IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 72

Suit No 672 of 2015

Between

Centre for Laser and Aesthetic Medicine Pte Ltd

… *Plaintiff*

And

(1) Goh Pui Kiat
(2) Wong Hwee Leng
(3) GPK Clinic (Orchard) Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Contract] — [Contractual terms] — [Express terms] — [Interpretation]
[Equity] — [Fiduciary relationships] — [Duties]
[Tort] — [Confidence] — [Breach]
[Tort] — [Conspiracy] — [Unlawful means conspiracy]

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Centre for Laser and Aesthetic Medicine Pte Ltd
v
Goh Pui Kiat and others

[2017] SGHC 72

High Court — Suit No 672 of 2015
Chua Lee Ming J
4–6, 11, 17, 21 October 2016; 20 February 2017

6 April 2017

Chua Lee Ming J:

Introduction

1 The plaintiff, Centre for Laser and Aesthetic Medicine Pte Ltd ("CLAM"), was established by two doctors – Dr Kelvin Goh Yong Chiang ("Kelvin") and the first defendant, Dr Goh Pui Kiat ("Goh PK"). CLAM was in the business of running a medical clinic called Orchard MD Clinic & Surgery Singapore ("Orchard Clinic") located at Ngee Ann City Tower B #08-03, Singapore. Orchard Clinic provided general medical services as well as aesthetic treatments. CLAM employed both Kelvin and Goh PK to work at the clinic. The services provided by them focused on aesthetic treatments relating to skincare.

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2 The registered directors and equal shareholders of CLAM are Kelvin's wife, Goh Sok Ngoh Jacqueline ("Jacqueline") and the second defendant, Wong Hwee Leng ("Wong"), who is Goh PK's wife. It was not disputed that Kelvin and Goh PK were *de facto* directors of CLAM at all material times.

3 Goh PK and Wong are the two directors and equal shareholders of the third defendant, GPK Clinic (Orchard) Pte Ltd ("GPKPL"). GPKPL owned and operated GPK Clinic (Orchard) ("GPK Clinic") in competition with CLAM and Orchard Clinic.

4 CLAM's claims in this action were as follows:

(a) Goh PK breached his fiduciary duties and/or duty of good faith and fidelity by (i) failing to perform his work at Orchard Clinic since May 2014, (ii) diverting Orchard Clinic patients to GPK Clinic and (iii) poaching and/or soliciting employees away from CLAM.

(b) Goh PK knowingly procured and/or induced CLAM's employees to breach their contracts of employment by instructing them to direct patients and prospective patients of CLAM to GPKPL.

(c) Goh PK, Wong and GPKPL breached their duty of confidentiality to CLAM by improperly copying, using, reproducing, disclosing and/or disseminating CLAM's information relating to its patients and its products.

(d) Wong breached her fiduciary duties to CLAM in connection with the above matters.

(e) Goh PK, Wong and GPKPL conspired with intent to injure CLAM by the above unlawful acts.

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5 On 21 October 2016, I gave my decision which, in summary, was as follows:

(a) I found Goh PK and GPKPL liable for breach of confidentiality. I also found Goh PK and GPKPL liable for conspiracy to injure CLAM through Goh PK's breach of confidentiality.

(b) All of CLAM's other claims were dismissed.

(c) I directed the parties to compute the amount of damages to be paid to CLAM based on certain parameters set out by me. The parties subsequently agreed on the computation of damages at $193,481.38.

(d) I ordered that information relating to patients who had not seen Goh PK at GPK Clinic as of the date of my decision be deleted from the defendants' computers and/or other electronic devices, or destroyed if the information was in hardcopy. I also granted an injunction restraining the defendants from using any such information without prior authorization from CLAM.

6 I subsequently heard the parties on costs after they had reached agreement on the computation of damages. On 20 February 2017, I ordered Goh PK and GPKPL to pay 40% of CLAM's costs and disbursements. I further ordered that the party and party costs paid to CLAM were to be used to satisfy CLAM's outstanding obligations for solicitor and client costs. Any balance thereafter was to be used to reimburse Kelvin for any costs that he had paid on behalf of CLAM.

7 CLAM has appealed against the following:

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(a) The dismissal of its claims save for its claim relating to the poaching of its employees. CLAM confirmed during closing submissions that it was not pursuing the claim relating to the poaching of its employees.

(b) My decision on damages.

(c) My decision awarding CLAM 40% of its costs and disbursements.

8 Goh PK, Wong and GPKPL have appealed against the whole of my decision on costs.

Background

9 Kelvin and Goh PK started working together as partners in 8-11 Clinic & Surgery ("8-11 Clinic") in Yishun, Singapore, in 1994. In 2005, they incorporated Medical Practice Consultants Pte Ltd ("MPC") to own and operate 8-11 Clinic. Kelvin and Goh PK were the only two directors and shareholders of 8-11 Clinic.

10 CLAM was incorporated on 20 January 2006.[1] Jacqueline and Wong each held 50% of the shares in CLAM. Kelvin and Goh PK split the work days at Orchard Clinic between them. Kelvin's assigned days were Tuesdays, Thursdays and alternate Mondays and Saturdays. Goh PK's assigned days were Wednesdays, Fridays and alternate Mondays and Saturdays. It was agreed that profits of CLAM would be split equally between the two couples.[2]

11 On 12 October 2007, Kelvin and Goh PK signed a Confidentiality Contract and Mutual Undertaking[3] ("the Confidentiality Contract") pursuant to which they undertook that:

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(a) "at all times, during [their] lifetime … [Kelvin] and [Goh PK] shall not be allowed to practice any form of aesthetic medicine on his own or jointly with any other third party";

(b) neither of them "shall undertake any other employment whether paid or not; nor be permitted to have any interest in business or connections with any similar or competing business to the aesthetic medicine"; and

(c) neither of them "shall engage himself directly or indirectly, in any other activity which conflicts with the interest and/or operation of the practice of aesthetic medicine".

12 On 5 November 2010, Kelvin, Jacqueline, Goh PK and Wong signed a shareholder agreement ("the Shareholder Agreement") under which they agreed that any one of them could sell the entire stake in their jointly owned companies provided the price was at least "5 times the annual net profit with a service contract of 3 years or similar ratio".[4]

13 On 23 December 2010, Kelvin and Goh PK signed an agreement ("the 2010 Agreement") pursuant to which Kelvin was placed in charge of business operations and development of all the clinics.[5] Kelvin was also "allowed to engage in any business so as to achieve the objective set out in the [Shareholder Agreement]".

14 On 28 May 2012, Kelvin and Jacqueline set up a company called SkintechMD Pte Ltd ("Skintech").[6] Goh PK found out and on 8 November 2013, he commenced Suit No 1023 of 2013 ("Suit 1023/2013") against Kelvin for breach of the Confidentiality Contract. Goh PK alleged that Skintech

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carried on a similar and competing business to that of 8-11 Clinic and Orchard Clinic.

15 Suit 1023/2013 was settled after mediation on 14 February 2014. Kelvin, Jacqueline, Goh PK and Wong entered into a Settlement Agreement dated the same day.[7] The relevant clauses in the Settlement Agreement were as follows:

(a) Clause 2, which provided that the parties had up to 31 December 2016 to procure a sale of CLAM and MPC, subject to certain conditions.

(b) Clause 4, which provided that if the parties failed to procure a sale by 31 December 2016, CLAM and MPC would be sold by way of a closed auction amongst the parties through a simultaneous competitive open bidding process.

(c) Clause 7, which provided that pending the sale of CLAM and MPC, the parties were to "continue with and fulfil their responsibilities, arrangements and operations" of the 8-11 and Orchard Clinics.

(d) Clause 10, which provided that the parties were at liberty to set up any other business or clinics in any location in Singapore.

(e) Clause 12, which provided that the Settlement Agreement superseded all previous agreements, including the Confidentiality Contract, the Shareholder Agreement and the 2010 Agreement.

16 On 19 February 2014, Goh PK incorporated a company called 8-11 Clinic (Orchard) Pte Ltd to operate his new clinic. The new clinic was called

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"8-11 Clinic (Orchard)" and was situated just two units away from Orchard Clinic.

17 On 9 May 2014, Goh PK received a letter from the Ministry of Health informing him that he was not allowed to use the name "8-11" for his new clinic because of the ongoing dispute between Kelvin and himself. Apparently, Kelvin had complained to the Ministry of Health. Kelvin also caused MPC and 8-11 Clinic to commence action in Suit No 473 of 2014 ("Suit 473/2014") against Goh PK and his new company for passing off. Goh PK then changed the name of his company to GPK Clinic (Orchard) Pte Ltd (*ie*, GPKPL). He also changed the name of his new clinic to GPK Clinic (Orchard) (*ie*, GPK Clinic). On 1 August 2014, Suit 473/2014 was struck out.

18 On 12 September 2014, Jacqueline commenced Originating Summons No 871 of 2014 ("OS 871/2014") seeking leave pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) to commence proceedings in the name of CLAM against the defendants. However, the parties reached an agreement that (a) Goh PK and Wong would consent, as directors of CLAM, to a board resolution authorising CLAM to commence an action against them for the breaches set out in OS 871/2014 and (b) Kelvin would be authorized to represent and instruct CLAM in such an action.

19 On 10 June 2015, Jacqueline and Wong passed a board resolution giving effect to the agreement reached ("the Resolution").[8] The Resolution stated as follows:

> That an action by the Company against Dr Goh Pui Kiat, Mdm Wong Hwee Leng and GPK Clinic (Orchard) Pte Ltd in respect of the following allegations (set out in detail below) be hereby authorized, and that Dr Kelvin Goh Yong Chiang (as *de* facto director of the Company) shall have full authority to represent and instruct the Company in any such action:

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…

20 On 3 July 2015, this present suit was filed pursuant to the Resolution.

21 Orchard Clinic ceased operations on 31 March 2016 when the tenancy for its premises at Ngee Ann City Tower B expired.[9]

Whether Goh PK breached his fiduciary duties and/or duty of good faith and fidelity

22 As stated earlier, CLAM's claim was based on allegations that Goh PK (a) failed to perform his work at Orchard Clinic since May 2014, (b) diverted Orchard Clinic patients to GPK Clinic and (c) poached and/or solicited employees away from CLAM.

Whether Goh PK failed to work at Orchard Clinic on his assigned days since May 2014

23 The following facts were undisputed:[10]

(a) Goh PK was assigned to work at Orchard Clinic on Wednesdays, Fridays and alternate Mondays and Saturdays.

(b) After GPK Clinic commenced operations on 19 May 2014, Goh PK's practice was to report for work at Orchard Clinic on his assigned days, attend to administrative tasks, see certain patients who had made appointments to see him and sign the daily cash ledgers of Orchard Clinic against the figures showing the takings of the clinic on his assigned days.

(c) Goh PK would also spend time at GPK Clinic seeing patients there. If a patient arrived at Orchard Clinic, the staff at Orchard Clinic would inform him and he would then either attend to them at Orchard

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Clinic or ask the staff of Orchard Clinic to send the patients to GPK Clinic. The circumstances in which Goh PK asked for patients to be sent to GPK Clinic and his reasons for doing so were in dispute.

(d) On two occasions, Goh PK instructed the staff at Orchard Clinic to administer pre-procedure numbing cream on patients, before sending the patients over to GPK Clinic for treatment.

(e) All fees collected from patients who saw Goh PK at GPK Clinic were kept by GPK Clinic.

(f) The number of patients seen by Goh PK at Orchard Clinic on his assigned days decreased over time. After the beginning of June 2014, Goh PK saw at most eight patients at Orchard Clinic.

(g) From around July or August 2014, the staff of Orchard Clinic stopped scheduling appointments for patients to see Goh PK on his assigned days. When Goh PK's patients called to make appointments, the staff fixed the appointments on Kelvin's assigned days instead.[11] Whether the staff had acted on Kelvin's and/or Jacqueline's instructions remained in dispute. Goh PK found out about the practice and on 6 December 2014, he issued a memorandum to the staff of Orchard Clinic which stated that "[a]ny patients coming on my working days should not be told there is no doctor. I am around either by SMS, whatsapp or at GPK Clinic".

24 CLAM argued that Goh PK could not work at GPK Clinic on his assigned days at Orchard Clinic. I disagreed. It was not disputed that Clause 10 permitted Goh PK to operate GPK Clinic in competition with Orchard Clinic. There was nothing to prevent Goh PK from working at GPK Clinic on

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his assigned days at Orchard Clinic. In addition, as Kelvin himself accepted,[12] there was no reason to blame Goh PK for working at GPK Clinic after the staff at Orchard Clinic stopped fixing appointments on his assigned days and started fixing appointments for Goh PK's patients on Kelvin's assigned days instead. Further, as will be dealt with below, Goh PK was entitled to divert patients from Orchard Clinic to GPK Clinic. Therefore, he could ask for patients to be sent to GPK Clinic although these patients could of course still choose to be treated at Orchard Clinic.

25 In my judgment, what was required of Goh PK on his assigned days was that he carried out his tasks at Orchard Clinic and attended to patients at Orchard Clinic if they chose to be treated there. On the evidence, Goh PK did not fail to perform his work at Orchard Clinic on his assigned days.

Whether Goh PK diverted CLAM's patients to GPKPL in breach of his duties

26 Clause 10 reads as follows:

> The Parties shall be entirely at liberty to set up any other business or clinics in any location in Singapore. For the avoidance of doubt, none of the Parties shall make any allegations or make any claim in respect of diversion of patients/customers from MPC or CLAM.

27 The scope of Clause 10 was central to this issue. It was clear that Kelvin and Goh PK had agreed to a parting of ways. The Settlement Agreement provided the mechanism for the sale of CLAM and MPC. It was common ground that Goh PK wanted the sale process to be completed within a few months whereas Kelvin wanted a period of five years; they compromised on three years.[13] Clause 10 reflected their agreement that, in the meantime, Kelvin and Goh PK could compete with CLAM and MPC. It was not disputed that Clause 10 permitted Goh PK to set up GPK Clinic. The issue

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before me was whether Clause 10 also permitted Goh PK to divert patients from Orchard Clinic to GPK Clinic.

28 Goh PK submitted that it was clear from the second sentence in Clause 10 ("the Second Sentence") that he could divert patients from Orchard Clinic to GPK Clinic. Nevertheless, Goh PK accepted that his ethical duties and responsibilities as a medical practitioner prohibited him from diverting to himself any patient who had consulted Kelvin exclusively.[14]

29 Conversely, CLAM submitted that Clause 10 did not permit Goh PK to divert patients from Orchard Clinic to GPK Clinic. First, CLAM submitted as follows:

(a) The commercial purpose of the Settlement Agreement was to have the parties disengage from their partnership by the end of 2016 or early 2017 at the latest and in the meantime, allow the parties to start new businesses whilst continuing the businesses of CLAM and MPC.

(b) Consistent with the commercial purpose of the Settlement Agreement, Clause 10 should be construed to mean that the parties will not, by mere reason of opening a competing business, be in breach of their duties to MPC or CLAM if "diversion" occurred.

30 CLAM explained that by "diversion", it meant "inevitable" or "passive" diversion, *ie*, where patients of MPC or CLAM learnt of the existence of GPK Clinic and chose to go there.[15] The immediate difficulty with CLAM's submission was that, as CLAM itself agreed,[16] such cases did not amount to diversion. CLAM's interpretation therefore meant that the Second Sentence merely clarified that the parties agreed not to make any claim for diversion in cases where there was in fact no diversion. However, if this

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was all that the Second Sentence meant, there was absolutely no reason or necessity for it.

31 It is trite that in construing a contract, there is a presumption against redundant words or surplusage: see Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015) at para 7.03. In my view, CLAM failed to rebut this presumption. The Settlement Agreement was drafted by Kelvin's solicitors and reviewed by Goh PK's solicitors. It was unlikely that they would have added the Second Sentence if it was devoid of meaning. Further, the evidence was consistent with the fact that the Second Sentence was intended to clarify that the parties could divert patients from CLAM and MPC:

(a) Kelvin himself agreed that the word "diversion" in Clause 10 referred to the case where a doctor took steps to ask the patient to go to his new clinic and that the purpose of Clause 10 was to prevent any disputes over diversion in such cases.[17]

(b) Both Kelvin and Jacqueline testified that Clause 10 permitted them to sell Skintech products to patients at Orchard Clinic.[18] Initially, both took the position that by offering to sell Skintech products at Orchard Clinic, they did not compete with the latter and they were just offering patients a wider range of products to choose from.[19] However, their explanation that Skintech products gave patients a wider choice only served to confirm that Skintech products *did* compete with those sold by Orchard Clinic. Kelvin had to admit on the stand that if a patient chose to buy Skintech products, that would result in a loss of income to Orchard Clinic.[20] It must have been clear to Kelvin and Jacqueline that selling Skintech products to patients at Orchard Clinic

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> was tantamount to diverting those patients away from Orchard Clinic, at least where the purchase of products was concerned. Nevertheless, they were of the view that Clause 10 permitted them to do so.

32 In my view, the inclusion of the expression "for the avoidance of doubt" in the Second Sentence showed that the Second Sentence was intended to clarify the scope of the first sentence. Specifically, the Second Sentence was intended to remove any doubt about whether the liberty to compete included the liberty to divert patients from CLAM and MPC. The clear language used could only mean that Clause 10 permitted the parties to set up competing clinics and to also divert patients from CLAM and MPC. Otherwise, the Second Sentence would have no meaning.

33 Second, CLAM argued that Clause 10 must be interpreted to prevent both Goh PK and Kelvin from diverting patients from CLAM because Clause 7 required them to continue with and fulfil their responsibilities to the 8-11 and Orchard Clinics pending the sale of CLAM and MPC. I disagreed. The interpretation that I gave to Clause 10 did not render Clause 7 meaningless. Clause 7 continued to apply where patients chose to continue to be treated at Orchard Clinic. In such cases, Goh PK was obliged to attend to these patients at Orchard Clinic on his assigned days.

34 The interpretation that I gave Clause 10 was also consistent with the circumstances surrounding the Settlement Agreement. The Settlement Agreement was the result of the mediation of the dispute in Suit 1023/2013 in which Goh PK had sued Kelvin for breach of the Confidentiality Contract (see [14]–[15] above). In his oral testimony, Kelvin confirmed that in Suit 1023/2013, Goh PK had alleged that he (Kelvin) was diverting Orchard Clinic patients by selling them Skintech products instead of Orchard Clinic products.[21]

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Goh PK was seeking S$15m in liquidated damages as provided under the Confidentiality Contract. Against this factual matrix, it was clear that Clause 10 was intended to forestall future claims for diversion by permitting Kelvin and Goh PK not only to compete against CLAM and MPC but also to divert patients from CLAM and MPC.

35 Third, CLAM submitted that a reading of Clause 10 that permitted the parties to divert patients from CLAM and MPC might adversely affect the potential sale of the two companies. That may be true. However, in my view, the parties signed the Settlement Agreement with full knowledge and understanding of how Clause 10 was supposed to operate. As stated earlier, Kelvin's solicitors drafted the Settlement Agreement which was reviewed by Goh PK's solicitors. Both Kelvin and Jacqueline understood Clause 10 to permit the diversion of patients. In my judgment, Kelvin and Jacqueline must have understood that Clause 10 could affect the potential sale of the two companies. It was not for the court to re-write the agreement just because Kelvin and Jacqueline did not like how things turned out.

36 Finally, counsel for CLAM referred to the fact that during the mediation that led to the Settlement Agreement, Goh PK did not give any indication that he intended to open his new clinic just two units away from Orchard Clinic. He referred to this fact twice – during his cross-examination of Goh PK[22] and during closing submissions.[23] It appeared that Kelvin and Jacqueline had not anticipated, and were upset, that Goh PK would bring his competing clinic to Orchard Clinic's very doorsteps. However, I did not see why Goh PK's silence as to the location of his new clinic was relevant to the interpretation of Clause 10. After all, the Settlement Agreement did not prohibit Goh PK from competing in close proximity to Orchard Clinic.

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37 I therefore dismissed CLAM's claims based on diversion of patients.

38 I should add that CLAM had also submitted that the defendants' case was based on an implied term that Goh PK was entitled to divert Orchard Clinic patients to GPK Clinic and that the defence had not pleaded an implied term. I disagreed. What was in issue was the scope of Clause 10. There was no need for any implied term.

Whether Goh PK poached and/or solicited employees away from CLAM

39 As stated earlier, CLAM confirmed during closing submissions that it was not pursuing this claim. I therefore dismissed the claim. CLAM is not appealing against the dismissal of this claim.

Whether Goh PK procured and/or induced CLAM's employees to breach their contracts of employment

40 CLAM pleaded in its statement of claim that Goh PK induced certain employees of CLAM to breach the terms of their employment by instructing them to direct patients and prospective patients of CLAM to GPK Clinic. However, CLAM did not deal with this claim in its closing submissions. In any event, in my view, the evidence did not support this claim. I therefore dismissed it.

Whether Goh PK, Wong and GPKPL breached their duty of confidentiality

41 The following facts were not disputed:

(a) CLAM kept, through Orchard Clinic, a patient and inventory database on its computers, using a clinic management software program called "Clinic Assist". Clinic Assist, which is also used by a

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number of other doctors in Singapore, was developed by Assurance Technology Pte Ltd ("Assurance Technology").

(b) Clinic Assist enabled CLAM to collate a database ("Clinic Information") containing, among other things:

(i) a comprehensive patient list;

(ii) the patients' personal information, including their contact details;

(iii) the patients' biodata, including their allergies and medical conditions;

(iv) the patients' treatment history, including the fees charged and the medicines and/or drugs purchased;

(v) an inventory list of drugs, medicines and other products bought and sold by Orchard Clinic; and

(vi) information on prepaid treatment packages purchased by patients.

(c) Goh PK and Wong were aware at all material times that the Clinic Information was confidential and proprietary to CLAM and that unauthorized use of the information had the potential to adversely affect CLAM's business.

(d) Goh PK purchased the Clinic Assist software from Assurance Technology for his use in GPK Clinic.

(e) On 25 April 2014, Goh PK copied the Clinic Information from Orchard Clinic's computers to GPK Clinic's computers, with the help

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of Assurance Technology. This was done without informing Kelvin or Jacqueline.

(f) Shortly after GPK Clinic commenced operations, Goh PK instructed the staff of GPK Clinic to send out greeting cards to patients of Orchard Clinic, using their names and addresses obtained from the Clinic Information. These greeting cards informed the recipients that Goh PK had opened GPK Clinic and welcomed them to see him at the clinic.

(g) Goh PK also referred to and used the Clinic Information in the course of treating former Orchard Clinic patients who saw him at GPK Clinic.

42 The elements that have to be satisfied for an action in breach of confidence are: (a) the information must possess the necessary quality of confidentiality; (b) the information must have been imparted (or received) in circumstances importing an obligation of confidence; and (c) there must be an unauthorized use of that information to the detriment of the party from whom the information originated (see *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 at [64]; *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd and another* [2014] 2 SLR 1045 at [129]).

43 There was no doubt that the Clinic Information was confidential in nature (see [41(c)] above). It was also clear that the Clinic Information belonged to CLAM. Goh PK was entitled to have access to the information by virtue of his position as a doctor employed by CLAM and as a *de facto* director of CLAM. However, he did not have, and Clause 10 did not give him, the right to copy the Clinic Information and use the same for purposes of GPK Clinic without permission, even if it was for purposes of being able to follow

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up on his patients' treatments. Whenever a former patient of his from Orchard Clinic went to see him at GPK Clinic, Goh PK had to request Orchard Clinic to transfer the patient's records to GPK Clinic after obtaining the patient's consent to do so.

44 In the circumstances, Goh PK, who possessed the Clinic Information, owed a duty of confidence to CLAM and he breached this duty by using the Clinic Information for the purposes of GPK Clinic.

45 As Goh PK was a director of GPKPL, Goh PK's state of mind and knowledge was attributed to GPKPL: see *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [47]–[48]. GPKPL was therefore also subject to a duty of confidence with respect to the Clinic Information. GPKPL breached this duty when the Clinic Information was used for the purposes of GPK Clinic.

46 As for Wong, she did not work at CLAM or Orchard Clinic. It was not disputed that she was informed of Goh PK's actions after he had carried them out and that she did not object to any of these actions or take any steps to prevent them. I accepted Wong's evidence that she had no knowledge of the business plans or operations of GPK Clinic.[24] I was satisfied that she had not participated in Goh PK's breach of confidentiality. I therefore dismissed the claim for breach of confidentiality against her.

Whether Wong breached her fiduciary duties to CLAM

47 CLAM's case against Wong was that she breached her duties as a director of CLAM in not disclosing Goh PK's actions to CLAM. As I had dismissed CLAM's claims against Goh PK for breach of fiduciary duties, it followed that the related claims against Wong were also dismissed.

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Whether Goh PK, Wong and CPKPL conspired with intent to injure CLAM by unlawful means

48 The elements of unlawful means conspiracy are as follows: (a) there must be a combination of two or more persons to do certain acts; (b) the alleged conspirators must have the intention to cause damage or injury to the plaintiff by those acts; (c) the acts must be unlawful; (d) the acts must be performed in furtherance of the agreement; and (e) the plaintiff must have suffered loss as a result of the conspiracy (*EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [112]).

49 A company may conspire with its director even if the director in question is the alter ego of the company and the agreement or combination between the company and the director is established by attributing the director's mental state to the company: *The Wellness Group Pte Ltd and another v OSIM International Ltd and others and another suit* [2016] 3 SLR 729 at [209], citing Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 15.056.

50 In view of my earlier findings, I concluded that Goh PK and GPKPL had conspired to injure CLAM by means of the breach of confidentiality, and I dismissed the conspiracy claim against Wong.

Damages

51 CLAM sought damages for its breach of confidentiality and related conspiracy claims. In my view,

(a) the loss to CLAM was the loss of profits that Orchard Clinic could have continued to make from patients who would not have been

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diverted to GPK Clinic but for the unauthorized use of the Clinic Information; and

(b) the profits made by GPK Clinic from Orchard Clinic patients, who were diverted to GPK Clinic as a result of the unauthorized use of the Clinic Information, best represented the loss suffered by CLAM. After all, Orchard Clinic and GPK Clinic were competitors offering similar services and products.

52 There was no direct evidence to show whether any of the patients who were diverted to GPK Clinic, would *not* have been diverted if Goh PK and GPKPL had not misused the Clinic Information. However, I agreed with CLAM that it did not need to prove its loss with complete certainty. Where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is not a reason to award no damages or only nominal damages: *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 at [57], citing *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623. In the present case, it was clear to me that some substantial loss had been incurred.

53 In my judgment, CLAM's loss should be computed based on the profits that GPK Clinic made from patients who were diverted from Orchard Clinic to GPK Clinic during the period of six months from the date that GPK Clinic commenced operations, *ie*, from 19 May 2014 to 19 November 2014.

54 The evidence showed that Goh PK would have been able to divert patients from Orchard Clinic to GPK Clinic even without misusing the Clinic Information, except that it would have taken him a longer time to do so. What

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the Clinic Information did was to enable Goh PK to accelerate his diversion of patients from Orchard Clinic to GPK Clinic. It provided Goh PK with an immediate source of contact details. This enabled Goh PK and GPK Clinic to contact patients more easily before their scheduled appointments at Orchard Clinic. In addition, although Goh PK could obtain patients' records from Orchard Clinic with their consent, the fact that GPK Clinic had the patients' records immediately available no doubt helped persuade Orchard Clinic patients to switch to GPK Clinic, especially in cases where they were still undecided on, or close to, their scheduled appointment days at Orchard Clinic. Unsurprisingly, Goh PK's patients quite readily switched to GPK Clinic. After July 2014, very few appointments were made for Goh PK at Orchard Clinic and by August 2014, the staff at Orchard Clinic stopped scheduling appointments for Goh PK at Orchard Clinic altogether.

55 Given the circumstances of this case, in my judgment,

(a) it was a fair and reasonable estimate that Goh PK would have been able to divert patients from Orchard Clinic to GPK Clinic within a period of six months (*ie*, by 19 November 2014), without any unauthorized use of the Clinic Information; and

(b) it was reasonable to treat all the patients who were diverted from Orchard Clinic to GPK Clinic within this period, as having been diverted as a result of Goh PK's misuse of the Clinic Information.

56 I rejected CLAM's submission that its loss should be computed for the period from 19 May 2014 to 31 December 2016 (the deadline for the sale of CLAM and MPC under the Settlement Agreement). Using this period would have over-compensated CLAM. As concluded earlier, Goh PK would have been able to divert patients to GPK Clinic within six months, without misusing

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the Clinic Information. It followed that any loss suffered by CLAM beyond the six-month period would not be attributable to the breach of confidentiality.

Computation of loss

57 The remaining questions related to the parameters to be applied in computing the profits made by GPK Clinic from patients diverted from Orchard Clinic to GPK Clinic during the six-month period from 19 May 2014 to 19 November 2014.

58 I rejected the computation of loss made by CLAM's expert witness, Mr John Temple-Cole ("Temple-Cole"), a partner of KordaMentha. Temple-Cole was instructed to compute the loss suffered by CLAM as a result of Goh PK wrongfully stopping work on his assigned days at Orchard Clinic for the period from 19 May 2014 to 31 December 2016 and working, instead, at a competing clinic (*ie*, GPK Clinic).[25] Temple-Cole was also instructed by CLAM to assume that CLAM would have derived revenue on Goh PK's assigned days in the period subsequent to 19 May 2014 at a level similar to that derived in the period prior to 19 May 2014.[26] Temple-Cole's approach assumed that patients who used to see either Kelvin or Goh PK at Orchard Clinic before 19 May 2014 would have continued to see the two doctors at Orchard Clinic after GPK Clinic started operating.[27] As a result of the instructions given to him, Temple-Cole's computation did not address the loss suffered as a result of the breach of confidentiality. It also did not take into account the effect of competition from GPK Clinic.

59 The defendants' expert, Mr Assan Masood ("Masood"), Chief Executive Officer and Managing Partner of MGI Menon and Associates, computed the loss to CLAM based on the actual earnings (net of costs of sales

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and sales of non-CLAM products) by GPK Clinic on Goh PK's assigned days. Non-CLAM products referred to products sold in GPK Clinic but not in Orchard Clinic.[28]

60 Masood's approach was therefore a better reflection of the loss suffered by CLAM as a result of the breach of confidentiality. However, I was of the view that no distinction should be drawn between CLAM products and non-CLAM products. It was reasonable to assume that if the patient had been treated at Orchard Clinic, some equivalent CLAM product would have been sold to the patient in place of the non-CLAM product that was sold at GPK Clinic. I was also of the view that profits earned from all Orchard Clinic patients treated at GPK Clinic ought to be included in the computation regardless of the day in the week that the patients saw Goh PK at GPK Clinic. If a patient had been diverted as a result of the breach of confidentiality, it did not matter whether they saw Goh PK at GPK Clinic on his Orchard Clinic assigned days or not.

61 I therefore directed the parties to compute the amount of profits made by GPK Clinic from Orchard Clinic patients, using Masood's approach but based on the following parameters:

(a) An Orchard Clinic patient was someone who was already registered as a patient of Orchard Clinic when Goh PK copied the Clinic Information on 25 April 2014. Those who became patients of Orchard Clinic after 25 April 2014 would be excluded since the Clinic Information that Goh PK copied would not have included their information. If any such patient subsequently became a patient of GPK Clinic, that would not have been caused by the breach of confidentiality.

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(b) Profits earned by GPK Clinic from Orchard Clinic patients were to include all products sold to the patients at GPK Clinic. No distinction was to be drawn between CLAM and non-CLAM products.

(c) Profits earned from all Orchard Clinic patients were to be included regardless of the day in the week on which they were treated by Goh PK at GPK Clinic.

Costs

62 The parties agreed on the sum of $120,000 as the full amount of party and party costs excluding disbursements. The issues before me were (a) who was entitled to costs, and (b) whether the amount of $120,000 should be discounted.

63 It was not disputed that costs should follow the event, *ie*, the successful party should be awarded costs. However, the parties disputed who the successful party was. The defendants pointed out that CLAM had made several distinct claims and had succeed only on its claim based on breach of confidentiality. All its other claims were dismissed. The defendants submitted that in substance, they were in effect the successful parties and as such were entitled to costs.

64 The defendants referred me to *Riduan bin Yusof v Khng Thian Huat and another* [2005] 4 SLR(R) 234 ("*Riduan*"). In that case, the appellant and his wife rented a property from the respondents. The respondents terminated the tenancy in 2001 but the appellant vacated the property only in 2003 after removing certain alterations. The respondents sued for double rent and damage to the property caused by the removal of the alterations. The respondents' main claim for double rent was dismissed but they succeeded on

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their subsidiary claim for damage caused to the property. The Court of Appeal awarded the appellant 80% of the costs of the trial.

65 In my view, *Riduan* was distinguishable as the respondents had failed in their main claim and had only succeeded on a subsidiary claim. In the present case, CLAM's claim for breach of confidentiality was clearly one of the main claims.

66 I agreed with CLAM that it was the successful party in the suit since it had succeeded in its claim for damages for breach of confidentiality. As a general rule, the unsuccessful party is the one who has to write the cheque at the end of the day: *Day v Day* [2006] EWCA Civ 415 at [17]. I found no reason to depart from this general rule in this case.

67 However, CLAM was entitled to recover its costs from only Goh PK and GPKPL. It was not disputed that Wong was entitled to recover her costs from CLAM since CLAM's claims against her were all dismissed. The parties agreed that instead of making a separate order for costs in favour of Wong, I should instead take that as a factor in deciding the costs payable by Goh PK and GPKPL to CLAM.

68 It was clear that the costs to be awarded to CLAM had to reflect the fact that it had succeeded only on its breach of confidentiality and the related conspiracy claims. CLAM submitted that it should be awarded 80% of the costs. The defendants submitted that as CLAM succeeded in only one out of five claims, it should be awarded 20% of the agreed costs.

69 The breach of confidentiality claim was one of two main claims in this case, the other being the claim for diversion of Orchard Clinic patients. In

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addition to the question of damages recoverable, the breach of confidentiality claim also had to deal with the deletion of records from GPK Clinic's database. Taking into account the claims that were dismissed and the costs that CLAM had to pay to Wong, I awarded CLAM 40% of the costs in this case.

70 The defendants also submitted that CLAM's costs should not include the fees paid to CLAM's expert, Temple-Cole, since I had rejected his computations. I disagreed with the defendants. The real question was whether the fees had been reasonably incurred for this action and in my view they had been. CLAM was therefore entitled to recover 40% of the fees paid to Temple-Cole.

71 Counsel for CLAM sought an order that Kelvin be reimbursed for all costs and expenses incurred by him on behalf of CLAM in this action, including those incurred in respect of the claims that were dismissed. This action was commenced pursuant to the Resolution (see [19]). The Resolution had not provided for Kelvin to be reimbursed for costs and expenses incurred by him and the scope of the Resolution was not an issue in this trial. In reality, the disputes were between Kelvin and Jacqueline on the one hand and Goh PK and Wong on the other. It was at least unclear whether Goh PK and Wong would have agreed to the Resolution if Kelvin was to be reimbursed for the costs and expenses incurred by him since that would have meant agreeing to partially fund (albeit, indirectly through their interests in CLAM) this action against themselves. In the circumstances, I was of the view that it was not appropriate for me to make the order in favour of Kelvin, in this action.

72 However, the party and party costs to be paid to CLAM were to reimburse CLAM, at least partially, for its solicitor and client costs. Kelvin had paid at least some of the solicitor and client costs on behalf of CLAM. I

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therefore ordered that the party and party costs were to be used to satisfy CLAM's outstanding obligations for solicitor and client costs. Any balance thereafter was to be used to reimburse Kelvin for any costs that he had paid on behalf of CLAM. Otherwise, CLAM would benefit from the costs recovered from Goh PK and GPKPL and in turn, half of this benefit would eventually find its way back to Goh PK (and Wong). It would have been wrong to allow that to happen.

Chua Lee Ming
Judge

Thio Shen Yi SC, Wee Yu Ping Nicole, Lim Wei Wen, Gordon, and Ngo Shuxiang, Nicholas (TSMP Law Corporation) for the plaintiff; Pereira George Barnabas and Chua Yung Zheng, Keith (Pereira & Tan LLC) for the defendants.

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1 1 AB 33–36.
2 Agreed Statement of Facts, para 7.
3 1 AB 214–217.
4 1 AB 218.
5 1 AB 219.
6 1 AB 41–43.
7 1 AB 252–258.
8 1AB 259–260.
9 Agreed Statement of Facts, para 32.
10 Agreed Statement of Facts, paras 6 and 25–29.
11 NE, 4 October 2016, at 88:1–17.
12 NE, 4 October 2016, at 89:5–11.
13 CLAM's closing submissions at para 13.
14 NE, 5 October 2016, at 111:14–20.
15 NE, 4 October 2016, at 8:14–9:24; NE, 17 October 2016, at 55:22–56:13, and 57:9–22.
16 NE, 17 October 2016, at 56:2–13.

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17 NE, 4 October 2016, at 46:23–47:11.
18 NE, 4 October 2016, at 56:22–57:14; Jacqueline's AEIC, para 10; NE, 5 October 2016, at 3:1–4:1 and 6:11–17.
19 NE, 4 October 2016, at 56:13–57:2; Jacqueline's AEIC, para 11.
20 NE, 4 October 2016, at 56:22–57:7.
21 NE, 4 October 2016, at 24:8–25:3.
22 NE, 5 October 2016, at 79:17–25.
23 CLAM's closing submissions, at para 20.
24 Wong's AEIC, para 20; NE, 6 October 2016, at 86:13–18.
25 Temple-Cole's AEIC, exhibit JTC-2 ("Temple-Cole's expert report") at para 1.2.1.
26 Temple-Cole's expert report at para 1.3.1a.
27 NE, 11 October 2016, at 20:5–10.
28 Masood's 2nd Supplementary AEIC, exhibit AM-3 at para 5.2.4.

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