS TO ACQUIRE

68 This was a statement of an opinion. The Defendants argued that this was thus not actionable. That would be true in relation to deceit, in the absence of any evidence that Lau did not truly hold that opinion. As noted above at

[6] NE Day 1, page 132, lines 3–5.

[54] and [56], an opinion may be negligently formed, and may thus be the basis of an action in negligence. However, aside from the questions about the establishment of a duty of care as discussed above at [55], there was nothing adduced to show that there was breach of any such duty. How Lau was supposedly negligent in making any statement or representation was not made out by the Plaintiffs.

SALES SHOULD INCREASE TO $1 MILLION AFTER THE INJECTION OF FUNDS

69 Similarly, this would again be a statement of opinion. Again, no deceit was shown to exist, and neither was any breach of duty of care. Any actual reliance would also be doubtful given that Lau was not himself involved in Macmacor before, and any person hearing Lau, if he had indeed made this representation, would be aware of that.

THE PROFIT MARGIN WAS HIGH

70 What a high profit margin would be was a matter that could be taken differently by different persons. A factual misstatement was not made out. Additionally, fraud was not shown, nor was breach of any duty of care. Again, reliance was quite doubtful.

MACMACOR SHOULD GROW TOGETHER WITH HEINRICH

71 The predictive force of this statement was doubtful—it could be construed as conditional on many factors, and for that reason, was not a misstatement of fact; even if it was one of opinion, it would be very difficult to make out that there has been breach of any duty owed. This alleged statement was clearly not an actionable misrepresentation.

Conclusion as to misrepresentation claims

72 There was thus no actionable misrepresentation in respect of any of the several statements relied upon by the Plaintiffs.

73 It was significant that the misrepresentations were allegedly made many years earlier. As noted by the Defendants, these allegations were only raised after Lau left the company. Lau also denied making these representations. No estoppel was claimed or asserted, but the long passage of time did raise concerns about the veracity of Kor's claims.

Breach of Directors' Duties

74 Heinrich's claim against Lau was on the basis of breach of common law and statutory duties as a director of Heinrich. Heinrich contended that these duties included the duties: to act *bona fide* and in good faith in Heinrich's interests; to act for the proper purpose of Heinrich in its affairs; to ensure proper administration of Heinrich's affairs and property; to serve Heinrich faithfully and not to prefer other interests to the prejudice of or conflict with those of Heinrich; to ensure that transactions were entered into at arm's length in fulfilment of the corporate objective of Heinrich to maximise profits; to not place or allow himself to be placed in a position of conflict; to properly account and pay all monies or property received; to manage and deal with Heinrich's property in a trustee-like manner; and to disclose to Heinrich any breaches of duty owed by him to Heinrich. The general duties under common law, equity and s 157 of the Companies Act (Cap 50, 2006 Rev Ed) were also invoked.

75 As was the case in respect of the allegations of misrepresentation, the allegations of breaches of duty by Lau as a director were framed by the Plaintiffs on multiple grounds, without clearly separating out the different threads. In these grounds of decision therefore, each of the different bases for breach will have to be considered. In respect of each basis, I have provided a summary of my concerns, while leaving further detail in respect of each factual allegation to be addressed after.

Breach of Fiduciary Duties

76 The greater part of the Plaintiffs' arguments would appear to have centred on the breach of fiduciary obligations. These were essentially contentions that there was a breach of the primary duties of a director: acting in good faith in the interests of the company, avoidance of conflict of interest and the exercise of powers for proper purposes.

Acting bona fides *in the interests of the company*

77 In *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064 ("*Intraco*"), the Court of Appeal considered whether an honest and intelligent person in the position of the directors, taking an objective view, would reasonably have concluded that the impugned transactions were in the interests of the company (see *Intraco* at [28]–[29]).

78 This issue was also considered in *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 ("*Ho Kang Peng*"). The Court of Appeal reiterated the approach in *Intraco*, at [37]:

> …It is clear that the court will be slow to interfere with commercial decisions of directors which have been made honestly even if they turn out, on hindsight, to be financially

> detrimental (see *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ("*Intraco (CA)*") at [30]). As stated by Lord Greene MR in *Re Smith and Fawcett Ltd* [1942] Ch 304 at 306, directors "must exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company". It is therefore "theoretically possible for a board of directors to make a decision which is commercially ludicrous and yet act perfectly honestly"…

79 The Court of Appeal then noted at [38] that nonetheless the court may draw an inference that the directors had not been acting honestly:

> 38 However, this does not mean that the court should refrain from exercising any supervision over directors as long as they claim to be genuinely acting to promote the company's interests. First, "where the transaction is not objectively in the company's interests, a judge may very well draw an inference that the directors were not acting honestly": see *Walter Woon* at para 8.36. The test in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 (at 74) of "whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company", has been accepted and applied by this court in *Intraco (CA)* (at [28]). On the other hand, it will be difficult to find that a director has acted *bona fide* in the interests of the company if he "take[s] risks which no director could honestly believe to be taken in the interests of the company": *Cheam Tat Pang v PP* [1996] 1 SLR(R) 161 at [80] ("*Cheam Tat Pang*").

And importantly for present purposes, the Court of Appeal further noted at [39] that *bona fides* would not be made out if the director acted dishonestly:

> 39 Secondly, it seems that the requirement of *bona fide* or honesty will not be satisfied if the director acted *dis*honestly even if for the purported aim of maximizing profits for the company. In *Vita Health Laboratories Pte Ltd v Pang Meng Seng* [2004] 4 SLR(R) 162 ("*Vita Health*"), the plaintiff companies claimed that the defendant director had breached his duties by, *inter alia*, creating false and unrecoverable receivables purportedly due from third parties so as to create an illusion that the company was successful and profitable. While the court acknowledged the sanctity of business judgment, it made clear that immunity from suit for poor

> commercial decisions was meant to protect "[*b*]*ona fide* entrepreneurs and honest commercial men [who] should not fear that business failure entails legal liability", and to encourage commercial risk and entrepreneurship (*Vita Health* at [17])…

Thus in *Ho Kang Peng*, it was found that a director who created a sham contract and made unauthorised payments to secure business could not be said to be said to be acting *bona fides* for the interests of the company.

80 However, in the present case, the impugned transactions in respect of Lau were not anywhere of the level in *Ho Kang Peng.* The actions by Lau were, I accepted, motivated by a desire to develop good relations with Li for the benefit of Heinrich. While generally one would expect the cultivation of good relations to be with potential customers, it was understandable and reasonable for there to be attempts to gain favour with suppliers. This could have been advantageous to Heinrich in several ways, including securing long-term contracts, better prices and credit terms. The extent to which such cultivation of a supplier was commercially justifiable or reasonable was largely a question that should be left to those in business. There would, no doubt, be a range of views. Against such a backdrop, the court would not conclude that any specific conduct was not motivated by commercial objectives, but was indicative of disloyalty or a conflict of interest. None of the supposed breaches amounted to breaches. I accepted that the actions of Lau were intended to benefit the company.

81 That Lau did not adopt a similar approach to other suppliers did not colour these transactions with Li with anything sinister. Directors can make a judgment about whom to cultivate. A marked difference in treatment may give rise to a concern, or perhaps a suspicion of an improper relationship or

connection, but will not be enough on its own. Thus, the scope of Lau's activities and transactions with Li, as well as the terms, including credit terms, of their dealings would not be sufficient to indicate any breach. If reliance were placed on such aspects, it had to be shown that the treatment was so different that an inference of conflict can be drawn on the balance of probabilities. In the present case, given the justifications provided by Lau, that he was interested in the business opportunities that could come from having Li as a supplier, it could not be said that such an inference could be made.

Avoiding conflicts of interest

82 The obligation to avoid conflict is shared by directors with other fiduciaries, such as trustees. It thus encompasses not making a profit without consent, as well as not being placed in a position where personal interests and those of the company are at odds: see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at paras 8.37–8.40.

83 In the present case, the primary question was not regarding the law, but whether there were any such conflicts of interest in fact. Based on the evidence, I did not conclude that any was made out.

Exercise of powers for proper purposes

84 The classic statement is that by Lord Green MR in *Re Smith and Fawcett Ltd* [1934] Ch 304, in which His Lordship stated that directors could not act for any collateral purpose. Again, in the present case the question was a factual one, namely whether Lau did act for a proper purpose. His position was that it was to develop business for the company through cultivating a

better relationship with Li and the latter's businesses; the Plaintiffs contended otherwise. I found, in the end, that it could not be said that Lau's actions were not for the purpose of benefiting the company's business dealings, and could not be said—even on an objective assessment—to be improper.

Duties under the Companies Act

85 The duties prescribed under statute relating to directors are those under ss 156 and 157 of the Companies Act.

86 s 156 requires declarations of conflicts of interest. s 156(1) reads:

> Subject to this section, every director or chief executive officer of a company who is in any way, directly or indirectly, interested in a transaction or proposed transaction with the company shall as soon as it is practicable after the relevant facts have come to his knowledge –
>
> > (a) declare the nature of his interest at a meeting of the directors of the company; or
> >
> > (b) send a written notice to the company containing details on the nature, character and extent of his interest in the transaction or proposed transaction with the company.

87 s 156(1) ties in with the fiduciary duties of directors and piggy backs on it as well as s 157 of the Companies Act: whether a conflict of interest arises will be dependent on consideration of the general law on fiduciary obligations and the operation of s 157.

88 s 157(1) requires that a director act honestly and use reasonable diligence:

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

The component that relates to honesty largely overlaps with the analysis of the director's fiduciary obligation, as noted in *Cheam Tat Pang v PP* [1996] 1 SLR(R) 161. To my mind, in the present case, there would not be much of a distinction between the general fiduciary obligation and s 157(1). As it was, I did not find any breach of these obligations.

89 Section 157(2) is concerned with the improper use of information and position (as an officer of the company):

> An officer or agent of a company shall not make improper use of his position as an officer or agent of the company or any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

90 Lau was an officer of the company by virtue of s 4 of the Companies Act, which defines an officer as including any director of the corporation. On the facts of the present case, I did not find that there was any improper use of position or information.

Common Law Duty of Care, Skill and Diligence

91 The common law duty, usually abbreviated as one of a duty of care, does not impose on the director anything more than the obligation to take such care as appropriate to his subjective circumstances, especially the state of his knowledge and experience: see *Re City Equitable Fire Insurance* [1925] Ch 407 at 42; as well as the commentary in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at pp 395–399.

92 In the present case, the Plaintiffs had to show that Lau failed to exercise due care in the actions that he took. I concluded that this was not

done. The evidence was that Lau took such actions as he did believe that it would benefit the company; none of his actions were contemplated to run the risk of harm to the company beyond the expenditure that was required and that was incurred. In respect of the transactions concerning the ropes, profit was actually made. In the other transactions, such as the arrangement for transhipment or courier services, while costs were incurred by Heinrich, none of these had exposed Heinrich to significant losses.

Specific Allegations of Breaches of Directors' Duties

93 Turning then, to the specific claims, these concerned two broad areas:

(a) the sale of ropes; and

(b) transactions for the benefit of Li, namely transhipment, courier transactions and miscellaneous activities.

Sale of ropes

94 The allegations concerned the attempted sale of a stock of ropes supplied by Li to a third party company, Gaylin. As it was, however, Gaylin rejected the ropes when offered, as Gaylin's requirements regarding ropes were not met. The ropes were not returned to Li, but were eventually sold to various parties. The Plaintiffs relied on a number of points to show the lack of loyalty or the presence of conflict on the part of Lau:

(a) The Plaintiffs argued that the speed with which payments were made to JHY showed that Lau prioritised his relationship with the other Defendants over his loyalty to Heinrich, especially when comparing this to the delay in paying Heinrich's suppliers;

(b) There was a lack of documentation, such as purchase orders, and delivery orders;

(c) Lau should have returned the goods to China. Instead he provided free storage for a considerable amount of time;

(d) Heinrich's resources were used to attempt to sell the ropes;

(e) A large profit of 26% was obtained by the sale of the ropes by the Defendants; and

(f) Agent commission given to Heinrich was not known or pleaded.

95 The issuing of cheques for payment when some of the ropes were sold to Impa was also put forward by the Plaintiffs in the hearing as indicating issues with Lau's conduct.

The original transaction

96 The attempted sale of the ropes to Gaylin, as well as the aftermath following the aborting of the sale, did not disclose any breach of duties by Lau.

97 Lau's evidence was that he, after learning that Li was in the business of supplying ropes, sought to sell Li's ropes in Singapore, for which a 15% discount, would be given. That discount would enable Heinrich to make a significant profit. Gaylin, a Singapore company, was approached by Lau and Gaylin had agreed to buy the ropes. The sale to Gaylin however fell through as the ropes did not meet Gaylin's requirements in a pull test. However, Lau

claimed that Heinrich was never at risk as none of its funds was used—payment to Li would only be made after payment was received by Gaylin.

98 I accepted that the initial sale transaction could not be impugned. The fact that this sale transaction did not go through did not translate into a breach of any of the obligations relied upon by the Plaintiffs. I could not accept the Plaintiffs' argument that that this transaction was not for the benefit of the company as the ropes were not wanted by Heinrich or Gaylin. It did turn out that the transaction with Gaylin could not go through, but whether there was any breach had to be assessed as at the time of the entry into the transaction. Heinrich stood to make a profit, and the cultivation of good relations with Li could be of benefit to Heinrich.

99 The fact that the transaction was not fully documented did not lead into a conclusion that the transaction was committed in breach of the duties owed by Lau. The Plaintiffs had to bring more into consideration than just the absence or lack of objective evidence—there could be many explanations for the dearth of documents, and misconduct was just one of the possibilities.

Onward sales

100 The Defendants alleged that after the ropes were rejected, Li had asked Lau to store the ropes and sell them on consignment. They were indeed stored, until buyers were found, namely Transvictory, PT Bumi Aranda, and Impa. Profit was made on the sales by Heinrich. The Plaintiffs argued that the sale to Transvictory should have resulted in greater profit had Lau obtained a lower price from Li's company on the basis that the ropes were rejected goods.

101 I found that the onward sale transactions were profitable. It may be that the amount of the profit should have taken into account, as well as the various costs incurred including any storage cost that should have been assigned to the ropes while buyers were sought. But even if the ropes were not sold at a profit, this would not indicate any breach of duties by Lau. A mistaken or losing trade does not by itself show any conduct that should be taken to be a breach of the duties owed by Lau to Heinrich. Similarly, any failure to obtain a larger amount of profit would not by itself show a breach of a fiduciary obligation. The duty is one of loyalty or avoidance of conflict; only if such failure can be traced to breach of that duty would the director be liable. There are significant difficulties facing anyone who seeks to show that not maximising profit evinces a fiduciary breach—such failure could result from many factors, including a lack of skill, or judgment calls being made in the course of negotiations. Thus, no breach of any of the duties owed by Lau as a director was made out in relation to the onward sale transactions.

Transhipments and courier shipments

102 The actions of Lau arranging for the transhipment of various goods and courier shipments were questioned by Kor. As noted above, some of these transactions were covered at length in the pleadings, and much time was taken up for these at the hearing.

103 However, these grounds will not go into detail into these transactions, as there was a common thread running through them. The Plaintiffs did not show that any of these transactions were, on the balance of probabilities, in breach of any directors' duties. Where breaches of directors' duties are alleged, there must be something in the acts complained of which must have substantially and adversely affected the duties owed. Inherent in this would be

that the allegations made against the director must go beyond inefficiency, quotidian mistakes or minor misjudgements. There must be something more than a minimal breach—this is an aspect of the *de minimis* maxim. Though it was not pleaded expressly, this was adequately raised in the Defendants' pleading. In any event, I accepted Lau's argument that what was done was again meant to cultivate Li. The actions in question covered a range of activities. I could not conclude that they were wholly out of sort in respect of the cultivation of good relations with a supplier. Thus, while the transhipment by Heinrich of various goods destined for Li's company in China seemed to have taken some time and effort, it could not be said that these were not of the nature of activity that would be pursued by a director trying to obtain a good relationship with a possible supplier. It may be that this was not what the Plaintiffs considered viable or advisable, but that would not be sufficient to establish a breach of directors' duties. There was nothing to show a lack of *bona fides*, conflict of interest, improper purpose, breach of the statutory duties, or the breach of the common law duty of care.

Other activities

104 The other activities complained of by the Plaintiffs did not result in any financial loss to Heinrich either. These related to various activities such as the sourcing of products, including healthcare products, and actions concerning the repair of furniture belonging to Li. The Plaintiffs claimed that there was an improper use of Heinrich's resources. But again, these activities were according to Lau, and I accepted, tied to the cultivation of good relations with Li as a supplier.

Evidence of Lau's Intentions to Breach Duties owed as Director

105 I considered other arguments that could show that Lau did commit a breach of his duties owed as a director of Heinrich.

Scale and cumulative nature

106 One possible argument was that the scale and cumulative nature of Lau's activities for Li tipped the scale and amounted as a whole to a breach of the director's duty of fidelity or loyalty. However, assessment of such a contention needed to be based on what the facts disclosed. Evidence that was required would be that the activities and benefits conferred were entirely out of proportion to the possible benefit to the company that could have been derived from the supplier or customer being cultivated. In the present case, there was nothing in terms of the overall scale or duration of the activities undertaken by Lau that showed that he deviated from the loyalty that would be expected from him. The transactions were all relatively minor in scope, and they did not seem to have occupied such a large proportion of Lau's time that a clear inference could be drawn, on the balance of probabilities, that his loyalty was compromised.

107 Another argument would have been that the evidence as a whole showed that Lau's concern was not with Heinrich, but with teaming up with and setting up shop with Li. Such an assertion was not supported by the evidence before me. There was nothing to contradict Lau's evidence that he only thought of establishing a business with Li in 2012, which was some time after most, if not all, of the various activities and transactions alleged to have constituted breaches of Lau's duties as a director. The fact that a company was formed by the two after the various transactions and activities were carried out

by Lau did not, even on the balance of probabilities, mean that one flowed from the other. Again, as in other instances in this case, there could be innocent explanations for the eventual joint enterprise of Lau and Li.

Cheque payments

108 There were also allegations made about cheques paid to Lau in relation to the Gaylin ropes transactions. The issue was not specifically raised in the pleadings, detailed though these were, nor did it give rise to a specific cause of action. The main contention appeared to be that Lau's conduct showed some improper activity. These cheques were received from Impa for the ropes in an onward sale. The Plaintiff contended that these cheques raised issues about the alleged breach of fiduciary duties as the payment vouchers were signed by Lau, that they were cashed by him and that the checks were paid into his personal account. Compounding the suspicion about the cheque payments were that the cash voucher stated that the payment was to cash, for the payment of one 'Ah Siong'. The allegation by the Plaintiffs here was that 'Ah Siong' was a fictitious character created to provide a cover for payment to Lau himself.

109 Lau maintained that the proceeds were paid over to Li, and that there was no breach of duties. I accepted the explanation from the Defendants that the proceeds of the checks were made over to Li, and I found that no breach of fiduciary duties arose. 'Ah Siong' was shown to be one Lin Yong Siang, an employee of Heinrich. This was so testified by Mr Chris Teo, a sales manager at Heinrich, and was so identified in the further and better particulars supplied by the Defendants. Lau's evidence, as I understood from his testimony, was that some name needed to be given so that a payment voucher could be

recorded. The Defendants argued that Lau did not do anything to hide what he did.

110 There were indeed better alternatives one would have thought in respect of the payment of these monies. However, that did not mean that what happened in respect of these cheques necessarily pointed to Lau's involvement in something improper.

111 There was also some issue about the description given in a payment voucher for the ropes prepared by Lau that these came from a "scrap supplier". I accepted that this description was used by Lau innocently, as no other description had come to his mind then to describe the ropes.

Testimony as to remuneration

112 In the course of cross-examination, an issue arose as to whether Li had remunerated Lau for one specific instance. In cross-examination, Li appeared to accept that he had paid Lau. But he then appeared to deny testifying as such. He subsequently stated that he had misunderstood what was asked. In light of the vagaries of translation, as Li had testified in Mandarin, and in view of his clarification, I could not conclude that Li had indeed admitted that there was such remuneration.

Knowing Assistance Claims

113 From my analysis above, no breach of fiduciary duties, whether dishonest or innocent, was made out against Lau. That would mean that the claims of knowing assistance could also not be made out against the other Defendants. However, even if I was wrong on this, and that there was a breach

of fiduciary duties by Lau, the claims of knowing assistance could not succeed against Li and JHY.

114 The elements of knowing assistance are (see *Underhill and Hayton: Law of Trusts and Trustees* (David Hayton gen ed) (LexisNexis, 18th Ed, 2010) ("*Underhill & Hayton*") at para 98.45):

(a) a breach of fiduciary duty;

(b) assistance by the Defendants in such breach;

(c) a causal link between the breach and loss to the beneficiaries, or between the breach and the gain; and

(d) a dishonest state of mind.

115 Of these four elements, three may be dealt with briefly in this case. The first requirement of a breach of fiduciary duties has already been considered above. The requirement that a defendant must have assisted the breach of duty reflects the principle that the defendant's actions or omissions must have had some causative impact: see *Underhill & Hayton* at para 98.53. Causation can be established by simply determining whether loss or damage had resulted from the breach: see *Grupo Torras SA v Al-Sabah (No 5)* [2001] Lloyd's Rep Bank 36. A dishonest breach of the fiduciary obligation need not be shown: see *Royal Brunei Airlines Sdn Bhd v Tan (Philip Kok Ming)* [1995] 2 AC 378 ("*Royal Brunei*"), per Lord Nicholls; as well as *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [109]. Neither is a proprietary basis necessary. No actual misapplication of property is required: see *Novoship (UK) Ltd and others v Mikhaylyuk and others* [2015] QB 499 at [93]. In *JD Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch) at [518] as well, Peter

Smith J contemplated that knowing assistance could operate without property being involved—it was sufficient that there only be a breach of fiduciary duties.

116 What was substantively material in the present case was whether there was sufficient evidence of dishonesty, the fourth element required for dishonest or knowing assistance (see above at [114]). The required state of mind has been described in various ways, including the five-fold test first adopted in *Baden v Société Générale pour Favoriser le Développement du Commerce et de I'Industrie en France SA* [1993] 1 WLR 509 at 575–576. But essentially following *Royal Brunei,* the better expression and inquiry is whether there was a dishonest state of mind of the part of those providing knowing assistance. Such dishonesty is established by knowledge of irregular shortcomings that would be regarded as a breach of standards of honest conduct: see *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589, at [22]:

> It therefore seems quite settled following from Lord Hoffmann's speech in *Barlow Clowes* [*International Ltd (in liquidation v Eurotrust International Ltd* [2006] 1 All ER 377] that for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them. …we see no reason to depart from this analysis.

117 There was no evidence of such dishonesty in the present case. The Defendants contended that Li had little direct knowledge as he handled matters through Lau's assistance. What to my mind was more significant was the absence of any evidence that Li knew that he was asking or involving Lau in anything that involved a breach of obligations owed by Lau to Heinrich. All the Plaintiffs could have pointed to was that Lau was asked by Li, or those

acting for Li, to carry out the various transactions. That alone is not sufficient—there could be any explanation for Li's state of mind. It was not a necessary inference, even on the balance of probabilities, that such requests would in Li's mind involve breach of duties. Similarly, in relation to JHY, there was nothing to show that there was any such knowledge. This would be so, given that the only way open to the Plaintiffs to fix knowledge on the part of JHY would be through Li by way of attribution. Nothing in the conduct of Li or JHY could be construed as dishonest by objective, ordinary standards.

118 Thus, the claims of knowing assistance against Li and JHY were not made out.

User principle

119 The Plaintiffs also claimed against Li and JHY, on the basis of the user principle, for the use of Heinrich's assets and resources, namely: the use of Lau's services; the use of Heinrich's warehouse and forklift in the transhipment of goods; the use of the services of Heinrich's employees in the transhipment; the use of Lau's services to source items for the benefit of Li and his company in China; and the use of Lau's services to serve Li's personal needs.

120 As I did not find any breach of the duties owed by Lau to Heinrich, there was no basis for the award of any damages or sum of money representing the use or benefit obtained by Lau, Li or JHY. The Plaintiffs' arguments appeared to be premised on a free-standing right to such an award simply from the supposed use of Heinrich's resources. This was based on a misapprehension of an award based on the user principle. The user principle is a measure of damages; it does not give a free-standing right to compensation.

What the Plaintiffs referred to as the user principle is a measure of damages adopted primarily in intellectual property cases where such property is used without permission by the defendant. It is particularly useful when an account of profits is not available for various reasons.

121 The Court of Appeal in *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 ("*ACES*") recognised that damages awarded pursuant to the user principle were available. In *ACES*, what was claimed were damages for the wrongful detention of goods. This underlines that the juridical basis of the user principle is that there has been use of property, whether goods or intellectual property, for which the compensatory measure is not suitable or available. As recognised in *ACES*, a claim based on the user principle is a restitutionary claim. Some unjust factor must be made out, in the form of a tort, whether for detention of goods or infringement of an intellectual property right. Nothing of that nature was shown in the present case and hence the user principle was inapplicable.

Miscellaneous

122 Allegations were also made that Li had benefited from the various transactions by having an excuse for the transfer of funds out of China. This was immaterial to the pleaded case before me. The deletion of e-mails relating to transactions with Li and JHY from the office computer by Lau also did not warrant a finding that Lau's evidence was not to be accepted.

Conclusion

123 Kor had apparently only discovered many of the events and transactions making up his whole slew of allegations *after* Lau left. Data was apparently deleted from the computer previously used by Lau. Lau had also left to set up a business with Li. These matters could certainly give rise to some suspicion, but suspicion alone was not a foundation for a legal claim. The range of allegations made perhaps disclosed the breadth and extent of responsibility entrusted to Lau in Heinrich by Kor, but whatever the level of betrayal that Kor might have felt at Lau's departure, none of the allegations against the Defendants were made out based on the evidence adduced.

124 For the above reasons, the Plaintiffs' applications failed. Costs of $100,000 and reasonable disbursements were awarded to the Defendants.

Aedit Abdullah
Judicial Commissioner

Decruz Martin Francis (Shenton Law Practice LLP) for the Plaintiffs;
Lai Swee Fung (instructed) and Lim Boon Cheng Robin (Robin Law Corporation) for the Defendants.