IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 59

Civil Appeal No 154 of 2016

Between

GOH SENG HENG

… *Appellant*

And

(1) LIBERTY SKY INVESTMENTS LIMITED
(2) OVERSEA-CHINESE BANKING CORPORATION LTD

… *Respondents*

In the matter of Originating Summons No 509 of 2016

In the matter of Order 24, Rule 6(5) of the Rules of Court (Cap 322, Rule 5, 2014 Rev Ed)

Between

LIBERTY SKY INVESTMENTS LIMITED

… *Plaintiff*

And

(1) OVERSEA-CHINESE BANKING CORPORATION LTD
(2) GOH SENG HENG

… *Defendants*

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v
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17 August 2017

5 October 2017

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 In Suit No 1311 of 2015 ("the Suit"), the first respondent, Liberty Sky Investments Limited ("LSI") claimed that the appellant Dr Goh Seng Heng ("Dr Goh") had made fraudulent misrepresentations which induced LSI to enter into a share sale and purchase agreement ("the SPA") with Dr Goh, pursuant to which LSI purchased shares in a company from Dr Goh for $14,422,050 ("the Sale Price"). In the Suit, LSI sought, *inter alia*, rescission of the SPA and the return of the Sale Price, which was paid into Dr Goh's bank account ("the Account") with the second respondent, Oversea-Chinese Banking Corporation Ltd ("OCBC").

2 Separately, and (significantly, in our view) without informing Dr Goh, LSI commenced Originating Summons No 509 of 2016 ("OS 509/2016")

against OCBC, seeking disclosure of documents relating to the Account to discover if the Sale Price remained in the Account or had been transferred to any third parties. If the Sale Price had been transferred to third parties, LSI could then seek recovery by asserting a proprietary claim to the Sale Price.

3 When Dr Goh found out about OS 509/2016, he successfully applied to be added as a defendant to the proceedings. Dr Goh argued against the order sought by LSI, while OCBC took the position that it would abide by any orders made by the court. The High Court judge ("the Judge") allowed LSI's application in OS 509/2016 (see *Liberty Sky Investments Ltd v Oversea-Chinese Banking Corp Ltd and another* [2017] SGHC 20 ("the GD")). The present appeal was Dr Goh's appeal against this decision. We allowed the appeal and now give the detailed grounds for our decision.

Facts

Parties to the dispute

4 Dr Goh was a medical doctor with an established practice in aesthetic medical services. He founded Aesthetic Medical Partners Pte Ltd ("AMP"), a Singapore-incorporated company in 2008. AMP, through its wholly-owned subsidiary, Aesthetic Medical Holdings Pte Ltd ("AMH"), operates a chain of clinics under the PPP laser brand ("the PPP brand"). Dr Goh was the former Managing Director of AMP and today remains a shareholder. His daughter, Dr Michelle Goh, is also a shareholder of AMP. We refer to Dr Goh and his daughter collectively as "the Gohs".

5 LSI is an investment company incorporated in the Seychelles. Mdm Gong Ruilin ("Mdm Gong") is its shareholder and director. Mr Lin Lijun ("Mr Lin") is Mdm Gong's husband (collectively, "the Lins"). The Lins are

Chinese nationals based in Shanghai. They are also the franchisees for the PPP brand in Suzhou, China.

Background to the dispute

6 On 25 November 2014, Dr Goh and LSI entered into the SPA, under which Dr Goh would sell 32,049 shares in AMP (representing approximately 10.6% of the shareholding in AMP) to LSI for the Sale Price of $14,422,050.

7 LSI alleged that the SPA was entered into as a result of the following express representations, which were fraudulently made by Dr Goh between 23 October 2014 and 25 October 2014 (see the GD at [8]):

(a) A trade sale of the shares in AMP to one Mr Peter Lim (or a company controlled by him) was imminent and would take place within a month from 23 October 2014 ("the Trade Sale representation").

(b) If the trade sale did not materialise, Dr Goh planned to list AMP through an initial public offering ("IPO") on the Singapore Exchange Mainboard. The IPO was targeted for completion during the period from March 2015 to June 2015, and at any rate no later than 24 months after LSI acquired the AMP shares from Dr Goh ("the IPO representation").

(c) There were minority shareholders who could stifle the trade sale or IPO and Dr Goh needed funding from the Lins to buy out the interests of these minority shareholders ("the Minority Shareholders representation").

8 We refer to these representations collectively as "the Three Representations". Dr Goh denied making the Three Representations, and claimed that, in any event, he had an honest belief in the Three Representations

and, further, that LSI had not been induced to enter the SPA by the Three Representations.

9 On 31 December 2015, LSI commenced the Suit against the Gohs. In the Suit, LSI raised, *inter alia*, claims of fraudulent misrepresentation and sought the rescission of the SPA and return of the Sale Price.

10 On 23 May 2016, LSI filed ***two*** applications. The first was Summons No 2483 of 2016 ("SUM 2483/2016"), where LSI sought Mareva injunctions against the Gohs. The second was OS 509/2016 (which, as already mentioned, is the subject of the present appeal). As noted above (at [2]), OS 509/2016 was an application against OCBC to seek discovery of documents relating to the Account. LSI neither named Dr Goh as defendant in OS 509/2016, nor informed him of it. Subsequently, Dr Goh found out about OS 509/2016 and succeeded in being joined as second defendant so that he could oppose it. It bears reiterating that whilst LSI filed *two* applications on the *same day*, Dr Goh *only* had notice of *the first* (which is not surprising since he was one of the parties in the first application). As we shall see, this was an important factor that we considered in relation to the issue as to whether or not LSI had come to court with clean hands in so far as the *second* application (*viz*, OS 509/2016) was concerned (see below at [32] and [56]−[60]).

11 On 10 November 2016, the Judge allowed SUM 2483/2016 in part, granting a Mareva injunction against Dr Goh ("the LSI Mareva"), but not against Dr Michelle Goh. The Judge also allowed OS 509/2016 and ordered OCBC to disclose the documents relating to the Account. The execution of this order was stayed pending the present appeal.

12 Dr Goh also appealed against the Judge's decision to grant the LSI Mareva. That is the subject of Civil Appeal No 97 of 2016, which will be heard by this court at a later date.

The decision below

13 The Judge held that the applicable test for the grant of the order sought by LSI was the test laid down by this court in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey James*" and "the *Dorsey James* test"), which the Judge summarised as follows (see the GD at [20]):

> First, the person from whom discovery is sought must have had been involved in the wrongdoing, though the involvement may have been completely innocent. Second, the applicant must be able to show a reasonable *prima facie* case of wrongdoing against the person whose information or identity is sought of. Third, the applicant must show that the disclosure sought is necessary to enable him to take action, or at least that it is just and convenient in the interests of justice to make the order sought. Two significant considerations in the last factor are whether there exists an alternative and more appropriate method to obtain the information and whether the order is proportionate in the circumstances. [references omitted]

14 In the court below, it was not disputed by parties that the first element was satisfied (see the GD at [25]). It was also clear that, with respect to the second element, the relevant wrongdoing must be a cause of action that would give LSI a proprietary claim over the Sale Price. Otherwise, LSI would have no basis to pursue claims against third parties who have received the Sale Price, which was LSI's stated purpose in commencing OS 509/2016 (see above at [2]). The Judge therefore considered the second element only in relation to LSI's claims of fraudulent misrepresentation, which, if proven, may provide LSI with a proprietary claim over the Sale Price (see the GD at [26]).

15 The Judge found that the second element was satisfied as LSI had demonstrated a *prima facie* case of fraudulent misrepresentation against Dr Goh, in respect of all the Three Representations (see the GD at [45]). In relation to the third element, the Judge held that it was necessary, just and convenient to order disclosure of the relevant documents from OCBC in order for LSI to trace and follow the Sale Price (see the GD at [46]).

16 The Judge further held that OS 509/2016 was not an abuse of process, notwithstanding the fact that it could be argued that LSI should have commenced the application for third-party discovery as a summons in the Suit instead, as no prejudice was caused to Dr Goh (see the GD at [51]). Accordingly, the Judge allowed OS 509/2016. Dissatisfied, Dr Goh appealed against the Judge's decision.

Parties' cases on appeal

17 On appeal, counsel for Dr Goh, Mr Adrian Tan ("Mr Tan"), contended that the Judge had applied the wrong test. Mr Tan drew a distinction between a *Norwich Pharmacal* order ("NPO") (which can be traced to the eponymous decision of the House of Lords in *Norwich Pharmacal Co and others v Customs and Excise Commissioners* [1974] AC 133 ("*Norwich Pharmacal*")) and a *Bankers Trust* Order ("BTO") (which was named after the later decision of the English Court of Appeal in *Bankers Trust Co v Shapira and others* [1980] 1 WLR 1274 ("*Bankers Trust*")).

18 According to Mr Tan, an NPO was a form of pre-action discovery that was sought for the purpose of identifying persons who were potentially liable to the applicant. Mr Tan submitted that the *Dorsey James* test was the appropriate test for the grant of an NPO (and, in this regard, we do acknowledge

that *Dorsey James* related to the grant of an NPO). In contrast, a BTO was not typically a form of pre-action discovery. Instead, it was typically obtained in conjunction with or in aid of a Mareva injunction in order to preserve or trace an asset. Therefore, Mr Tan argued that before a BTO was granted, an applicant would have to show:

> (a) That there are good grounds for thinking that he has proprietary interests over the asset, for example, by showing compelling evidence of fraud regarding the asset; and
>
> (b) That there is a risk of dissipation of the asset, and a real prospect that the BTO will lead to the location or preservation of the asset.

19 Mr Tan further submitted that the present application involved a BTO given that LSI's stated purpose in pursuing the application was to trace the Sale Price. Accordingly, he submitted that the Judge had applied the wrong test when she applied the *Dorsey James* test to the present case, and failed to consider whether there was *compelling* evidence of fraud and a risk of dissipation of Dr Goh's assets.

20 Furthermore, Mr Tan submitted that, even if the Judge had applied the correct test, she had erred in finding that the second and third elements of the *Dorsey James* test were satisfied.

21 On the other hand, counsel for LSI, Mr Harpreet Singh Nehal SC ("Mr Singh"), argued that the Judge's decision ought to be upheld based on the reasons stated in the GD. Additionally, Mr Singh raised matters that occurred after the GD was issued to bolster his case. For example, Mr Singh pointed out that on 16 March 2017, during a hearing for a freezing order against Dr Goh's family members, Dr Goh's lawyers had admitted that the Sale Price had been

used to purchase two luxurious properties in Sentosa as gifts for his children, and for the purchase of "some yachts".

22 Mr Singh submitted that these admissions demonstrated that Dr Goh knew clearly where the Sale Price had gone to, and thus the disclosure order that LSI was seeking could not be said to be oppressive. Mr Singh further maintained that the disclosure order remained necessary, as despite these admissions, about $4,000,000 of the Sale Price remained unaccounted for.

Our decision

Introduction

23 As noted at [17]–[19] above, the issue of the applicable test was a matter hotly disputed on appeal. One key area of controversy was whether LSI had to show (in the context of the present case) a reasonable *prima facie* case of fraud, or had to show *compelling* evidence of fraud. A similar issue was also raised before the High Court in *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd and others and another appeal* [2016] 4 SLR 1392 ("*La Dolce Vita*").

24 *La Dolce Vita* involved two similar applications by the plaintiffs for disclosure of the second defendant's banking documents from two of the second defendant's banks. Each bank was named as the first defendant in each application. The plaintiffs there alleged that the second defendant had made various fraudulent misrepresentations which induced the plaintiffs into acquiring shares in that business. In that context, parties contested whether the plaintiffs needed only to show a reasonable case of wrongdoing to make out a *prima facie* case of fraud, or had to show a "strong *prima facie* case of fraud" (*La Dolce Vita* at [36] and [40]–[41]). Ultimately, the High Court left this point

open, as the court found that there was "sufficiently strong and cogent evidence to establish a *prima facie* case of fraud" on the basis of, *inter alia*, several expert reports that indicated that the business's financial and accounting information had been subjected to fraudulent manipulation and overstatement (at [54] and [59]–[65]).

25 On the facts of the present case, we also did not need to decide this point. As we proceed to explain below (at [33]–[55]), we found that LSI had not even demonstrated a reasonable *prima facie* case of wrongdoing (hereafter referred to in the context of this case as "a *prima facie* case of fraud") to begin with. Thus, even though we were of the tentative view that it may well be too fine a line to attempt (as Mr Tan's argument in effect suggested) to define different degrees of a *prima facie* case, we need not decide this point definitively given the facts of this particular case. At this juncture, it suffices for us to make the following observations.

26 In attempting to buttress his arguments on this particular issue, Mr Tan had relied on the following passage from the judgment of Lord Denning MR in *Banker's Trust* (at 1282)*:*

> This new jurisdiction [to order a BTO] must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a *good ground* for thinking the money in the bank is the plaintiff's money—as, for instance, when the customer has got the money by fraud—or other wrongdoing—and paid it into his account at the bank. … [emphasis added]

27 Whilst the passage just quoted states that "good ground" was required, it must nevertheless be read in context. In particular, in the sentences that immediately follow, Lord Denning observed as follows (*ibid*):

> … The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkin's words, to lift the latch of the banker's door: see *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321, 355. The customer, who has ***prima facie*** been guilty of ***fraud***, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396, 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents-for that is the only way of tracing the money or of knowing what has happened to it. … [emphasis added in bold italics and underlined bold italics]

28 The foregoing passage suggests that Lord Denning was, contrary to Mr Tan's submissions, applying the standard of a *prima facie* case of fraud, and that Lord Denning did not intend to draw any fine distinction between a "good ground" on the one hand and a "*prima facie*" case on the other. Indeed, it is also interesting to note that Lord Denning did in fact also cite *Norwich Pharmacal* (at 1281) without any substantive comment or elaboration as such upon that case.

29 Mr Tan also relied on the following passage from the judgment of Waller LJ in *Banker's Trust* (at 1283) to suggest that compelling evidence of fraud was required before a BTO would be granted:

> Clearly it is undesirable that an order such as this should be lightly made. But the answer to this part of Mr. Elliott's submission, in my judgment, is that here there is *very strong evidence indeed of fraud* on the part of the other two defendants-the first and second defendants. They presented two forged cheques, each for half a million dollars, and as a result a total of $1,000,000 was transferred to accounts in their names or from which they would benefit. [emphasis added]

30 However, it appears to us that, in the passage just quoted, Waller LJ was merely making a fact-specific assessment that, in *Bankers Trust*, the evidence of fraud was very strong. It does *not* appear that Waller LJ was purporting to set out a *general* principle for future cases. This interpretation is supported by the

fact that Waller LJ had *agreed* with Lord Denning's judgment (which, as mentioned above at [28], appears to have applied the test of a *prima facie* case); indeed, Waller LJ only purported to "add a word or two" about the points made by counsel for the bank in *Bankers Trust* (at 1282). Viewed in this light, Waller LJ's judgment was of little assistance to Mr Tan's submission.

31 Nevertheless, as stated above at [25], we did not have to decide this point in the present case. We will render a definitive decision when the issue arises directly for decision before this court.

32 In addition to our view that LSI had not even demonstrated a *prima facie* case of fraud, we also held that it would not have been just to allow LSI's application. It was common ground between parties that the element of showing that the application was "necessary, just and convenient" as established in *Dorsey James* at [45] (see also above at [13]) was also an element in the present application, regardless of whether the application was characterised as an application for a NPO (as in *Dorsey James*) or as an application for a BTO. We accepted this to be correct: given the BTO's roots as an equitable remedy (see *Banker's Trust* at 1282, *per* Lord Denning MR), the court would therefore retain the discretion to consider issues of necessity, justice and convenience in deciding whether a BTO should be granted. In the present case, as we go on to explain below at [56]–[60], we were of the view that it was, in any event, not just to allow the application as LSI had not come to the court with clean hands.

No* reasonable *prima facie case of fraud

33 We begin with the issue of whether there was a *prima facie* case of fraud. The Judge had found that there were *prima facie* cases of fraud in relation to all of the Three Representations, namely, the Trade Sale representation, the IPO

representation and Minority Shareholders representation. We will thus examine each representation in turn.

The Trade Sale representation

34 In our view, LSI has not shown a *prima facie* case that the Trade Sale representation was made. Even if it had been made, however, we were not satisfied that there was *prima facie* evidence that LSI was induced by the Trade Sale representation into entering the SPA.

35 In this regard, we considered two points to be pertinent. First, the terms of the SPA and the date that it was entered into appeared at odds with the Trade Sale representation. The SPA was entered into on 25 November 2014 (see above at [6]). According to the Trade Sale representation, a trade sale of the shares in AMP to one Mr Peter Lim (or a company controlled by him) was imminent and would take place *within a month from 23 October 2014* (see above at [7(a)]). Thus, the one-month timeframe stated in the Trade Sale representation had expired by the time the SPA was entered into. This strongly suggested that the Trade Sale representation was either never made by Dr Goh, or was no longer believed to be true by LSI by the time it entered into the SPA.

36 In response, LSI submitted that the focus of the Trade Sale representation was on a trade sale being *imminent*, rather than on the trade sale taking place within a month from the date of the representation. However, it was not apparent to us that LSI's pleaded case bore such an interpretation. LSI had pleaded that Dr Goh had told Mdm Gong on 23 October 2014 that a trade sale "was imminent and would likely take place within one (1) month". This suggested to us that according to LSI's pleadings, under the Trade Sale representation, the claim that a trade sale was "imminent" was *not* merely a

general and open-ended one but had been made with a specific one-month timeframe in mind.

37 Furthermore, even if we accepted LSI's characterisation of the Trade Sale representation, the representation still did not sit easily with the following term of the SPA:

> In the event there is no IPO or trade sale at the *end of the 24 months from the SPA date*, [LSI] can sell the above shares back to [Dr Goh] or [AMP] with a prior notification of 21 days, at the principle [*sic*] and annualized [internal rate of return of 15% ("IRR")] as specified above. The principle [*sic*] and the IRR return are guaranteed by [AMP]. The payment and share transfer shall be completed within 21 days. [emphasis added]

38 This term provided LSI with the option of reselling its AMP shares to Dr Goh or AMP if no trade sale or IPO had taken place at the end of *24 months from the date of the SPA*, at the Sale Price and with an IRR of 15% guaranteed by AMP ("the Guarantee").

39 It seemed to us that if Dr Goh had indeed represented that a trade sale was imminent and if LSI had indeed believed that representation, the inclusion of the Guarantee as a term of the SPA is puzzling, to say the least. To say that an event was "imminent" is to say that the event is both very likely to take place, and would take place very soon. The Guarantee, however, both provided a fairly long period of time (24 months) for a trade sale to take place, and would only be operative if (contrary to the Trade Sale representation), the trade sale did *not* take place. Thus, the presence of the Guarantee strongly suggests that the Trade Sale representation was not made and that, even if it was, LSI was not induced by the Trade Sale representation into entering the SPA.

40 The second weighty factor that we took into account was that, on the material before us, LSI did not register any protest about a lack of a trade sale,

until it sent a letter of demand to Dr Goh on 24 November 2015. In other words, after entering into the SPA in 25 November 2014, LSI did not inquire of Dr Goh regarding the supposedly *imminent* trade sale *for* ***close to a year***. This conspicuous silence from LSI strongly suggested that the Trade Sale representation (even if made) did not induce LSI into entering the SPA.

The IPO representation

41 We now turn to the IPO representation. The IPO representation stated that the IPO was targeted for completion around March 2015 to June 2015, and at any rate no later than 24 months after LSI acquired the AMP shares from Dr Goh (see above at [7(b)]).

42 However, as was the case with the Trade Sale representation (see above at [39]–[40]), the IPO representation did not sit well with the inclusion of the Guarantee as a term of the SPA, and there was no evidence of any protest by LSI about the absence of an IPO until the letter of demand was sent on 24 November 2015. LSI's silence was particularly troubling given that Mdm Gong had become a director of AMP on 8 June 2015, *ie*, the final month for the IPO's targeted completion. It therefore seemed to us that there was insufficient evidence, even on a *prima facie* standard, to establish that a representation was made and that LSI was induced by the ~~Trade Sale~~IPO representation into entering the SPA.

43 Furthermore, there was, in our view, also no *prima facie* evidence of Dr Goh's lack of honest belief in the IPO representation. Dr Goh had appointed financial and legal advisors, including Maybank, Clifford Chance and KPMG (collectively, "the Advisors"), to assist in bringing about an IPO. Nevertheless, LSI pointed out that Dr Goh's last communication with the Advisors was

exchanged on 25 February 2014, more than seven months before Dr Goh allegedly made the IPO representation on 23 October 2014.

44 However, this seven-month lull in activity must be viewed in the context of parties' focus on achieving a trade sale at that particular point in time. Correspondence between Dr Goh and Mdm Gong on 13 January 2015 made it clear that parties regarded a trade sale as "plan A", and that IPO was "plan B … if in the event that [a deal with Peter Lim] did not reach [Dr Goh's] satisfaction on terms and conditions". Viewed in this light, Dr Goh's relative lack of activity in pursuing an IPO was not particularly surprising, nor indicative of a lack of belief in the IPO representations.

45 Furthermore, the evidence suggested that Dr Goh had taken some steps during that period to prepare for an IPO. On 8 December 2014, Joel Ng ("Mr Ng"), an officer of AMP, sent an email to Dr Goh attaching a "*requested* draft IPO timetable" [emphasis added] ("the Timetable"). While the email did not specify when the request for the Timetable was made, it nevertheless suggested that Dr Goh was still working towards an IPO during this period, despite not corresponding with the Advisors.

46 Somewhat surprisingly, LSI relied on the same documents as evidence of Dr Goh's *lack* of belief in the IPO representation. LSI highlighted that "[the Timetable] itself states that a listing in the Mar-Apr 2015 listing window would be a '*challenge*' and '*not advisable*', and that a listing in the June to August 2015 window was also problematic because '*most of the institutional investors would be away from summer holidays etc*'"[emphasis in original].

47 However, we did not consider the Timetable to be evidence of Dr Goh's lack of honest belief in the IPO representation. To begin with,

Dr Goh should not be imputed with the knowledge of Mr Ng's negative assessments, because Mr Ng's email was only sent *after* the IPO representation was allegedly made and also after the SPA was entered into.

48 Furthermore, even if one were to take Mr Ng's assessments into account, we were of the view that LSI had been selective in its quotations from the Timetable. LSI had failed to mention that Mr Ng had made positive recommendations regarding the very next listing window in the period from October to early December 2015, considering the window to be "appropriate" as sufficient time would be given for financial statements to be audited, and there would "be greater drive valuation" as "potential cornerstone investors are on the lookout for deals as 2015 comes to an end".

49 An IPO during the October to early December 2015 window would fall within the timeframe envisaged by the IPO representation. While it would be five months after the targeted completion of March to June 2014, it was well within 24 months after LSI acquired shares in AMP. Accordingly, we were of the view that LSI had not shown *prima facie* evidence of Dr Goh's lack of honest belief in the alleged IPO representation. Therefore, in the circumstances, we held that LSI had failed to demonstrate a *prima facie* case of fraud in respect of the IPO representation.

The Minority Shareholders representation

50 In so far as the Minority Shareholders representation was concerned, we were of the view that there was no *prima facie* evidence that the representation had induced LSI into entering the contract.

51 At the oral hearing before us, Mr Singh accepted that LSI had entered into the SPA in part because of AMP's potential for a trade sale or an IPO. However, he maintained that LSI was also induced by the Minority Shareholders representation. He relied on the Judge's finding (at [44]) that Mdm Gong had "reposed a fair amount of trust in Dr Goh". In this context, Mr Singh submitted, the Minority Shareholders representation had created a sense of crisis and urgency, prompting Mdm Gong to help Dr Goh and causing LSI to enter into the SPA without conducting any substantial due diligence.

52 Mr Singh's case implied that Mdm Gong was motivated, at least in part, by altruistic reasons when she caused LSI to enter into the SPA. However, we found this assertion of altruism to be inconsistent with the general tenor of the commercial relationship between Dr Goh and Mdm Gong. Dr Goh and Mdm Gong first met in November 2013, barely a year before the SPA was entered into in November 2014. The circumstances of their initial meeting also indicated that their relationship was rooted in commercial interests: the Lins were introduced to Dr Goh by representatives of other shareholders in AMP during the launch of the first outlet of a laser clinic under the PPP brand in Shanghai. Subsequently, as mentioned above at [5], the Lins became franchisees of the PPP brand and owned a laser clinic under the PPP brand in Suzhou. This took place in or around September 2014, barely a month before the representations were allegedly made in October 2014. In light of the foregoing, we found, with respect, the Judge's characterisation of the level of trust in the relationship between Dr Goh and Mdm Gong to be somewhat overstated.

53 We accepted that there was *prima facie* evidence that LSI had agreed to forgo due diligence in the light of the circumstances stated in the Minority Shareholders representation. However, to say that LSI was induced by the

Minority Shareholders representation to *forgo due diligence*, was *not* the same as saying that the Minority Shareholders representation induced LSI into *entering the SPA*. LSI did not gratuitously waive the need for due diligence and proceed to enter into the SPA upon hearing the Minority Shareholders representation. In lieu of due diligence, Dr Goh had offered the Guarantee, and the question of who (Dr Goh or AMP) would be included as guarantor was the subject of considerable negotiation. The negotiation took place among the Lins and Dr Goh, as the Lins negotiated for Dr Goh to be included as a guarantor (as opposed to AMP being the sole guarantor), but Dr Goh declined. Eventually, LSI acceded to Dr Goh's position in this regard and accepted the Guarantee, which did not, however, include Dr Goh as a guarantor.

54 In addition, one must not lose sight of the fact that Mdm Gong did not enter into the SPA in her personal capacity. Instead, she acted through LSI, an *investment* company. While LSI's structure was not disclosed, correspondence from Mr Lin indicated that he and Mdm Gong were "investing with some of [their] close friends". The evidence indicated that these "close friends" (whose identities were not disclosed) also played a significant role in LSI's decision-making process. When Mr Lin entered into negotiations over several terms in the SPA (including the issue of whether Dr Goh would be providing a guarantee, as discussed earlier), he cited the need to "make the clauses transparent" to these close friends. Even after the SPA had been entered into on 25 November 2014, Mdm Gong emailed Dr Goh on 7 December 2014 on behalf of "one of [the Lins'] close friends" to confirm the effect of the Guarantee. Such caution displayed by these "close friends" was not surprising: LSI was, after all, an *investment* company, and the monies involved here – more than $14,000,000 – were very substantial.

55 Accordingly, despite the claim that Mdm Gong was motivated by altruistic reasons, we were not persuaded that there was *prima facie* evidence that LSI was induced into entering the SPA by the Minority Shareholder representation.

LSI had not come to court with clean hands

56 As mentioned above at [2] and [10], LSI had commenced OS 509/2016 *without informing* Dr Goh, *despite* also applying for a Mareva injunction against the Gohs *on the same day*. At the oral hearing before us, Mr Singh accepted that Dr Goh should have been notified of OS 509/2016. He also accepted that LSI's failure to notify Dr Goh of OS 509/2016 was a matter that the court could take into consideration in determining whether it would be just to grant the application in OS 509/2016. Mr Singh explained LSI's failure to notify Dr Goh in the following manner:

(a) First, LSI had taken out OS 509/2016 after review of the relevant legal authorities, which did not indicate that Dr Goh had to be notified.

(b) Second, OS 509/2016 was not taken out with a view to deprive Dr Goh of a chance to defend the application. In fact, LSI had twice requested Dr Goh's banking documents from Dr Goh himself, and he had rejected the request each time.

57 Mr Singh also urged the court to take into account the fact that when Dr Goh applied to intervene in OS 509/2016, LSI had consented to the application.

58 We did not find any of these explanations satisfactory. While Mr Singh claimed that the decision to not notify Dr Goh of OS 509/2016 was made after

a review of the legal authorities, when asked by the court, he was unable to point to any case where a plaintiff had made an application for a defendant's banking documents without informing the defendant (in circumstances where the defendant's identity was known and the defendant was contactable).

59 We also failed to see how Dr Goh's rejection of LSI's previous requests for the same documents sought in OS 509/2016 justified LSI's failure to notify Dr Goh of OS 509/2016. In fact, we considered this to be, on the contrary, an aggravating factor: it meant that LSI knew that Dr Goh would object to OS 509/2016, and yet chose to commence OS 509/2016 without informing him. Finally, the fact that LSI consented to Dr Goh's application to intervene simply demonstrated how obvious it was that Dr Goh should have been notified from the outset.

60 As it turned out, Dr Goh found out (albeit fortuitously) about OS 509/2016, and was able to appear in court to oppose it. The point remained, however, that LSI had commenced OS 509/2016 in a manner that plainly went against the spirit of the law. LSI was, in essence, trying to steal a march on Dr Goh. In view of such conduct, LSI could not be said to have come to the court with clean hands. We thus did not consider it just to allow OS 509/2016.

Concluding remarks

61 For the foregoing reasons, we allowed the appeal and set aside the Judge's order in OS 509/2016.

62 We wish to remind all advocates of the importance of adhering to the *spirit* of the law, and not just the *letter* of the law. While advocates within an adversarial system are constrained to engage in legal combat, they are not entitled to pursue victory at all costs, regardless of the means. They owe a duty

not only to their respective clients but also to the court; they are officers of the court who must ensure that legal combat is engaged in ethically and with honour at all times. In this regard, the following guidance provided by the Lord Chief Justice Cockburn in an extra-judicial address is instructive (see George P Costigan Jr, "The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M. Berryer on November 8, 1864" (1931) 19 Cal L Rev 521 at p 523):

> My noble and learned friend Lord Brougham … said that an advocate should be fearless in carrying out the interests of his client, but I couple that with this qualification and this restriction, that *the arms which he wields are to be the arms of the warrior and not of the assassin*. It is his duty to strive to accomplish the interests of his clients *per fas* and not *per nefas*. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and immutable interests of truth and justice. [emphasis added]

63 First delivered in 1864, these apt and excellent observations by Cockburn CJ have since been endorsed by the Singapore courts in a number of cases (see, for example, *Shaw & Shaw Ltd v Lim Hock Kim (No 2)* [1958] MLJ 129 at 130–131; *Public Trustee and another v By Products Traders Pte Ltd and others* [2005] 3 SLR(R) 449 at [31]; *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [40]; and *Law Society of Singapore v Mahadevan Lukshumayeh and others* [2008] 4 SLR(R) 116 at [77]). It remains relevant, and all advocates would do well to pay heed to such sage advice.

Andrew Phang Boon Leong	Judith Prakash	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge of Appeal

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