Subtle Senses Pte Ltd (in creditor's voluntary liquidation) *v* Healthtrends Medical Investments Pte Ltd
[2012] SGHC 148

Case Number : Suit No 53 of 2011

Decision Date : 23 July 2012

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Tan Kok Peng and Ho Mingjie Kevin (Braddell Brothers LLP) for the plaintiff; Aqbal Singh s/o Kuldip Singh (Pinnacle Law LLC) for the defendant.

Parties : Subtle Senses Pte Ltd (in creditor's voluntary liquidation) — Healthtrends Medical Investments Pte Ltd

Restitution – Money had and received

23 July 2012

Woo Bih Li J:

Introduction

1 This is a case which highlights the importance of companies within a group structure being accurate in their accounting records and forthcoming in their dealings with one another or with external parties. In this case, the plaintiff was an indirect, wholly-owned subsidiary of the defendant prior to the plaintiff being placed under creditors' voluntary winding up. The plaintiff sought to recover moneys paid by a third party to the defendant on the basis that the moneys were held by the defendant as the plaintiff's nominee, as evidenced from the plaintiff's contract with the third party. The defendant, however, contended that the moneys were the true and exclusive consideration for another contract it had entered into with the parent company of the third party, even though this position was not reflected in the latter contract.

2 Having considered the evidence and submissions, I granted judgment in favour of the plaintiff. The defendant has filed an appeal to the Court of Appeal. The detailed reasons for my decision are set out below.

Facts

3 The plaintiff, Subtle Senses Pte Ltd, was, prior to liquidation, in the business of providing spa services. It was started in 2003 and was acquired by the defendant, Healthtrend Medical Investments Pte Ltd, to be part of the defendant's group of companies ("the Healthtrends Group") in 2008.

4 After the defendant's acquisition of the plaintiff, the plaintiff became an indirect, wholly-owned subsidiary of the defendant. The plaintiff's sole shareholder was a company known as Healthtrends Medical Group Pte Ltd ("HTMG"). All of the ordinary shares of HTMG were, in turn, owned by a company known as Healthtrends Holding Pte Ltd ("HTH"), which in turn was wholly-owned by the defendant.

5 At all material times and prior to its liquidation, the plaintiff's board of directors consisted of: (i)

Mr Gerald Lim King Wee ("Gerald Lim") who was the plaintiff's initial founder prior to the acquisition by Healthtrends Group; (ii) Dr Billy Hardie ("Hardie"), a managing director of the defendant and the Healthtrends Group; and (iii) Mr Kong Chee Keong ("Kong"), the then chief financial officer of the defendant and the Healthtrends Group. The plaintiff's finance manager at all material times was Ms Sally Ang Poh Choo ("Sally Ang").

6 The defendant, as the ultimate holding company of the Healthtrends Group, did not generate revenue through business activities but had overall charge of the group's business activities. According to the defendant, at all material times, it oversaw the provision of financial support to the subsidiaries comprising the Healthtrends Group, including but not limited to the provision of working capital to the said subsidiaries. [note: 1]

7 Between February 2010 and March 2010, Hardie and Kong negotiated a deal with True Spa Pte Ltd and Tru'Est Pte Ltd (collectively, "the True Companies") whereby the plaintiff agreed to acquire the True Companies' businesses, taking over its customers and assets. [note: 2]

8 On 17 March 2010, the plaintiff and the True Companies entered into a business sale agreement ("BSA"). Under the terms of the BSA, the plaintiff was obliged to take over the True Companies' businesses; and the True Companies were obliged, *inter alia*, to pay a sum of S$1.25 million ("the Cash Consideration"). The relevant clauses in the BSA were as follows: [note: 3]

> 3.1 Sale Consideration
>
> The consideration for the assumption by the Purchaser of the Assumed Liabilities relating to the Businesses shall be:
>
> 3.1.1 the sale, transfer, assignment, conveyance and delivery by the [True Companies] to the [Plaintiff] of all of the [True Companies'] rights, title and interest in and to the Assets relating to the Businesses and all the Business Records relating to the Businesses as of Completion; and
>
> 3.1.2 an amount in cash of S$1,250,000 …

9 Importantly, under cl 3.3 of the BSA, the True Companies were obliged to pay the Cash Consideration to: [note: 4]

> the account of the [plaintiff] or [the defendant] (*as the [plaintiff's] nominee*) as directed by the [plaintiff] …
>
> [emphasis added]

The defendant relied on this provision to claim that it was beneficially entitled to the Cash Consideration.

10 On the same day the BSA was entered into (*ie*, 17 March 2010), the parent company of the True Companies – CJ Group Pte Ltd ("CJ Group") – signed a share subscription agreement ("SSA") with the defendant wherein the defendant would issue 5,232,610 shares (about 2% of its enlarged shareholding) to CJ Group for a stated subscription price of S$1.00. [note: 5] Clause 4 of the SSA indicated that the parties intended completion of both the SSA and the BSA to take place simultaneously: [note: 6]

> Completion [of the SSA] shall take place … simultaneously with the completion of the sale and purchase of the business of [the True Companies] pursuant to the agreement dated 17 March 2010 entered into among [the True Companies] and [the plaintiff]…

11 However, in fact, completion under the BSA was effected on 24 April 2010 and completion under the SSA was effected on 2 June 2010. [note: 7]

12 Mr Patrick Wee ("Patrick Wee"), director of both the True Companies and CJ Group, signed the BSA and the SSA ("the Written Agreements") on behalf of the True Companies and CJ Group respectively. His late brother, Mr John Wee ("John Wee"), an alternate director of the True Companies, was intimately involved in the negotiations leading to the Written Agreements.

13 According to Hardie, the True Companies paid the Cash Consideration to the defendant between 23 April 2010 and 30 July 2010, in four separate tranches (less a sum of S$114,614.05 deducted as a set-off for various operational expenses incurred by the True Companies in relation to the businesses transferred to the plaintiff). In total, a sum of S$1,135,385.95 was paid to the defendant. [note: 8]

14 Between 5 May 2010 and 4 August 2010, the defendant in turn remitted a total of $577,058.19 to the plaintiff over four tranches; [note: 9] *each remittance occurring shortly after payment of a tranche of the Cash Consideration was made by the True Companies to the defendant*. [note: 10] According to the plaintiff, a balance sum of S$558,327.76 remained due from the defendant to the plaintiff from the moneys paid by the True Companies.

15 Throughout this entire period (*ie*, between May 2010 to August 2010), all moneys received from the True Companies as payment of the Cash Consideration was recorded in the defendant's accounting records as *an amount due to the plaintiff*; and the plaintiff's accounting records also reflected the same amount as *a sum due from the defendant*. Each remittance made by the defendant to the plaintiff was also subsequently recorded in the defendant's accounting records as a reduction in the amount due to the plaintiff. [note: 11]

16 Beginning in September 2010, the plaintiff's management, (*ie*, Gerald Lim and Sally Ang, sent emails and a letter to the defendant to request the defendant to pay the plaintiff the remaining Cash Consideration withheld by the defendant (*ie*, S$558,327.76). These emails stated that the plaintiff considered the moneys as belonging to them. None of the directors of the defendant denied the assertions in the emails. [note: 12]

17 In or about October 2010, the plaintiff instructed M/s WongPartnership LLP to issue a statutory demand dated 13 October 2010 to the defendant seeking payment of the sum of S$569,990.86 (which included a separate sum of S$11,663.10 for expenses incurred by the plaintiff on the defendant's behalf). [note: 13] The statutory demand stated the BSA as the basis of the claim for the remaining Cash Consideration. The defendant replied through a letter from their then solicitors, M/s Wong Tan & Molly Lim LLC, dated 15 October 2010, wherein *it did not deny the basis of the plaintiff's demand*, but merely stated that it was entitled to raise certain set-offs "given the business relations, inter-company finances and close connection between the parties". [note: 14]

18 On or about 19 October 2010, the plaintiff was placed under provisional liquidation by way of a resolution passed by the plaintiff's board of directors. The plaintiff was subsequently placed under creditors' voluntary winding up on 16 November 2010. During a creditors' meeting held for this

purpose, Hardie presented to the plaintiff's creditors the plaintiff's Statement of Affairs ("SOA") which stated, *inter alia*, the following: [note: 15]

TRADE DEBTOR AND INTERCOMPANY DEBTOR SCHEDULE

Description	**NBV S$**	**Realisable Value %**	**Liquidation Value S$**
Accounts receivable	10,781.79	25%	2,695.45
Astique Medical Pte ltd [sic]	1,605.00	100%	1,605.00
Healthtrends Medical Group Cash	250,000.00	100%	250,000.00
Healthtrends Medical Group Transfer of Debt	481,880.36	0%	-
Healthtrends Medical Investment	***453,617.86***	100%	***453,617.86***
Healthtrend Medical Specialist Pte Ltd	(7,582.34)	100%	(7,582.34)
Healthtrends Medical Holdings Pte Ltd	(50,835.58)	100%	(50,835.58)
	1,139,467.09		649,500.39

[emphasis added]

19 The SOA was signed and certified by Hardie on 12 November 2010 verifying that the contents of the SOA were true and accurate – *ie*, that the sum of S$453,617.86 was due and owing from the defendant to the plaintiff. This was also confirmed by Hardie under cross-examination, [note: 16] though he claimed to have subsequently changed his mind as to the accuracy of the SOA after discussions with Baker Tilly Consultancy (Singapore) Pte Ltd ("Baker Tilly"). [note: 17]

20 According to the plaintiff, the sum of S$453,617.86 stated in the SOA constituted the outstanding amount ("the Outstanding Sum") due from the defendant to the plaintiff from the Cash Consideration paid by the True Companies under the BSA, after taking into account various debits and credits between the plaintiff and the defendant. The Outstanding Sum thus formed the subject matter of the plaintiff's claim in this action.

21 Following the appointment of liquidators, the liquidators or their solicitors wrote to the defendant or its solicitors to demand the return of the Outstanding Sum on three separate occasions. The only responses from the defendant's solicitors were holding responses. [note: 18]

22 Subsequently, the plaintiff commenced the present action on 26 January 2011 and served the Writ of Summons and Statement of Claim on the defendant's solicitors on the same day. [note: 19] In its original Defence and Counterclaim filed on 21 February 2011, the defendant again did not deny that the plaintiff was the beneficial owner of the Outstanding Sum. Instead, it pleaded a counterclaim based upon various expenditures which it alleged was incurred at the plaintiff's request and pursuant to an agreement between the parties and it also counterclaimed payment for alleged management services rendered by it to the plaintiff. [note: 20]

23 It was only until 27 May 2011 when Hardie filed a reply affidavit resisting the plaintiff's application for summary judgment that the issue as to the beneficial ownership of the Cash

Consideration was first raised by the defendant against the plaintiff's claim.

The plaintiff's case

24 The plaintiff's case in seeking to recover the Outstanding Sum was as follows: [note: 21]

(a) The Outstanding Sum comprised moneys paid by the True Companies to the defendant as payment of the Cash Consideration under the BSA between the True Companies and the plaintiff;

(b) The moneys were paid to the defendant solely as the plaintiff's nominee; and

(c) The defendant was obliged to pay the moneys received from the True Companies to the plaintiff as money had and received by the defendant to the use of the plaintiff and/or as a bare trustee, being nothing more than a nominee of the plaintiff for the purpose of receiving the moneys from the True Companies.

25 During oral submissions, counsel for the plaintiff acknowledged that he was not seriously pressing the alternative cause of action that there was a bare trust between the plaintiff and the defendant. [note: 22] The plaintiff was therefore relying primarily on the cause of action of money had and received.

The defendant's case

26 In response, the defendant submitted that the Cash Consideration (including the Outstanding Sum) was vested beneficially in itself for the following reasons:

(a) There was no agreement or undertaking on the part of the defendant that, as between the plaintiff and the defendant, the latter would be the former's "nominee" for the purpose of receiving the Cash Consideration from the True Companies; [note: 23]

(b) There was in existence an agreement or understanding between the relevant parties (*ie*, the CJ Group and the defendant, and the plaintiff and the defendant) that the Cash Consideration was the true and exclusive consideration for shares issued by the defendant to CJ Group under the SSA; [note: 24] and

(c) The plaintiff was estopped by convention from denying that the beneficial ownership of the Cash Consideration from the True Companies vested beneficially in the defendant. [note: 25]

Issues

27 The following issues arose for my consideration:

(a) Was the plaintiff entitled to the Cash Consideration, which the True Companies paid to the defendant, as moneys had and received by the defendant to the use of the plaintiff?

(b) Was the plaintiff estopped by convention from denying that the beneficial ownership of the Cash Consideration vested in the defendant?

The reasons for the court's decision

The plaintiff was entitled to the Cash Consideration paid to the defendant as moneys had and

The plaintiff was entitled to the cash consideration paid to the defendant as moneys had and received

The defendant received the moneys from the True Companies as the plaintiff's nominee

28 The plaintiff's action in money had and received rested largely on clear documentary evidence – namely, the terms of the Written Agreements. Clause 3.3 of the BSA clearly stipulated that the defendant was to be paid the Cash Consideration *as a nominee of the plaintiff*, while the SSA indicated that the consideration for the issued shares was for the nominal amount of S$1. The Written Agreements were entered into on the same day (17 March 2010).

29 The directing minds of both the plaintiff and the defendant, (*ie*, Hardie and Kong), were involved in the negotiation of both the Written Agreements and undisputedly had *actual knowledge* of the terms and content of both agreements. Thus, any suggestion by the defendant that its directors were unaware of the terms of the BSA, or that the BSA could not in anyway affect the relationship between the plaintiff and the defendant, was in my view without merit.

30 In legal terminology, the word "nominee" as utilized in cl 3.3 of the BSA is often used interchangeably with the word "agent" (see *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 at [19] – [24]; *Neo Kok Eng v Yeow Chern Lean and Another Suit* [2008] SGHC 151 at [102] and [103]). The plaintiff therefore submitted that the defendant had collected the Cash Consideration *merely as the plaintiff's agent*. In refusing to pay over the Outstanding Sum to the plaintiff upon demand, the plaintiff was thus entitled to bring an action in money had and received against the defendant (see Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 19th Ed, 2010) at para 6-100 ("*Bowstead and Reynolds*"); *Halsbury's Laws of Singapore*, vol 15 (2006 Reissue) at [180.241]).

31 Although the defendant sought to contest the validity of the plaintiff's cause of action, [note: 26] none of the defendant's witnesses could provide a meaningful account as to why the word "nominee" was utilized in cl 3.3 of the BSA and/or how it was to be interpreted if not as suggested by the plaintiff. Under cross-examination, it became apparent that Hardie simply could not *reasonably differ* from the objective understanding of the word "nominee" as adopted by the plaintiff: [note: 27]

> Q: Dr Hardie, if, as you say, everyone was in agreement and therefore you were clear that they were going to pay the funds to [the defendant], why then do you feel the need to insert the word "nominee" in the agreement?
>
> [Hardie]: I am not the one who inserted the word "nominee". All parties were agreeable as to how to term this and then the word "nominee" was inserted.
>
> Q: By who?
>
> [Hardie]: Eventually, I guess it was the lawyers who did the editing of the documents there and then.
>
> Q: Are you saying that the lawyers did this without instructions from their clients?
>
> [Hardie]: I did not say that. I said that all parties were agreeable, hence, the lawyers inserted the "nominee"…

Q: … Is that your position? That because as far as you are concerned, everyone is on the same page here, there is no need to specify in this agreement that the money must come to [the defendant]. You were content to have the words "as directed by the purchaser"?

[Hardie]: Your Honour, I would like to confirm that.

Q: Then I put it to you that the insertion of the word "nominee" has no purpose.

[Hardie]: I disagree, your Honour.

32 Indeed, had it been the intention of all parties that the Cash Consideration was to be vested beneficially in the defendant as being the true and exclusive consideration for the shares issued by the defendant, then the BSA and the SSA would have been worded differently.

33 The defendant also submitted that an action for money had and received "by a third party" (*ie*, the plaintiff) should be limited to specific scenarios which did not apply on the present facts, citing Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract (Second Singapore and Malaysian Edition)* (Butterworths Asia, 1998) at pp 1122–1124 as authority for this position. [note: 28]

34 In my view, the defendant's argument was misconceived. First, no explanation was provided by the defendant as to what these "specific scenarios" are. Secondly, and more importantly, the learned author of the cited reference was expounding on third-party scenarios where the plaintiff who was suing for money had and received was not a party to the contract it was relying on. In the present case, however, the plaintiff *was the original contracting party* with the True Companies and its cause of action of money had and received was juristically sourced to the *agency relationship* (rather than a contractual one) between the plaintiff and the defendant. As mentioned above at [30], it is trite law that a principal can sue its agent for money had and received if the latter has received money on the principal's behalf, whether or not the money was received by the agent from the principal himself or a third party.

35 In the result, based on the plain reading of the Written Agreements, the defendant was clearly the agent of the plaintiff with regard to the receipt of the Cash Consideration. The evidential burden therefore shifted to the defendant to show that when the circumstances *behind* the Written Agreements were revealed, there would still be a strong legal basis upon which the defendant could legitimately claim beneficial ownership of the Cash Consideration.

The defendant has no legal basis to claim beneficial ownership of the Cash Consideration

(1) There was no clear agreement or understanding that the Cash Consideration was the consideration for the defendant's shares being issued to CJ Group under the SSA

36 Throughout the trial, the defendant's case hinged primarily on its allegation that there was an agreement or understanding between the relevant parties (*ie*, CJ Group and itself; and the plaintiff and itself) that the Cash Consideration was the true and exclusive consideration for the defendant's 5,232,610 shares issued to CJ Group under the SSA ("the Alleged Agreements"). This appeared to be the only basis upon which the defendant could claim that it had beneficial ownership of the Cash Consideration. In fact, counsel for the defendant candidly acknowledged during oral submissions that "if the [Cash Consideration] is not for the shares, then the basis of [the defendant's] defence falls". [note: 29]

(A) The defendant's case vis-à-vis the Written Agreements

37 The defendant's case was a difficult one to mount right from the start because it clearly contradicted the Written Agreements, both of which contain entire agreement clauses (see cll 13.1 of the BSA and 8.3 of the SSA). [note: 30] Each of such clauses stipulated that each agreement contained the whole agreement between the contracting parties. Although the plaintiff was not entitled to rely on the entire agreement clause of the SSA since it was not a party to that contract, and the entire agreement clause in the BSA did not bind the defendant as it was not a party thereto, the defendant's case was nonetheless *evidentially weakened* to the extent that the Alleged Agreements ran counter to the formally drafted agreements. I would add that the plaintiff did not rely on s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) to preclude the defendant from relying on the Alleged Agreements.

38 The defendant's witnesses (*ie*, Hardie and Kong) gave conflicting evidence during cross-examination as to how the Alleged Agreements were to be considered vis-à-vis the Written Agreements. While Hardie admitted that the Alleged Agreements were not reflected at all in the Written Agreements, [note: 31] Kong insisted on the contrary that the insertion of the word "nominee" in cl 3.3 of the BSA sufficiently reflected the Alleged Agreements between the parties. [note: 32] In my view, Kong's interpretation of the word "nominee" was a bare assertion which could not be substantiated by any objective evidence.

(B) The defendant's decision not to call its legal advisors and external auditors at trial

39 It was also telling that despite the difficulties the defendant would face in arguing against the plain reading of the Written Agreements and the defendant's financial statements, it had decided not to call its legal advisors (who vetted or drafted the Written Agreements) and external auditors (who prepared the financial statements) as witnesses for the trial.

40 Assuming that the defendant was indeed telling the truth with regard to the Alleged Agreements, its legal advisors and external auditors could have testified to great effect in the defendant's favour. For example, its legal advisors could have corroborated Kong's account as to the reason(s) why the word "nominee" was utilized. The same legal advisors could also have explained why the alleged "true consideration [for the issued shares could] not be reflected in the [SSA]" as the defendant so claimed. [note: 33]

41 Similarly, the defendant's external auditors could also have given evidence to explain why the financial statements of the defendant reflected the plaintiff's position and not the defendant's, if the defendant's version was correct.

42 Therefore, I drew an adverse inference against the defendant for its refusal to call its legal advisors and external auditors to corroborate its evidence.

43 With the foregoing in mind, I now turn to consider the Alleged Agreements which the defendant claimed to have existed: firstly, between CJ Group and itself; and secondly, between the plaintiff and itself.

(C) THE ALLEGED AGREEMENT OR UNDERSTANDING BETWEEN THE DEFENDANT AND CJ GROUP

44 The defendant first claimed that there was an agreement or understanding with CJ Group (the contracting party to the SSA) that the Cash Consideration was intended to be the true and exclusive

consideration for the shares issued under the SSA. According to the defendant, John Wee had informed the defendant that if the SSA showed that the CJ Group was paying $1.25m for the shares in the defendant, the CJ Group would require internal approval which would delay the process. To avoid the alleged delay, the consideration for the shares of the defendant was therefore stated in the SSA to be a nominal sum of S$1. Consequently, the Cash Consideration under the BSA was stated to be part of the consideration to be paid to the plaintiff by the True Companies for the plaintiff's assumption of liabilities under the BSA. Having considered the evidence in totality, I was not persuaded that the aforementioned agreement or understanding between CJ Group and the defendant existed for the following reasons.

45 Firstly, Patrick Wee (director of CJ Group) had categorically denied the defendant's allegation under cross-examination. Patrick Wee had claimed that, as the *sole* director of CJ Group, he would have no difficulty internally approving the investment in the defendant company even though there was another shareholder in the CJ Group. He stressed that the Cash Consideration was not for the acquisition of the shares. He also pointed out that no financial information had been provided to John Wee or him from which they could have assessed the value of the shares before allegedly agreeing to pay the Cash Consideration for the shares. The defendant was not able to produce any documentary evidence to contradict him on this point. Indeed, neither Hardie nor Kong referred to any financial information which was disclosed to John or Patrick Wee to enable either to assess the value of the shares.

46 Secondly, as mentioned at [10] above, the completion of the SSA was supposed to take place simultaneously with the completion of the sale and purchase of the businesses of the True Companies pursuant to the BSA but did not. Upon completion under the SSA, the defendant was to deliver to the CJ Group various documents including the share certificate for the shares. Upon completion under the BSA, the True Companies were to pay the first of the four instalments of the Cash Consideration to the plaintiff. The first instalment was for $500,000 and the subsequent three instalments were for $250,000 each. The subsequent three instalments were required under the BSA to be paid on or before the last day of each calendar month commencing on or before the last day of the month immediately after the month in which completion was effected (see cll 3.2.1 and 3.2.2 of the BSA). As it turned out, completion of the BSA was on 24 April 2010. The True Companies paid the first instalment of $500,000 on or about that date apparently without receiving the share certificate because the SSA was completed only on 2 June 2010.

47 It appears that the CJ Group never chased for the issuance of the shares to it, even though the first instalment was already paid (by the True Companies). In any event, under the BSA, the True Companies' payment of the Cash Consideration is not conditional upon the CJ Group receiving the shares. These points supported Patrick Wee's evidence that the Cash Consideration was not in payment for the shares and contradicted the defendant's allegation that there was an agreement with the CJ Group that the Cash Consideration was for the shares.

48 Thirdly, although Kong said that the solicitors representing the parties were aware right from the beginning of the drafting of the Written Agreements that the Cash Consideration was for the acquisition of the shares, this point was not inserted in the initial drafts of the Written Agreements.

49 Fourthly, the parties were scheduled to execute the Written Agreements at 1pm of 17 March 2010. Yet it was not until 11.55am of 17 March that Kong sent an email to John Wee enclosing a draft of the SSA which showed the Cash Consideration as being payable for the shares. To this, John Wee replied by email at 12.14pm to say that the point had not been agreed and he was not inclined to agree although the matter could be discussed. It was significant that there was no written reply by Kong to say that the defendant was unable to accommodate the wishes of the CJ Group and that the

SSA should reflect the true consideration for the shares. Eventually, the SSA was executed later that day with the provision already mentioned in cl 3.3 whereby the True Companies were to credit the account of the plaintiff or the defendant (as the plaintiff's nominee) with the payments of the Cash Consideration.

(D) THE ALLEGED AGREEMENT OR UNDERSTANDING BETWEEN THE PLAINTIFF AND THE DEFENDANT

50 To substantiate its allegation about the alleged agreement between the plaintiff and the defendant, the defendant drew this court's attention to various pieces of evidence.

51 The defendant relied on a memorandum of proposal ("the Memorandum") dated 17 March 2010 which was prepared by Hardie, Kong, Gerald Lim and Sally Ang and circulated to the defendant's board of directors ("the BOD") prior to a BOD meeting on the 15 April 2010, after the Written Agreements were executed. Section 2 of the Memorandum read as follows: [note: 34]

> In consideration for the above and as an integral part of the transaction, [the defendant] will issue 5.6 [*sic*] million shares (equivalent to 2% based on post-issuance enlarged share capital) to [CJ Group]; whereupon [the True Companies] will pay $1.25 million in 4 tranches.

Both Kong and Hardie stated in their affidavits of evidence-in-chief ("AEICs") [note: 35] that s 2 of the Memorandum sets out the "true nature" of the transactions in the Written Agreements.

52 In my view, s 2 of the Memorandum did not unequivocally state that the Cash Consideration was consideration for the shares only – a position Kong himself subsequently affirmed under cross-examination. [note: 36]

53 More importantly, it seemed to me that the Memorandum was a self-serving document. It will be recalled that there was no written assertion by Hardie or Kong to either of the Wee brothers to say that the Cash Consideration was to pay for the acquisition of the shares until Kong's late email sent at 11.55am of 17 March 2010 (see [49] above). To this, John Wee had disagreed. Up to the time when the Written Agreements were executed, the defendant apparently had no other directors except for Hardie and Kong. However, by 15 April 2010, the defendant had additional directors like Prof Wong Poh Kam as a non-executive director and Bill Ng Eng Tiong ("Bill Ng") as an alternate director. [note: 37] It appears to me, therefore, that the Memorandum was meant to persuade the other directors about the value in proceeding with the Written Agreements. Even then, the Memorandum did not state unequivocally what the defendant was alleging before me.

54 Secondly, the defendant relied on the transcript and minutes of the BOD meeting held on 15 April 2010. This was a meeting attended by, *inter alia*, Hardie, Kong, Gerald Lim, Sally Ang and Bill Ng. Paras 2.3 and 2.4 of the minutes of the BOD meeting read as follows: [note: 38]

> 2.3 [Bill Ng] noted *that (a) the exchange of 2% of [the defendant's] shares for $1.25M* (payable in four (4) instalments) plus the S$800K in lease deposit effectively valued [the defendant] at S$100M; and (b) the success of the transaction would depend on good execution.
>
> 2.4 [Some other directors] sought and obtained confirmation from [Hardie] and [Kong] that the present transaction would not be a sales and purchase of [the True Companies]. It would be a transaction wherein [the plaintiff] would deliver the outstanding entitlements of [the True Companies'] customers for an exchange of [the True Companies'] fixed assets, equipments, investors (if any), lease deposit (S$800K), customer base … *plus a premium on True Companies's*

purchase of 2% [of the defendant] for S$1.25M.

[emphasis added]

There was also a post-meeting addendum of the minutes which read: [note: 39]

> [The defendant's] current valuation is estimated at S$40M. 2% of the Defendant = $800K. Hence the premium is S$450K.

55 According to the defendant, the defendant's BOD proceeded with the understanding during the meeting that the Cash Consideration would be treated as payment for the issued shares of the defendant at a valuation of S$1.25m. This understanding therefore bound the plaintiff's directors since they were present at the meeting but did not object to it.

56 In my view, the defendant's suggested inference that there was an understanding between the plaintiff and the defendant *did not follow* from the transcript or minutes of the BOD meeting. It appears that the participants of the meeting were simply considering the economic benefits and detriments of the Written Agreements as a collective whole but *at no point was it made clear that the Cash Consideration vested exclusively in the defendant for the shares*. [note: 40] In fact, relying on the transcript, one could also have construed the Cash Consideration as being intended to vest beneficially in the plaintiff in order to allow the latter to service customers from the True Companies: [note: 41]

PROF WONG:	Now, you are saying that they would pay us 1.25 million, right?
YC LEE:	Yah, this is second part of the deal.
PROF WONG:	Yah.
[Bill Ng]:	In four tranches.
YC LEE:	Yah.
PROF WONG:	In four tranches, then – and then but in exchange – so now we are getting all these customer asset [*sic*] and all that, *plus 1.25 million over four tranches, and in exchange, right, we have to service the current customer [sic] they have, their obligations*.
[Gerald Lim]:	*Yes*.

[emphasis added]

57 Moreover, the plaintiff pointed out [note: 42] that following the BOD meeting, Sally Ang had sent an email to Kong dated 16 April 2010 attaching a table clearly showing the Cash Consideration as part of *what the plaintiff would be receiving in exchange* under the BSA. Kong accepted the table and requested that it be attached to the minutes of the BOD meeting without comment. [note: 43]

58 The third piece of evidence relied on by the defendant was an addendum to notice ("the Addendum") to an extra-ordinary general meeting ("EOGM") held by the defendant on 31 May 2010 to

obtain the shareholders' approval of the issuance of the approximately 5.2 million shares to CJ Group. Gerald Lim's proxy, Sally Ang, attended the EOGM in his stead although the former did receive the Addendum prior to the EOGM. [note: 44] The relevant paras in the Addendum which supported the defendant's case were as follows: [note: 45]

> (2.3) In substance, this transaction comprises two interlinked parts …
>
> (2.5) The second part of the transaction is essentially a cash payment of $1.25 million. Although this sum was intended for the purchase of 2% (or 5,232,600 new shares) of [the defendant's] enlarged capital, [CJ Group] requested for their own internal reasons that these shares be issued to them at a nominal value of $1.00.
>
> (2.6) As a collective whole the two inter linked parts of the transaction is [*sic*] to the interest of [the defendant] in general and [the plaintiff] in particular.

59 However, I found it unlikely that if what was represented to the shareholders was true, it should appear so clearly *only* on 31 May 2010 but with no corroborating evidence from any correspondence between the defendant and CJ Group prior to 17 March 2010.

60 In all likelihood, the quoted paras (especially para 2.5) in the Addendum were simply convenient explanations offered by Hardie and Kong to their shareholders at the EOGM in order to obtain their approval – after the Written Agreements had been signed – for the issuance of new shares to CJ Group. The representation found in the Addendum was therefore *evidentially insufficient* to support the defendant's case that *an agreement or understanding existed between the relevant parties* that the Cash Consideration was intended as consideration solely for the issuance of the defendant's shares to CJ Group.

61 Finally, the defendant highlighted that HTMG (see above at [4]) had issued guarantees (totalling S$1,208,674.98) to the landlords of two different leases in order to secure the landlords' novation of their respective leases to the plaintiff as required under cl 4.1 of the BSA. The defendant appeared to be arguing that the potential liabilities undertaken by HTMG somehow meant that the defendant (as the indirect parent company of HTMG) must have been the intended beneficial owner of the Cash Consideration.

62 I did not agree that this piece of evidence supported that argument. In my view, this piece of evidence was *consistent* with the view that the transactions in both Written Agreements were probably considered *as a collective whole* by the companies within the Healthtrends Group. However, at the material time when the Written Agreements were executed, the defendant was content for the SSA to state that the consideration for the shares was $1 and for the BSA to state that the Cash Consideration was part of the overall consideration payable by the True Companies to the plaintiff for the plaintiff to assume various liabilities of the businesses of the True Companies. It was not for the court to re-write the Written Agreements for the defendant or the plaintiff. It was open to the defendant to reach some sort of agreement with the plaintiff that the Cash Consideration would belong to the defendant but no such agreement was ever reached. The defendant was complacent because both of them belonged to the same group.

(2) The acts of the defendant subsequent to the Written Agreements contradict its claim that the Cash Consideration vested beneficially in the defendant

63 Moreover, the acts of the defendant (through its directors) subsequent to the Written Agreements either did not support or actually contradicted the defendant's claim about the Alleged

Agreements.

(A) The remittance of part of the Cash Consideration from the defendant to the plaintiff

64 It was undisputed that the defendant had, between 5 May 2010 and 4 August 2010, remitted a total of S$577,058.19 to the plaintiff; *each remittance occurring shortly after the True Companies paid a tranche of the Cash Consideration to the defendant*. In response, the defendant submitted that the moneys remitted were merely "operating capital" [note: 46] which "reflected the overall policy and practice of the defendant assisting subsidiaries within the Healthtrends Group". [note: 47]

65 However, I found that the defendant's submission did not sit well with the email correspondence between Sally Ang (representing the plaintiff) and Hardie (representing the defendant) on 2 June 2010. [note: 48] On that day, Sally Ang had sent an email to Hardie requesting that the funds received from the True Companies be remitted to the plaintiff, without any hint that she had deemed those funds as vesting beneficially in the defendant:

> Hi Dr Hardie
>
> Kindly advise when can we have the $250k 2nd receivable funds from True Spa, we need the funds for issuing May 2010 rental payment to Royal Brother & Ngee Ann Mgt [*sic*] …

In response, Hardie sent out the following email (while copying Gerald Lim and Kong in the email tread) which also did not suggest that the funds vested beneficially in the defendant:

> Hi Sally & Gerald,
>
> True Spa's side only disbursed $150k to us … Even then, it was written wrongly and we sent back to them for correction.
>
> I will send you the cheque when they have returned [*sic*] to us.

(B) The accounting records of both the plaintiff and the defendant

66 It was undisputed that a plain reading of the accounting records of both the plaintiff and the defendant supported the plaintiff's case. [note: 49] After each tranche of payment was made to the defendant, both plaintiff and defendant would record in their inter-company accounts that the True Companies had paid a sum to the defendant and that the sum was an account receivable in favour of the plaintiff ("the Management Accounts"). This was confirmed by Kong under cross-examination: [note: 50]

> Q: Coming, then, since you mentioned it, to accounting for it in your books, [the defendant] has accounted for this receipt of $1.25 million as a loan from [the plaintiff]; correct?
>
> [Kong]: I would put it – I cannot remember whether it is a loan, an amount due to or whatever, but *it is an inter-company balance. Yes, correct.*
>
> Q: Then some sums were remitted along the way to [the plaintiff]; correct?
>
> [Kong]: That is correct.

Q: *These sums that were remitted were recorded as payments of loan?*

[Kong]: *Through the inter-company balance.*

[emphasis added]

67 The defendant's Annual Financial Statement for FY 2008 ("AFS 2008") [note: 51] and the plaintiff's SOA as presented to its creditors [note: 52] also indicated that the Cash Consideration vested beneficially in the plaintiff. Crucially, these were important financial documents which were signed and certified by Hardie himself. [note: 53]

68 Para 28 of the "Notes to the Financial Statements" in the defendant's AFS 2008 read as follows:

> **28. Events after the balance sheet date (cont'd)**
>
> On 17 March 2010, another subsidiary, [the plaintiff] entered into an agreement to acquire the businesses of [the True Companies]. The cash consideration received for the acquisition of businesses, which includes assets and liabilities such as unperformed services, is $1,250,000.

69 The plain reading of para 28 supported the plaintiff's case. Subsequently, the plaintiff's SOA presented by Hardie to its creditors also stated that the Outstanding Sum was due and owing *from* the defendant (see above at [18]).

70 In response, Hardie claimed in his AEIC that he had relied on one Mr Mainak Panchal, ("Mainak Panchal") who was the group finance manager to prepare the Management Accounts, which he in turn relied on for the defendant's AFS 2008 and the Plaintiff's SOA. Hardie said he now recognized that they were inaccurate upon the advice of Baker Tilly (see above at [19]). In his own words, Hardie had understood the AFS 2008 and the SOA to be true and accurate up until 27 May 2011 when he changed his mind after receiving Baker Tilly's advice. [note: 54]

71 In my view, Hardie's evidence in relation to the alleged inaccuracies of the Management Accounts, the AFS 2008 and the SOA was not a credible one. During the trial, the defendant decided not to (or failed to) call either Mainak Panchal or Mr Cheng Soon Keong, director of Baker Tilly, to the witness stand. This meant that Hardie's evidence that the Management Accounts were inaccurate remained *wholly uncorroborated.* In any case, the relevant party which could have given objective evidence in support of the defendant's case would have been its external auditors who helped prepare the AFS 2008 (see above at [41]) and not Baker Tilly. The defendant's unwillingness to call its external auditors as witnesses was thus prejudicial to its own case.

72 During oral submissions, counsel for the defendant also acknowledged that if the contents of para 28 of AFS 2008 were reflected in the defendant's Annual Financial Statement for FY 2010 instead, the defendant would have "no case in court". [note: 55]

73 I found this argument to be unpersuasive. In my view, whether the contents of para 28 were reflected in FY 2008 or FY 2010, they were financial statements *prepared by external auditors and signed and certified by Hardie as being true and accurate*. Each would be equally damaging to the

defendant.

(C) The defendant's response to the emails and letter sent by the plaintiff's management

74 Moving beyond the accounting records, I also took into account the defendant's response (or lack thereof) to the emails and letter sent by the plaintiff's management to the defendant in late September 2010. I found it striking that the defendant did not even for one moment deny liability when the plaintiff's management first requested over email, [note: 56] and subsequently demanded over a formal letter, [note: 57] that the defendant pay the plaintiff the Outstanding Sum. As mentioned earlier (see above at [16]), these emails and letter clearly stated that the plaintiff considered the Cash Consideration as belonging to them.

(D) The defendant's response to the statutory demand sent and the writ of summons served by the plaintiff

75 Even when the defendant was faced with a statutory demand (*ie*, the plaintiff's statutory demand dated 13 October 2010 from WongPartnership (see above at [17])), [note: 58] the defendant's response through a letter from their then solicitors, M/s Wong Tan & Molly Lim LLC, dated 15 October 2010, did not deny the basis of the plaintiff's demand (that the Cash Consideration vested beneficially in the plaintiff), but merely stated that it was entitled to raise certain set-offs against the plaintiff "given the business relations, inter-company finances and close connection between the parties". [note: 59] This was confirmed by Hardie under cross-examination: [note: 60]

> Q: Do you assert that [the] response from Messrs Wong Tan & Molly Lim does not say that the sum or any part of the sum of $1.25 million received from the True Companies under the [BSA] does not belong to [the plaintiff]?
>
> [Hardie]: I agree; it does not say it.
>
> Q: You will recall that *Messrs Wong Tan & Molly Lim were the same firm who advised you and [Kong] at that 17 March 2010 meeting with John Wee and Patrick Wee*, and you were very clear, as well as [Kong], that you had communicated the understanding you say you have with [John Wee] and [Patrick Wee], that the $1.25 million was for the shares and not for the transfer of assets?
>
> [Hardie]: Yes.
>
> Q: *But they did not state this in [the letter in response to the statutory demand]?*
>
> …
>
> Q: [Can you] confirm that your lawyers in their substantive response [in the letter] do not mention any reference to an understanding of an agreement that the sum of monies paid by True Spa under the [BSA] does not belong to [the plaintiff]?
>
> [Hardie]: That is correct, your Honour.
>
> [emphasis added]

76 Hardie's concession on this point was significant. To succeed in its defence, the defendant would have to stand by the incredulous account that its legal advisors who knew about the Alleged Agreements chose not only to draft the Written Agreements as they currently stood, but also failed

to bring up the Alleged Agreements in the response letter to the plaintiff dated 15 October 2010. The simpler and more sensible explanation must be that neither Hardie nor Kong nor the defendant's legal advisors had *believed or acted as if the Cash Consideration was vested beneficially in the defendant at the material time*.

77 To sum up, I reiterate that the defendant's failure to deny the basis of the plaintiff's demand (that the Cash Consideration vested beneficially in the plaintiff) continued even after the plaintiff's Writ of Summons was served on 26 January 2011 (see above at [22]).

78 For the foregoing reasons, I was of the view that the defendant was not entitled to claim beneficial ownership of the Cash Consideration. The plaintiff was therefore rightfully entitled to an action for money had and received to recover the Outstanding Sum.

The defendant could not make out the elements of estoppel by convention to deny the plaintiff's entitlement to the Cash Consideration

79 In its Defence, the defendant also submitted that the plaintiff was estopped (based on the doctrine of estoppel by convention) from denying that the Cash Consideration belonged to the defendant. In my view, the defendant's reliance on the doctrine of estoppel was futile.

The elements of estoppel by convention

80 It was recently laid down by the Court of Appeal that for estoppel by convention to operate, the following elements must be present (*Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 at [31]):

> (a) The parties must have acted on "an assumed and incorrect state of fact or law" in their *course of dealing;*
>
> (b) The assumption must be either shared by both parties pursuant to *an agreement or something akin to an agreement*, or made by one party and acquiesced to by the other; and
>
> (c) It must be *unjust or unconscionable* to allow the parties (or one of them) to go back on the assumption.
>
> (a) [emphasis added]

Application of the law to the facts

81 In view of my determination that there was no agreement or understanding that the Cash Consideration was exclusively for the shares, the defendant's argument on estoppel by convention necessarily fails since it would not be able to show that both the defendant and the plaintiff had acted on the state of facts as alleged by the defendant. Accordingly, the defendant would also not be able to rely on any injustice or unconscionability.

Conclusion

82 For the foregoing reasons, I granted judgment in favour of the plaintiff against the defendant for the Outstanding Sum of S$453,617.86, with interest at the rate of 5.33% per annum from the date of the writ, *ie*, 26 January 2011, to the date of full payment.

83 I also ordered the defendant to pay the plaintiff the costs of the trial, fixed at S$100,000 plus

reasonable disbursements to be agreed failing which it would be fixed by the court. As regards any order for costs in the cause, which had been made in the course of this action, such costs were to be paid by the defendant to the plaintiff to be taxed if not agreed.

[note: 1] Hardie's AEIC at [7] – [10].

[note: 2] Hardie's AEIC at [29].

[note: 3] Agreed Bundle of Documents ("ABD") Vol 2 at 512.

[note: 4] ABD Vol 2 at 513.

[note: 5] ABD Vol 2 at 562 – 572.

[note: 6] ABD Vol 2 at 566.

[note: 7] NE 17 May 2012 pp 10 (line 14) – 11 (line 2).

[note: 8] Hardie's AEIC at [96].

[note: 9] Hardie's AEIC at [98].

[note: 10] Hardie's AEIC at [99] – [102]; Gerald Lim's AEIC at [39].

[note: 11] ABD Vol 4 at 1430-1431.

[note: 12] ABD Vol 4 at 1343-1350.

[note: 13] ABD Vol 4 at 1406-1407.

[note: 14] ABD Vol 4 at 1416-1417.

[note: 15] ABD Vol 5 at 1675H.

[note: 16] Hardie's AEIC at [127]; Notes of Evidence ("NE"), 18 May 2012 at pp 57 (line 21)- 58 (line 4).

[note: 17] Hardie's AEIC at [133]; NE, 18 May 2012 at pp 62 (line 17) – 63 (line 8).

[note: 18] ABD Vol 5 at 1770A, 1783, 1809-1810, 1813, 1814 and 1825.

[note: 19] Setting Down Bundle at 1-13.

[note: 20] Setting Down Bundle at 14-18.

[note: 21] Plaintiff's written submissions at [20].

[note: 22] NE, 23 May 2012 at p 63 (lines 10-12).

[note: 23] See Defendant's opening statement at [62] and Defendant's written submissions at [21].

[note: 24] See Defendant's opening statement at [34] and Defendant's written submissions at [28].

[note: 25] See Defendant's opening statement at [69]-[73] and Defendant's written submissions at [51]-[52].

[note: 26] See Defendant's written submissions at [11]–[21].

[note: 27] NE, 18 May 2012 at pp 10 (line 21) – 11 (line 24).

[note: 28] Defendant's closing submissions at [15] – [19].

[note: 29] NE, 23 May 2012 at p 14 (lines 15–17).

[note: 30] ABD Vol 2 at 519, 569.

[note: 31] NE, 18 May 2012 at p 6 (lines 3–10).

[note: 32] NE, 16 May 2012 at pp 79 (lines 11-20); 84 (line 21) - 85 (line 6).

[note: 33] NE, 16 May 2012 at p 64 (lines 8 – 9).

[note: 34] ABD Vol 2 at 543.

[note: 35] Kong's AEIC at [55]; Billy Hardie's AEIC at [56].

[note: 36] NE, 16 May 2012 at pp 89 (line 21) to 92 (line 2).

[note: 37] See Plaintiff's Core Bundle at [350] and NE 18/5/2012 p 83 lines 10-16

[note: 38] ABD Vol 6 at 2241.

[note: 39] ABD Vol 6 at 2242.

[note: 40] See plaintiff's closing submissions at [64].

[note: 41] ABD Vol 7 at 2482 – 2483.

[note: 42] Plaintiff's written submissions at [66].

[note: 43] ABD Vol 3 at 835 – 836.

[note: 44] NE, 15 May 2012 at p 74 (lines 13 – 17).

[note: 45] ABD Vol 3 at 895.

[note: 46] Defendant's written submissions at [50].

[note: 47] Defendant's opening statement at [55].

[note: 48] ABD Vol 3 at 938.

[note: 49] See ABD Vol 4 at 1430 – 1431.

[note: 50] NE, 16 May 2012 at p 88 (lines 14 – 25).

[note: 51] ABD Vol 4 at 1303.

[note: 52] ABD Vol 5 at 1675H.

[note: 53] ABD Vol 4 at 1250; ABD Vol 5 at 1675.

[note: 54] Hardie's AEIC at [133]; NE, 18 May 2012, pp 55 (lines 3–13) and 63 (lines 3–8).

[note: 55] NE, 23 May 2012 at p 50 (lines 4–6).

[note: 56] ABD Vol 4 at 1348 (Sally's email dated 23 Sept 2010); and ABD Vol 4 at 1343-1344(Gerald Lim's email dated 26 Sept 2010).

[note: 57] ABD Vol 4 at 1365.

[note: 58] ABD Vol 4 at 1406-1407.

[note: 59] ABD Vol 4 at 1416-1417.

[note: 60] NE, 18 May 2012 at pp 73 (line 9) – 75 (line 5).