IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 222

Suit No 555 of 2017

Between

Anita Hatta

… *Plaintiff*

And

(1) Lee Siow Kiang Georgia
(2) DrGL Pte. Ltd.
(3) DrGL Spa Pte. Ltd.
(4) Ciel Pte. Ltd.

… *Defendants*

JUDGMENT

[Contract] — [Misrepresentation] — [Inducement]
[Companies] — [Oppression] — [Minority shareholders]

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Anita Hatta
v
Lee Siow Kiang Georgia and others

[2019] SGHC 222

High Court — Suit No 555 of 2017
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24 September 2019 Judgment reserved.

Valerie Thean J:

Introduction

1 The plaintiff, Ms Anita Hatta, is a film and television producer. The first defendant, Dr Lee Siow Kiang Georgia, is a doctor and the founder and medical director of TLC Lifestyle Practice ("TLC"), a clinic specialising in aesthetic treatments. Dr Lee is also the sole director of the second, third and fourth defendants ("the Companies"), which are engaged in the packaging, marketing and sale of DrGL® products, a line of skincare created by Dr Lee.

2 Ms Hatta and Dr Lee met for an evening discussion on 20 January 2012. Subsequently, on 2 February 2012, Ms Hatta invested $2m for the purposes of the second, third and fourth defendants ("the Investment"). She thereafter received, on 3 February 2012, 5% of the Companies' shareholding. In early 2017, as part of negotiations to secure new capital investment from Adval

Capital Pte Ltd ("Adval"), the second and third defendants' assets were transferred to a new company, in return for entitlement to 20% shareholding in the new joint venture company.

3 On 20 June 2017, Ms Hatta brought the present proceedings. She contends Dr Lee made misrepresentations on the evening of 20 January 2012 and seeks rescission of her $2m investment or, in the alternative, damages in the sum of $2m pursuant to s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("Misrepresentation Act"). In the alternative, she contends that Dr Lee's actions between 2012 and 2017 amount to minority oppression, and seeks a share buy-out by Dr Lee, either at $2m, or at a price to be determined by an independent valuer.

Background

Ms Hatta's investment and the parties' understanding

4 In or around 2006, Ms Hatta was introduced to Dr Lee by a mutual friend, Ms Sherry Lim. Ms Lim was then a patient of Dr Lee's. Ms Hatta also became Dr Lee's patient. Ms Lim subsequently became Ms Hatta's personal assistant. The three were also social acquaintances.

5 In or around 2011, Ms Lim heard that Dr Lee was looking for investors to further develop her range of skincare products, DrGL®.[1] On 19 January 2012, Ms Lim arranged for Dr Lee and Ms Hatta to meet the next evening at Ms Hatta's home.

6 During this meeting on 20 January 2012, Ms Hatta contends, Dr Lee

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1 Setting Down Bundle, Tab 3 at [13]; Tab 4 at [11(a)].

informed both her and Ms Lim that she required additional capital for the Companies to expand their business overseas, expand their distribution network, conduct more research and development and expand the Companies' bottling facilities.[2] She spoke of her plans to have DrGL® products sold in large department stores in Singapore and to expand abroad. There were other interested investors looking to invest in the Companies. A third party investor by the name of Andy Wong, for instance, had offered to invest a sum of $24m in the Companies.[3] Ms Hatta asserts that Dr Lee made three key representations to her during that meeting ("the Representations"):

(a) The sales of the DrGL® skincare products were doing very well and had exceeded $5m since its launch in or around 2008.

(b) Dr Lee had personally invested approximately $14m into the Companies.

(c) The Companies were worth $40m or Dr Lee knew that the Companies were worth $40m, and Ms Hatta's investment of $2m would represent 5% of the shareholdings in the Companies.

7 Dr Lee denies making the Representations. Her recollection is that they had a short meeting, and she is unable to remember the details of their exchange, save that Ms Hatta offered her house for use for the Companies' events.[4] Following the meeting at Ms Hatta's house, Ms Hatta was introduced to Mr Frank Cintamani by Dr Lee, as a close friend who assisted her with business

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2 Bundle of Affidavits of Evidence-in-Chief ("BAEIC") Vol 1, Tab 1 at [33].

3 BAEIC Vol 1, Tab 1 at [35]; Setting Down Bundle, Tab 2 at [15].

4 BAEIC Vol 1, Tab 4 at [15]–[16].

matters. Ms Hatta was asked to continue the discussions with Mr Cintamani.

8 On or around 31 January 2012, Mr Cintamani and Ms Hatta incorporated Fide Productions Pte Ltd ("Fide")[5] in order to host fashion shows and events.[6] Mr Cintamani had persuaded Ms Hatta to extend a shareholder's loan of $2m to Fide to be used as Fide's working capital ("the Fide Loan").[7] Ms Hatta was given the position of managing director.[8] It is not disputed that she had no operational role in Fide.

9 On 3 February 2012, Fide and the Companies agreed on an Exclusive Rights Agreement ("the First ERA"). Mr Cintamani and Ms Hatta represented Fide and Dr Lee represented the Companies. Under the First ERA, dated 2 February 2012,[9] Fide agreed to purchase exclusive rights to produce all events for the Companies for four years in exchange for a sum of $4m, which was to be paid in 2 tranches of $2m.[10] Fide was to pay $4m to the Companies, specifically, $2m on execution of the First ERA, and $2m within six months thereafter.

10 Three share transfer forms were signed by parties, for the following:[11]

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5 BAEIC Vol 1, Tab 1 at [17].

6 BAEIC Vol 1, Tab 1 at [15].

7 BAEIC Vol 1, Tab 1 at [48].

8 BAEIC Vol 1, Tab 1 at [18].

9 Agreed Bundle of Documents ("AB") Vol 1 at pp 598–693.

10 AB Vol 1 at p 599.

11 Setting Down Bundle, Tab 3 at [16]; Tab 4 at [13].

(a) a transfer of 500 ordinary shares in the second defendant, for a stated consideration of $1, from Dr Lee to Ms Hatta;

(b) a transfer of 5 ordinary shares in the third defendant, for a stated consideration of $1, from Mr Cintamani to Ms Hatta; and

(c) a transfer of 50 ordinary shares in the fourth defendant, for a stated consideration of $1, from Dr Lee to Ms Hatta.

11 On or about 2 February 2012, Ms Hatta issued two cheques of $2m each in favour of Fide, one for the purpose of the Investment, and the other for the purpose of the Fide Loan.[12] Both cheques were made to Fide because Mr Cintamani informed her that, after discussions with Dr Lee, Dr Lee had requested for the payment of the Investment to be made through Fide.[13] Mr Cintamani and Ms Hatta went to the United Overseas Bank and deposited the said cheques into Fide's account.[14] Mr Cintamani later withdrew these monies and deposited them both into his personal bank account.[15] On 3 February 2012, Mr Cintamani gave Dr Lee a cheque for $2m that was made out in his own name and addressed to her personally.[16]

Events from 2012 to 2015

12 The parties are in agreement that between 2012 and 2015, Ms Hatta and Dr Lee maintained a good shareholder relationship, which was largely an

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12 BAEIC Vol 1, Tab 1 at [50].

13 BAEIC Vol 1, Tab 1 at [48].

14 BAEIC Vol 1, Tab 1 at [50].

15 BAEIC Vol 1, Tab 1 at [50].

16 BAEIC Vol 1, Tab 1 at [50]; Tab 4 at [30].

informal one.[17] What is in dispute is Ms Hatta's role in the Companies. According to Ms Hatta, both she and Dr Lee understood that in consideration of Ms Hatta's $2m investment, apart from being given 5% of shareholding in the Companies, Ms Hatta would be consulted on material events, regularly updated and involved in decision-making on key matters (I refer to this in this judgment as "the Alleged Understanding", and detail its specifics below). Dr Lee, in contrast, denies the existence of the Alleged Understanding. Ms Hatta, she says, was "entirely unconcerned" with the Companies' operations, and was updated only at Dr Lee's discretion.[18]

13 Around 1 September 2012, Fide and the Companies entered into a revised version of the First ERA titled "Amendment of Exclusive Rights Agreement Dated 2 February 2012" ("the Revised ERA").[19] Dated 1 September, the Revised ERA purported to supersede the First ERA, and stated that, given that Fide had "failed to make payments on the 2nd tranche", it would "forego any further rights or claims for the exclusive appointment to produce all events for the Companies".[20] Mr Cintamani signed the Revised ERA on behalf of Fide.[21]

14 Subsequently, Dr Lee approached Ms Hatta to make a further investment in the Companies. On 23 November 2012, Dr Lee asked Ms Hatta to invest a further $2m. In an email informing her that the initial $2m had been rechannelled into the Companies, Dr Lee asked: "wonder if you can assist us to

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17 Setting Down Bundle, Tab 2 at [15]; Tab 3 at [17].

18 BAEIC Vol 1, Tab 4 at [23].

19 AB Vol 2 at pp 898–902.

20 AB Vol 2 at p 900.

21 AB Vol 2 at p 902.

fulfil the balance 2million for the other 5%".

15 On 21 December 2012, Dr Lee wrote to a lawyer, Ms Kuah Boon Theng, to ask her to prepare an agreement which envisaged a $2m investment for 5% in the second defendant and 12% in the fourth defendant in phases. The same email contained an instruction to Mr Richard Chan, an accountant for the Companies, to prepare a share transfer. Ms Kuah replied on 27 December 2012 with a draft agreement. Ms Lim replied to ask Ms Kuah to amend Ms Hatta's address. Ms Hatta then asked to see the accounts and to verify the extent of Dr Lee's investment. On 9 January 2013, Dr Lee asked Mr Chan for records of expenditure relating to the "Total spent for skincare to date" and the accounts. On 12 January 2013, Dr Lee sent an email detailing $13,251,474.52 spent by the Companies. On 18 January 2013, Mr Chan followed on with the skincare development component for a slightly different period, March 2003 to December 2011, for a similar sum. Both related to TLC's expenses. Ms Hatta did not place any further funds with Dr Lee.

16 During this time period, between 2012 to 2015, the Companies' financial statements reflected losses for the Companies each year.[22]

The joint venture with Adval

17 In late 2015, a personal friend of Dr Lee, Ms Patsy Ong-Hahl, became interested in the Companies, and Dr Lee requested that Adval, Ms Ong-Hahl's company, develop a growth plan for the Companies.[23] On or around 4 December 2015, Adval commenced a due diligence exercise to understand the Companies'

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22 BAEIC Vol 1, Tab 4 at [88]–[89].

23 Setting Down Bundle, Tab 3 at [27].

businesses. In or around February 2016, Dr Lee and Adval entered into extensive discussions on Adval's proposed investment plan.[24] Ms Hatta was not involved in these discussions.

18 On 11 February 2016, Dr Lee introduced Ms Hatta to Mr Clarence Ku, Adval's Chief Financial Officer.[25] This was the first time that Ms Hatta was informed of the discussions with Adval.[26] On 22 February 2016, Dr Lee sent an email to Ms Hatta, summarising a proposal from the proposed investors. This was "JV Structure 1", the first of five joint venture proposals. This proposal stated that:[27]

(a) The Companies were to transfer their assets to Dr Lee, who would then transfer said assets to the joint venture company.

(b) Dr Lee and Ms Hatta would receive 19% and 1% of the shares in the joint venture company respectively.

19 On 26 February 2016, Ms Hatta emailed Dr Lee with certain queries concerning Adval's investment.[28] Later that day, Dr Lee informed Ms Hatta that she intended to hold an Extraordinary General Meeting ("EGM") for the Companies on 16 March 2016, as the "new investors…needs [sic] to be finalised by March".[29] On 3 March 2016, Ms Hatta received a Notice of EGM that was to be held on 18 March 2016 for the Companies, with the purpose of said EGM

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24 Setting Down Bundle, Tab 3 at [32].

25 Setting Down Bundle, Tab 3 at [38]; AB Vol 6 at p 3544.

26 BAEIC Vol 1, Tab 1 at [90].

27 BAEIC Vol 1, Tab 1 at [98].

28 BAEIC Vol 1, Tab 1 at [100].

29 BAEIC Vol 1, Tab 1 at [101].

being to approve the sale of the Companies' assets.[30] On 7 March 2016, Ms Hatta received hard copies of the draft assets purchase agreement. In contrast to JV Structure 1, where Dr Lee was to take over the assets of the Companies personally, under the new proposed structure ("JV Structure 2"), it would be Dr Lee's clinic, TLC, that would obtain the assets of the Companies.[31]

20 Ms Hatta appointed a proxy to attend the EGM on 18 March 2016, who raised several concerns relating to the purported lack of information provided to Ms Hatta about the proposed joint venture structure, and the fact that the EGM appeared to be a mechanism to force the sale of the Companies without addressing Ms Hatta's concerns.[32] Faced with the questions presented by Ms Hatta's proxy, Dr Lee adjourned the EGM.[33] A subsequent revision of the joint venture structure was then proposed to Ms Hatta in emails dated 19 May 2016 ("JV Structure 3").[34] Pursuant to JV Structure 3, the second defendant was to purchase the assets of the Companies. Additionally, Dr Lee undertook to pay off all the debts of the Companies.

21 Following additional discussions regarding the potential joint venture with Adval, Dr Lee forwarded to Ms Hatta another draft investment term sheet on 7 June 2016, which proposed a new structure for the joint venture ("JV Structure 4").[35] Ms Hatta replied via email on 14 June 2016, taking issue with several changes made in JV Structure 4; this included the fact that an individual,

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30 BAEIC Vol 1, Tab 1 at [102].

31 BAEIC Vol 1, Tab 1 at [104]; AB Vol 7 at p 4068.

32 BAEIC Vol 1, Tab 1 at [107].

33 BAEIC Vol 1, Tab 4 at [137].

34 BAEIC Vol 1, Tab 1 at [117].

35 BAEIC Vol 1, Tab 1 at [127]–[130].

Mr Chuah Wai Chow ("Mr Chuah") would be the majority shareholder instead of Adval, that there would be three directors (Mr Chuah, Ms Ong-Hahl and Dr Lee) instead of two (Ms Ong-Hahl and Dr Lee), and that there was a risk that the second defendant's shares in JV Company would be further diluted.[36]

22 On 28 November 2016, Dr Lee sent an email to Ms Hatta, stating that an "in-principle agreement with the proposed investors has been reached on the terms of a deal…"[37] The key aspects of the proposed deal ("Final JV Structure") were that:[38]

(a) Dr Lee and Ms Hatta would maintain their respective shareholding proportions in the second and third defendant, which would function as vehicles used to participate in the joint venture company, now named A DrBrand Pte Ltd ("ADB").

(b) The second and third defendants would transfer all their business assets to ADB in exchange for 20% of ordinary shares in ADB.

(c) The trademarks used by the second and third defendants in their skincare and spa businesses would be transferred and assigned to ADB for the cost of applying for registration of the marks.

(d) After taking over conduct of the business, the investors would work towards achieving an IPO or strategic sale within 5 years.

23 After receiving Dr Lee's email, Ms Hatta replied on 6 December 2016,

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36 BAEIC Vol 1, Tab 1 at [134].

37 BAEIC Vol 1, Tab 1 at [154].

38 BAEIC Vol 1, Tab 1 at [158].

raising several questions about the Final JV Structure.[39] On 6 January 2017, Ms Hatta received an email from the Companies' accounting firm, Richard Consultants Pte Ltd ("RC"), attaching the following:[40] a Notice of proposed Members' Resolutions in Writing of the second and third defendants; the text of said proposed resolutions; a draft business transfer agreement relating to the joint venture; a draft subscription agreement relating to the joint venture; and a draft shareholders' agreement relating to the joint venture. No deadline was given for Ms Hatta's decision. On or around 19 January 2017, Ms Hatta received an email from RC attaching a notice of passed Members' Resolutions in Writing of the second and third defendant, signed by Dr Lee. The notice stated that the substantial sale of the assets of the second and third defendant to ADB had been approved.

24 On 20 June 2017, Ms Hatta brought the present proceedings against the four defendants.

Issues

25 In this suit, Ms Hatta advanced two categories of claims. The first is founded on allegations of three misrepresentations made by Dr Lee on 20 January 2012. The second is of minority oppression arising out of Dr Lee's conduct on and after 2 February 2012, when Ms Hatta became a minority shareholder of the second to fourth defendants. I deal with each of these in turn.

Misrepresentation

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39 BAEIC Vol 1, Tab 1 at [161].

40 BAEIC Vol 1, Tab 1 at [162].

Context

26 Ms Hatta seeks to rely on three categories of misrepresentation: fraudulent misrepresentation, negligent misrepresentation, and misrepresentation under s 2(1) of the Misrepresentation Act.

27 In order for a claim of fraudulent misrepresentation to be made out, the following elements must be present (see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14]; *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201 at [7]):

(a) There was a representation of fact made by words or conduct.

(b) The representation must be made with the intention that it should be acted upon by the plaintiff.

(c) The plaintiff had acted upon the false statement.

(d) The plaintiff suffered damage by doing so.

(e) The representation was made with knowledge that it is false or in the absence of any genuine belief that it is true.

28 For a claim in negligent misrepresentation to succeed, there must be the following (see *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 at [121]):

(a) The defendant must have made a false representation of fact.

(b) The representation induced actual reliance.

(c) The defendant must owe a duty of care.

(d) There must be a breach of that duty of care.

(e) The breach must have caused damage to the plaintiff.

29 Section 2(1) of the Misrepresentation Act, on the other hand, functions as a statutory remedy. As explained by the Court of Appeal in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 1021 at [66]:

> What, then, is its true nature? Section 2(1) of the Misrepresentation Act is, in the first place, undoubtedly *statutory* in nature. It now *co-exists* with the tort of negligent misrepresentation at common law as first established in [*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465] and was clearly enacted to perform the *same function* – to furnish a remedy in *damages* where none had hitherto (apart from fraud or deceit) existed. However, it is also *simultaneously different from* the tort of negligent misrepresentation at common law. The burden of proof under the common law, in respect of a claim based on the tort of negligent misrepresentation, is on the plaintiff/representee. However, under s 2(1)…*the burden is on the defendant/representor to prove* "that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true".
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> [emphasis in original]

30 The elements required for a claim under s 2(1) of the Misrepresentation Act are hence similar to that of negligent misrepresentation, except that the burden of proving the absence of negligence lies on the defendant rather than the claimant. Section 2(1) requires the following elements (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong, gen ed) (Academy Publishing, 2012) at para 11.215:

(a) a misrepresentation made by one person to another;

(b) a subsequent contract between them;

(c) consequential loss; and

(d) an absence, at the time the contract was made, of a belief or reasonable grounds in the truth of the facts represented.

31 It is common ground that three requirements are crucial to the various types of misrepresentation alleged: first, a misrepresentation by Dr Lee; second, an intention on the part of Dr Lee for Ms Hatta to rely on her representation; and third, Ms Hatta's reasonable reliance on the misrepresentation.[41] For reasons that will become clear, I begin my analysis with these three elements.

Whether the Representations were made

32 Ms Hatta's claim rests on three representations she contends Dr Lee made to her on 20 January 2012. First, sales for the DrGL® skincare products had exceeded $5m since its launch in or around 2008 (referred to in this judgment as "the Sales Representation"). Second, the Companies were worth $40m (referred to in this judgment as "the Valuation Representation"). Third, Dr Lee had personally invested approximately $14m into the Companies (referred to in this judgment as "the Investment Representation"). I deal with these in turn.

The Sales Representation

33 During the course of cross-examination, Ms Hatta was presented with evidence from a supporting affidavit that she had filed in Originating Summons No 1134 of 2015 ("OS 1134"), which concerned her application for leave to bring an action on behalf of Fide against Mr Cintamani. In her affidavit, she stated that during her meeting with Dr Lee on 20 January 2012, Dr Lee had told

[41] NE 1 July 2019 at p 1–2.

her that "her businesses were not doing well".[42]

34 Ms Hatta's explanation was that Dr Lee had stated that the Companies' businesses were not doing well "on the surface",[43] and that Dr Lee had told her not to worry.[44] This was not convincing.

35 Moreover, after the investment, the communications between Ms Hatta and Dr Lee demonstrate that both parties were aware that the Companies were loss-making. In a WhatsApp text message sent by Dr Lee to Ms Hatta on 20 March 2013, Dr Lee informed Ms Hatta that she was "work[ing] hard so I can get the company to start earning money for you dear. The companies are not profitable yet."[45] Ms Hatta did not raise any query, nor did she appear in any way alarmed. Ms Hatta, when presented with the Companies' financial statements for 2012 and 2013, did not appear to be concerned with the fact that they were showing substantial losses.[46] Had the representation been made to Ms Hatta, it is likely that she would have questioned Dr Lee when she was presented with these statistics. Ms Hatta's claim that she had remained silent because she trusted Dr Lee to "manage the company [sic] in the best interests of the companies" is not persuasive.

36 I therefore find that this representation was not made.

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42 NE 9 April 2019 at p 166.

43 NE 9 April 2019 at p 168.

44 NE 9 April 2019 at p 172.

45 AB Vol 3 at pp 1353–1354.

46 NE 10 April 2019 at pp 58–59; AB Vol 2 at p 1074; AB Vol 3 at p 1297; AB Vol 3 at p 1338.

The Valuation Representation

37 Dr Lee's evidence was that she had not completed a valuation of the Companies as at 20 January 2012. $4m was proposed to her by Ms Hatta in return for a 10% shareholding, and this, given her own time and investment, she felt was a fair offer. By the time of trial, Ms Hatta conceded that Dr Lee did not explicitly state that the Companies' value amounted to $40m.[47] It was argued, rather that this representation was implied.[48] Ms Hatta contended that, because Dr Lee proposed $2m for a 5% shareholding in the Companies, a straight-line mathematical calculation would imply that the Companies were worth $40m.

38 First, this position, which was adopted on the first day of trial,[49] was not pleaded. What was pleaded was that there was a representation that the Companies were worth $40m or that Dr Lee knew they were worth $40m. Second, Dr Lee's position was that such a straight-line mathematical calculation was inappropriate in the present case, where the Companies were start-ups. Her evidence was that the price of the shares at the time of the negotiation was not associated with any discussion as to their value.

39 I accept that the representation could not have been implied. In the context of a start-up, the price to be paid by the investor depends upon the future potential with which the particular investor views the project. As there is no ready market for such shares, the price that parties agree upon would depend upon a range of intangibles, aspirational factors and calculations premised upon a subjective assessment of value. Ms Hatta's expert witness, Mr Andre Toh

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47 NE 9 April 2019 at p 26.

48 NE 9 April 2019 at p 27.

49 NE 9 April 2019 at p 26.

Sern, agreed during his cross-examination that the approach adopted towards the valuation of start-ups would be considered from "many perspective[s]", and that there would be differences in the way in which start-ups would be valued compared to mature companies.[50]

40 There was an alternative argument advanced, which was coupled with the contended misrepresentation that Dr Lee had invested $14m. This was that $40m was used because Dr Lee said another investor, Andy Wong, had offered $24m, and Ms Hatta's $2m would bring the Companies' value to $40m. This argument, which latches onto a rather convenient mathematical addition of $24m, $14m and $2m totalling $40m, is entirely speculative and inconsistent even with Ms Hatta's case. It was not disputed that Andy Wong was presented as an alternative that Dr Lee rejected in favour of Ms Hatta. It would also have been clear from Dr Lee's acceptance of Ms Hatta's offer over Andy Wong's that the price did not bear any relation to a time-of-sale valuation of the Companies.

41 I find that this representation was not implied.

The Investment Representation

42 Two pieces of evidence are important to this issue. The first is a text sent from Ms Lim to Ms Hatta, where Ms Lim relayed the conversation she had with Dr Lee on 19 January 2012:[51]

> Sherry: Total of $14 million invested so far. TLC is funds [sic] 3 companies: DRGL, Ciel (bottling) and DRGL Spa.

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50 NE 18 April 2019 at pp 14–15.

51 AB Vol 1 at p 563.

Dr Lee concedes that the statement was made in the 19 January 2012 conversation she had with Ms Lim in her clinic.[52] She concedes also, that "it's possible" she may have repeated this statement to Ms Hatta at their meeting on 20 January 2012.

43 Another piece of the puzzle, while subsequent in time, is provided by Ms Hatta's request for Dr Lee to detail her prior investment in the three companies after Dr Lee asks her for a second round of funding at the end of 2012.[53] Ms Hatta would likely not have asked for it if it had not arisen in prior discussion. Consistent with this, and in response to the request in January 2013, Dr Lee then furnishes a breakdown of a figure close to $14m.

44 I find, on a balance of probabilities, that the Investment Representation was made on the evening of 20 January 2012. Ms Hatta then asked about it in due course in January 2013, after Dr Lee asked for a second $2m tranche of investment.

45 Ms Hatta's case is that this is a misrepresentation, because, following a due diligence exercise, Adval determined that Dr Lee had made an "initial investment" of $6m into the Companies, alongside Ms Hatta's $2m.[54] Dr Lee argues that there were various other investments that were not reflected in the Companies' financial statements. Specifically, there were expenses that Dr Lee had incurred before the launch of the DrGL® brand and its line of products in 2011, such as expenses related to research and development costs.[55]

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52 NE 12 April 2019 at p 22.

53 BAEIC Vol 1, Tab 4 at [45].

54 AB Vol 6 at p 3567.

55 Defendant's Reply Written Submissions at [52].

46 It may be that Adval's summation is not determinative of the issue. It is clear, however, that Dr Lee had not done any calculation at the point at which the representation was made. It was only after Ms Hatta asked about the investment amount, on 9 January 2013, that Dr Lee then asked Mr Chan for the "(t)otal spent for skincare to date". It was three days after her request to Mr Chan, on 12 January 2013, that she emailed Ms Lim with details amounting to $13,251,474.52, explaining that the details did not include her costs of time. Mr Chan's email with a similar amount came only slightly later on 18 January 2013. Both summaries also relied on TLC's expenses on skincare, without any particular methodology as to why or which components were specifically billed to the Companies. The $14m representation was likely not an accurate statement of fact, and Dr Lee in all probability had no basis for making the factual representation at the point of time at which she made it.

Intention to induce

47 Did Dr Lee make this last representation with intention to induce Ms Hatta to invest in the Companies? The 20 January 2012 meeting was set up with the specific purpose of discussing Ms Hatta's potential investment. In view of the context, it is fair to assume that any statements made by Dr Lee were made for the purpose of inducing Ms Hatta to invest. Specifically, the $14m investment statement was important, because it showed that Dr Lee herself, aside from spending time building up her product, had expended money on the venture. It would logically follow that she had an intention to induce Ms Hatta to invest in the Companies through her statement.

Reasonable reliance

48 Nevertheless, reasonable reliance is pivotal to any case of misrepresentation. The representee must be induced by the misrepresentation to

act upon it. In considering whether the representee was induced by the representor's representation, the element of reliance from the perspective of the representee (see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee"*) at [43]). The representation must "act upon the will of the representee", such that the representee is influenced to change his behaviour in reliance on the representation (see *Anna Wee* at [44]). Ms Hatta's conduct demonstrates that she did not rely on any of Dr Lee's representations. Notwithstanding that I have held that only one of the three alleged representations were made, if I am wrong in that regard, it is clear that no reliance was placed on any of the three representations, for the following reasons.

49 First, Ms Hatta's investment was not immediate. It was more than ten days later that the various documents for the investment were signed. There was no allegation that she was hurried in any way by Dr Lee. Second, her conduct prior to making the investment indicated that she was not concerned about any particular aspects pertaining to the pleaded representations. She failed to request documentation of any kind, whether of financial accounts, sales and revenue statements, Andy Wong's offer to invest $24m, or Dr Lee's investment of $14m. Neither did she request for the signing of any warranties of any kind.

50 Third, no questions were asked about the sales volume or value of the Companies. This remained the case even after Ms Hatta engaged an accountant, Mr Jeff Khoo, in 2015, to advise her with regard to the Companies' financial statement for 2014.[56] Regarding the amount invested by Dr Lee, Ms Hatta did ask Dr Lee in January 2013, but she did not query or follow up on the breakdown

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56 NE 9 April 2019 at p 59.

furnished to her then, which showed that while it was relevant in her consideration of the further request of $2m, which she did not invest, she had not relied upon it in making the original $2m investment.

51 The final indicator is the time at which the misrepresentation claim was brought. The amendment to the statement of claim was made on 19 December 2017, almost six months after her initial statement of claim dated 20 June 2017. This was the first time Ms Hatta raised the issue, almost six years after the time when Dr Lee had purportedly first made the various representations.

52 Further, it was conceded that any reliance on a representation made must be reasonable (see *Quah Poh Hoe Peter v Probo Pacific Leasing Pte Ltd* [1992] 3 SLR(R) 400 at [13]). Ms Hatta's experience as a television producer in the media industry, after having produced shows like "Asia's Next Top Model" and "Almost Famous" would mean that she would possess at least a minimal understanding that losses can ensue from investments. It would be reasonable to expect her to complete a minimal degree of due diligence where a point was of importance to her. It was not reasonable, on her part, to have been induced by oral assertions as to the sales volume or value of the Companies, or the amount of money Dr Lee had invested. The need to check the Companies' financial statements would have been plain. She had sufficient time and resources to seek any independent legal advice that she required.

53 In this context, Ms Hatta's case included criticism that she had been "taken in" by Dr Lee's "larger than life" public persona and celebrity status,[57]

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[57] NE 1 July 2019 at p 2.

and Dr Lee's "façade" of success.[58] These image projections could not be said to amount to representations of fact nor could reliance have been placed reasonably upon them. Criticism was also made that Dr Lee spoke of rejecting other investors who were interested to invest more. These were not pleaded as misrepresentations, nor did Ms Hatta ascertain at any time the veracity of the other expressions of interest.

54 I thus find that Ms Hatta had not placed any reliance on any of the pleaded representations (in so far as any were made) nor would such reliance have been reasonable on the part of Ms Hatta.

Conclusion on misrepresentation, estoppel, affirmation and delay

55 Ms Hatta's claim on misrepresentation was of three kinds: negligent, statutory and fraudulent. At the base for all three claims is the need for reasonable reliance. In the light of my finding that there was no reasonable reliance on the part of Ms Hatta, all three alternatives fail.

56 I should mention that at various points of submissions and trial, Ms Hatta made various contentions as to fraud, on the basis that the First ERA was a sham agreement. In so far as these contentions relate to misrepresentation, the First ERA, signed on 3 February 2012, could not form a part of the misrepresentations made on 20 January 2012. I assume the contentions were made as part of the case for dishonesty in the context of the fraudulent misrepresentation claim. It is not necessary to consider these contentions as the representation claim has not been made out.

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58 Plaintiff's Written Closing Submissions at [86]; NE 9 April 2019 at p 5.

57 A further consequence of the failure of the misrepresentation claim is that there is also no necessity for me to consider Dr Lee's pleaded defences of estoppel, affirmation and delay that could otherwise bar Ms Hatta from seeking rescission of her investment.

Minority Oppression

Context

58 I now turn to Ms Hatta's claim under the head of minority oppression, pursuant to s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). The common element which undergirds the four limbs in s 216 (*ie*, oppression, disregard of a shareholder's interests, unfair discrimination and prejudice) is *commercial unfairness*. While a minority shareholder is not required to identify the specific limb relied on, it needs to demonstrate that the conduct complained of amounts to commercially unfair conduct (*Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 (*"Sakae*") at [81]).

59 Commercial fairness is not, however, considered in the abstract. The Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") cited at [87] Lord Hoffmann's summation of the law in the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092 ("*O'Neill*") at 1098–1099, which explains as follows in relation to s 459 of the Companies Act 1985 (c 6) (UK), the then English equivalent of s 216 of the Companies Act:

> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in

> collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

60 In *Tomolugen* at [88], Sundaresh Menon CJ explained that "the essence of a claim for relief on the ground of oppressive or unfairly prejudicial conduct lies in upholding the *commercial agreement* between the shareholders of a company [emphasis added]". Therefore, whether the majority's conduct amounts to unfairness must be seen in the context of the commercial agreement entered between the shareholders of the company. This commercial agreement does not merely refer to that encapsulated in the formal documents; it would also extend to *informal understandings* between the members. It is this agreement which creates *legitimate expectations* among the shareholders of the company, which the court considers in determining whether to grant relief under s 216 of the Companies Act, a point also reiterated in *Sakae* at [82].

61 These principles are the premise in analysing Ms Hatta's contentions. In brief, she contends that commercial unfairness has arisen because Dr Lee has breached an understanding between them (detailed and referred to below as "the

Alleged Understanding"). This Alleged Understanding grounded the quasi-partnership which she claims the parties had. In failing to meet Ms Hatta's legitimate expectations, Ms Hatta contends, Dr Lee has also breached fiduciary duties. Two broad issues need to be addressed:

(a) What is the content of the commercial agreement between parties?

(b) Has any commercial unfairness accordingly arisen?

The commercial agreement between Dr Lee and Ms Hatta

62 Ms Hatta contends that the Companies were quasi-partnerships, premised upon the Alleged Understanding, which she details as follows:[59]

(a) to be consulted on material events that would affect the Companies' reputation and continuity, including but not limited to, the forward planning and direction of the Companies' business and future;

(b) to be regularly updated on the Companies' financial statements and reports;

(c) to be addressed on any of her concerns regarding the business and financials of the Companies; and

(d) to be involved in any decision-making process relating to key money matters, including but not limited to any potential re-allocation, buy-out, monetising and disposal of the Companies' assets.

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[59] BAEIC Vol 1, Tab 1 at [44].

Did the Alleged Understanding exist?

63 It is not disputed that there is no record of the Alleged Understanding in any formal document. The evidence shows that there was no agreement for Ms Hatta to be consulted on material events that would affect the Companies' reputation and continuity (*ie*, (a) of the Alleged Understanding). It is true that Ms Hatta had been consulted on a few instances, such as when she and Dr Lee discussed the setting up of a company in China on or around 18 December 2012 to register DrGL® products and when Dr Lee requested Ms Hatta's feedback on 5 October 2013 on three potential partners that the Companies were considering engaging. However, for the most part, Dr Lee only provided *updates* on the Companies' affairs to Ms Hatta.[60]

64 When given information and updates by Dr Lee, at least prior to the introduction of Adval, Ms Hatta did not protest that Dr Lee had acted contrary to any understanding that she would be consulted before any important business decisions were undertaken. The following are examples where major decisions were made and Ms Hatta was of the view that an update was sufficient and did not complain about not being *consulted before* the decisions were taken:

> (a) 22 May 2012: Dr Lee updated Ms Hatta on various milestones and business decisions she had made without consulting or involving Ms Hatta. This included a franchise development project with AS Louken for overseas markets, the re-location of the second defendant, exploring the possibility of entering the China market with Luxasia, starting a hair spa outlet at Marina Bay Sands for the third defendant, etc.

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60 NE 10 April 2019 at p 26.

(b) 23 November 2012: Dr Lee informed Ms Hatta that she planned to enter into a joint venture with a Chinese contact for the China markets.

(c) On 20 November 2013, Dr Lee informed Ms Hatta that she was going to sign a non-disclosure agreement with an interest group to help the Companies expand.

(d) 5 July 2014: Dr Lee informed Ms Hatta that TA Associates, a global growth private equity firm, had expressed interest in investing in the Companies.

(e) 7 October 2014: Dr Lee informed Ms Hatta that the third defendant would be relocated to new premises at Pacific Plaza in order to take advantage of lower rental fees.

(f) On 1 October 2015, Dr Lee informed Ms Hatta that the Companies had started an outlet at BHG Bugis and the Companies would focus more on the online business.

65 The evidence indicates that Dr Lee updated Ms Hatta from time to time, and they also met up socially from time to time. *Some elements* of the Alleged Understanding exist, which I explain more fully below. But it was clear that Dr Lee was the sole director and managed the Companies without taking directions or engaging in close consultation with Ms Hatta on the usual run of business decisions or operations of the Companies.

66 That the Alleged Understanding did not exist in its full form as alleged is also reinforced by the fact that the Companies were not quasi-partnerships, contrary to Ms Hatta's contention. It is apposite, at this juncture, to return to the *locus classicus* of *Ebrahimi v Westbourne Galleries and others* [1973] 1 AC

360 ("*Ebrahimi*"), per Lord Wilberforce at 379–380:

> It would be impossible, and wholly undesirable, to define the circumstances in which [equitable] considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. *There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles.* The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: *(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence* - this element will often be found where a pre-existing partnership has been converted into a limited company; *(ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company* - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.
>
> [emphasis added]

67 The first point to note is that a quasi-partnership is a label used where parties work in circumstances akin to a partnership. In the present case, it was

plain after Ms Hatta's cross-examination that she did not participate in the making of major decisions in the Companies. When questioned during cross-examination, Ms Hatta gave evidence that she expected to be consulted on the appropriate attire for Dr Lee when Dr Lee attended events such as catwalk shows, birthday parties and award ceremonies,[61] and that she had contributed to the decision-making process of the Companies by suggesting whether, when the Companies shifted offices, the new offices should face the building lift. Ms Hatta later admitted that she had little experience in real estate matters.[62] Her lack of a substantial role is consistent with the size of her 5% shareholding.

68 A useful contrast may be drawn with *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*"), where the Court of Appeal found the existence of a quasi-partnership. There, the court found at [9] that the Sianandar and Lauw families had agreed at the outset that there would be mutual consultation on any important decisions relating to the operations and management of Richvein, the joint venture investment. Whenever important issues affecting the operations or management of Richvein arose, Henry Ngo, from the Sianandar family, would consult the Lauw family before making any decisions (see *Over & Over* at [10]). In July 1991, Henry Ngo unilaterally terminated a contract with a third party without consulting the Lauw family and this immediately served as a cause of concern for the latter (see *Over & Over* at [12]).

Implied or informal understanding giving rise to legitimate expectations

69 Notwithstanding the absence of a quasi-partnership in its traditional

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61 NE 9 April 2019 at p 180.

62 NE 9 April 2019 at p 182.

sense set out in *Ebrahimi*, *Ebrahimi* itself makes clear that Ms Hatta is not precluded from raising other legitimate expectations which could arise from implied or informal understandings between parties. The absence of presence of a quasi-partnership is not *determinative* of the question of whether equitable considerations ought to apply in any given case. As summarised by Mr Phillip Sales sitting as a Deputy High Court Judge in *Fisher v Cadman and others* [2006] BCLC 499 ("*Fisher*") at [84]:

> It is clear that Lord Wilberforce was not intending to set out an exhaustive list of factors by reference to which one might conclude that the members in a company had become subject to equitable considerations between themselves in the exercise of their rights as members; see also In re Bird Precision Bellows Ltd per Nourse J at p. 430C. *It is also clear that the term, "quasi-partnership", is only intended as a useful shorthand label, which should not in itself govern the answer to be given to the underlying question, whether the circumstances surrounding the conduct of the affairs of a particular company are such as to give rise to equitable constraints upon the behaviour of other members going beyond the strict rights and obligations set out in the Companies Act and the articles of association*: see per Lord Wilberforce in Westbourne Galleries at pp. 379G-380B and per Nourse J in In re Bird Precision Bellows Ltd at pp. 429G-430A.
>
> [emphasis added]

70 Fundamental to this analysis is the *type of company* involved. On the one hand, in a "purely commercial" venture based on an arm's length relationship, the rights and obligations which parties owe to one another would typically be "adequately and exhaustively" reflected in the formal documents (*eg* articles of association and shareholders' agreements) (as explained by Lord Wilberforce in *Ebrahimi*, see [66] above). This ought to be contrasted with companies formed on the basis of a *personal relationship*, and it is this character of a company that allows for equitable considerations to come into play. The rationale is that that the "affairs [of the company] were dealt with on a very informal basis throughout" and this indicates "a common understanding that the constitutional documents did not represent the complete and exhaustive

statement of how the relationship between the members and the members and management should be conducted" (see *Fisher* at [89]).

71 In the present case, the Companies have two shareholders, one a skilled entrepreneur with majority stake, the other an investor who, aside from the context of the investment, is not involved in the industry in which the products are sold. Ms Hatta emphasised that theirs was a personal relationship of mutual trust and confidence. That this was so may be seen from the total absence of documentation to govern their relationship and the informal basis on which Dr Lee and Ms Hatta dealt with one another. In my view, notwithstanding that the Companies were not quasi-partnerships, it is appropriate for equitable considerations to apply in this case (*ie*, for informal and implied understandings to give rise to legitimate expectations). The parties could not have contemplated that the articles of the Companies would completely and exhaustively govern their relationship.

72 Nevertheless, it is *not* the mutual trust and confidence between the shareholders which determines the *content* of the legitimate expectations. For that content, I return to the guidance of Lord Hoffmann in *O'Neill* (at [59] above), that the commercial agreement between parties is crucial. Where a quasi-partnership exists, as Lord Wilberforce pointed out in *Ebrahimi*, the frame forms a convenient label where a common understanding is implicit within the course of conduct and expectations appurtenant to partners. Outside of a quasi-partnership, the commercial agreement may be of a different kind, carrying its own informal understanding. But such understanding must arise out of the context and circumstances shown by the evidence. Consumer protection is not the function of s 216 of the Companies Act. It is therefore to the parties' commercial agreement that I direct the inquiry.

What was their informal understanding?

73 On the facts, I find that the informal understanding between Dr Lee and Ms Hatta would include three elements. The first arises from Ms Hatta's responsibility as a 5% shareholder. As a shareholder, she had a responsibility to sign off on financial statements. This gives her a right to ask questions about such statements and a reasonable expectation for appropriate answers and relevant information on financial statements to be given.

74 Two other elements arise out of the object of their joint enterprise. This object is best expressed by Dr Lee, in a text to Ms Lim on 21 January 2012, which reads:[63]

> Hey. Thank you for playing an important in Anita's interest. I just got another call at 214pm today from Malaysia investor, i will meet him next month but think i am most comfortable with u gals so far to bring the skincare to what i envision it to be.
>
> May counter offer the malaysia side to distribute for us instead if we go through this deal together. My only request is that once the funds comes in, to give me time to move the stock and transfer the IP, agreements to DrGL so that the new partner will come with everything in place and to give me at 18 mths to move the franchise project overseas and increase our distribution channel as this can only happen when i can employ the right people.
>
> *I wish that the partner who believe in me to stick with me to enjoy the fruits of my endgoal from the hard work.*
>
> G
>
> [emphasis added]

75 This text is important, because it was sent the day after their meeting on 20 January 2012, and prior to the documents being signed in February 2012. Her wish was for "the partner who believe in me to stick with me to enjoy the

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63 AB Vol 1 at pp 560–562.

fruits of my endgoal from the hard work". This wish was reiterated when Dr Lee approached Ms Hatta for another $2m on 23 November 2012, where she informed Ms Hatta that Mr Cintamani had offered to invest, "but I feel that it will be better for the company to have less partners for *ease of sell out in the future* [emphasis added]".[64] Dr Lee's case acknowledged that the premise of Ms Hatta's investment into her Companies, which both knew were loss-making, was joint gain on exit.

76 In framing the expectations that arise out of the object of their venture, I note that contrary to Ms Hatta's assertions, their understanding did envisage that Dr Lee could initiate discussion with Adval without consultation and could act independently in negotiation. As the sole director and 95% shareholder, the expectation set by Dr Lee only related to Ms Hatta's exit. Further, in relation to that exit, in the light of the plain and inherent risk of their entrepreneurial venture, it would not be that parties expected that profits must necessarily ensue. Rather, their informal understanding of a joint aim of a buyout from another investor has two implicit elements. First, it would be understood that reasonable information and answers would be furnished in respect of a buyout that Dr Lee considers viable to pursue. Second, it would be legitimate to expect that Dr Lee would ensure that the structure of the Adval joint venture ("the Adval JV") would be fair to Ms Hatta. This expectation of fair exit among shareholders arises because the Companies were start-ups, and Ms Hatta's cash injection was to enable the Companies to grow in order for both entrepreneur and investor to realise their stake at a later juncture.

77 For this reason, the elements of (a) to (d) of the Alleged Understanding

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64 AB Vol 2 at p 982.

that *relate specifically* to Ms Hatta's $2m investment, her responsibility to sign off on financial statements as a shareholder, and the jointly envisaged exit must exist. These elements would comprise of the following:

(a) being informed and having queries answered reasonably in relation to the financial statements or her investment;

(b) being informed and having queries answered reasonably in relation to the Adval JV; and

(c) fair treatment in the final Adval JV *deal.*

Fiduciary duties

78 Implicit in the commercial agreement would also be an "implied understanding that corporate participants in directorial positions would not use their positions of power to 'defraud' other participants, contrary to their duties in statute, common law or equity" (*Walter Woon on Company Law* (Tan Cheng Han, ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 5.76). This implied understanding would naturally fall within the commercial agreement of the parties which formed the basis of their association. This implied understanding is supported by case law. Coomaraswamy J has observed that it follows from a director's fiduciary duties to act in the best interests of a company that shareholders will have a legitimate expectation that those in control of the company will act *bona fide* in the interests of the company (*Leong Chee Kin (on behalf of himself and as a minority shareholder of Ideal Design Studio Pte Ltd) v Ideal Design Studio Pte Ltd and others* [2018] 4 SLR 331 at [65]).

79 In considering breaches of fiduciary duty as part of an oppression action, I begin with the analytical framework used in *Sakae*. It is first necessary to

consider whether it was an abuse of process for Ms Hatta to bring an oppression action for breaches of fiduciary duties committed by Dr Lee, instead of commencing a statutory derivative action under s 216A. This requires the court to have regard to the analytical framework set out by the Court of Appeal in *Sakae* at [116]:

> (a) **Injury**
>
> (i) What is the real injury that the plaintiff seeks to vindicate?
>
> (ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?
>
> (b) **Remedy**
>
> (i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?
>
> (ii) Is it a remedy that can only be obtained under s 216?

80 In this suit, the essential remedies sought by Ms Hatta include a share buyout order and a winding-up order. These remedies are not available in a statutory derivative action. As noted by the Court of Appeal in *Sakae* at [117], this is a "strong indicator" that the minority oppression action is not an abuse of process. Further, I am also satisfied that the real injury which Ms Hatta seeks to vindicate is the injury to her investment and the breach of her legitimate expectations as to how the affairs of the Companies, and her investment, were to be managed by Dr Lee (see *Sakae* at [125]). For example, the alleged breach of fiduciary duties in this case include the breach of the no-conflict rule in turning Ms Hatta's $2m investment into interest-bearing loans without Ms Hatta's informed consent. If proven, this would constitute a wrong against the Company, but would also separately amount to a *distinct personal wrong* against Ms Hatta, in so far as Dr Lee's actions were to her benefit at the expense

of Ms Hatta. Hence, it cannot be said that there is an abuse of process in Ms Hatta raising allegations of breach of fiduciary duties.

81 Following on, then, with the specific fiduciary duties, these are the no-profit and no-conflict rules, which were explained by the Court of Appeal in *Sakae* at [135]:

> Fiduciary duties in the classic sense encompass the two distinct rules proscribing a fiduciary from making a profit out of his fiduciary position (namely, the no-profit rule) and putting himself in a position where his own interests and his duty to his principal are in conflict (namely, the no-conflict rule) … Although conceptually distinct, these two rules share a common foundation in a director's duty of loyalty to his company.
>
> [internal citations omitted]

82 Pertinent to the facts of this case that we will come to, this duty of loyalty must be distinguished from that of care, skill and diligence, which must be sufficiently serious before amounting to oppression, and must be pleaded: see *Sakae* at [132] and [147].

Conclusion on the content of legitimate expectations

83 I hold therefore, that the commercial agreement between Dr Lee and Ms Hatta would entail the following informal and implied understandings: for Dr Lee to uphold her fiduciary duties; to deal with Ms Hatta's questions on the financial statements and the Adval JV fairly; and to treat Ms Hatta fairly in the final Adval JV deal. These would give rise to legitimate expectations, which if breached, would amount to commercial unfairness. I next deal with whether these expectations have been fulfilled.

Whether legitimate expectations were met

Fiduciary duties

84 I begin with the legitimate expectations arising from the implied understanding that Dr Lee would comply with her fiduciary duties. Ms Hatta raises a plethora of contentions with respect to Dr Lee's alleged breach of fiduciary duties, which I summarise into four categories:

(a) Dr Lee had mischaracterised her $2m investment;

(b) Dr Lee had wrongfully discharged Fide from its performance of the ERA;

(c) Dr Lee had mismanaged the finances of the Companies; and

(d) the Adval JV was not commercially fair to Ms Hatta.

85 I find that breaches of fiduciary duty do arise in the first three areas. In respect of the Adval JV I do not so find, but deal with the issue in the context of the three elements of their understanding which I have outlined at [77].

(1) Use of Ms Hatta's $2m investment

86 It is common ground that Ms Hatta paid $2m in order to obtain, and she did so obtain, 5% of shareholding in the Companies. What is in dispute is how the $2m was paid into the Companies. Ms Hatta takes the view that this was working capital for the Companies. Dr Lee takes the view that the $2m was paid to her personally and she could deal with the sum as she saw fit so long as Ms Hatta obtained 5% of the shares of the Companies.

87 Several separate documents dated 2 February 2012 were signed in order

to effect Ms Hatta's $2m investment in the Companies. The first was the ERA, where Fide agreed to pay *the Companies* (as opposed to Dr Lee personally) a total sum of $4m in exchange for the exclusive right to produce all events for the Companies for a period of four years.[65] Clause 2 details the core obligations as follows:

> 2. Conditions
>
> (a) In consideration of grant by the Companies to Fide of the exclusive right to produce all events for the Companies for a period of four years, including (but not limited to) public relations events and corporate social events, Fide shall pay a total sum of S$4,000,000 to the Companies in two equal tranches as follows:
>
> Upon execution of this Agreement (1st tranche)
>
> | | | |
> |---|---|---|
> | DrGL Spa | : | S$191,000 |
> | Ciel | : | S$300,000 |
> | DrGL | : | S$1,509,000 |
>
> Within six months from the date of execution of this Agreement (2nd tranche)
>
> | | | |
> |---|---|---|
> | DrGL Spa | : | S$191,000 |
> | Ciel | : | S$300,000 |
> | DrGL | : | S$1,509,000 |
>
> (Fide to issue payment directly to the Companies Director: **Georgia Lee Siow Kiang**]
>
> (b) In consideration of the payment of a total sum of S$4,000,000 by Fide to the Companies, the Companies **jointly and severally** undertake that they will exclusively appoint Fide and no other individual(s) and/or corporation(s) to produce all events for the Companies for a period of four years from the date of this Agreement, including (but not limited to) public relations events and corporate social events.

88 Both parties were not able to explain this document at trial. Ms Hatta

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65 AB Vol 1 at p 600.

understood $2m to be her investment in the Companies, and the additional $2m to be a loan to Fide. The document was prepared by Dr Lee and Mr Cintamani. Despite Dr Lee's understanding, explained during cross examination, that the ERA was meant as a mechanism for her to receive $2m from Ms Hatta in exchange for 5% of the Companies' shares, *there is no mention of any share transfer in the ERA itself*. Instead, Dr Lee and Ms Hatta *separately* entered into three share transfer agreements, which state that Ms Hatta provided $2 in consideration to Dr Lee and $1 in consideration to Mr Cintamani in exchange for receiving 5% of the Companies' shares.[66]

89 After obtaining the $2m from Mr Cintamani via a personal cheque, as stated above at [11], *and without Ms Hatta's knowledge*, Dr Lee proceeded to *loan* the $2m to the Companies, with the amount reflected as a personal loan from Dr Lee.[67] This was an interest-bearing loan. The net result of the agreements was that the Companies had additional liabilities, a loan of $2m, interest payable, and the grant of exclusive rights to Fide. In fact, the amounts stated at Clause 2(a) of the First ERA ought to have been reflected as consideration within the share transfer documents. Mr Chan was clear in his evidence in court that he had not seen the First ERA, and was not responsible for filling in the amounts in the completed First ERA. He was also clear that the amounts listed at Clause 2(a) would have amounted to valid consideration.[68] The $1 value on the share transfer form was in fact a misstatement. Dr Lee agreed

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66 AB Vol 2 at pp 622–624.

67 NE 12 April 2019 at p 106.

68 NE 17 April 2019 at p 109.

in cross-examination that what was done was an unnecessarily convoluted method of procuring working capital for the Companies.[69]

90 The mere fact that this arrangement was misleading or convoluted might not however necessarily amount to commercial unfairness, if the eventual result was that $2m was injected into the Companies. Ms Hatta did not complain that anything was amiss when Dr Lee informed her in November 2012 that her $2m had been "rechannelled" into the Companies.[70] What was objectionable was Dr Lee's creation of liabilities (in the form of the loans) and Dr Lee's profiting from the interest earned on those loans, *when it was clear that both Dr Lee and Ms Hatta had a common understanding that the $2m was to be used as working capital.*

91 This common understanding is reflected in Dr Lee's evidence that she was looking for an investor to inject expansion capital into the Companies,[71] and her email to Mr Ku and Ms Ong on 24 February 2016:[72]

> [Hatta's] intention was as investment to the 3 companies but my friend Frank, the majority shareholder of Fide structured it this way which I am not sure why. I think the best is to acknowledge that I have all along inform you that Anita has made that investment …

92 The loans that were provided by Dr Lee to the Companies, between 3 February 2012 (one day after the ERA was signed) and 31 December 2012, were identified in the expert report of Ms Chai Tse Yin. They amounted to

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69 NE 12 April 2019 at p 104.

70 AB Vol 2 at p 982.

71 BAEIC Vol 1, Tab 4 at [12].

72 AB Vol 7 at p 3631.

$2,070,000 in total:[73]

(a) On 26 March 2012, Dr Lee extended a loan of $1,200,000 to DRGL ("Loan 1") and $500,000 to CIEL ("Loan 2").

(b) On 23 November 2012, Dr Lee extended a loan of $150,000 to DRGL and $150,000 to CIEL.

(c) There were two smaller loans of $40,000 to DRGL (on 23 February 2012) and $30,000 to CIEL (on 31 October 2012).

93 The loan agreements for Loan 1 and Loan 2 provided that the interest amounts were $240,000 and $100,000 respectively. Ms Chai's expert opinion, which was made plain in her report and in cross-examination, is that interest *was* paid by DRGL and CIEL to Dr Lee. From the time the loans were extended to 31 January 2017 (*ie*, Ms Chai's review period), interest amounting to $90,000 and $39,166.51 were paid by DRGL and CIEL respectively.[74]

94 Dr Lee and Ms Evelyn Chan's (Dr Lee's personal assistant and the General Manager of the Companies) explanation was that this was an inadvertent mistake as the loans were meant to be interest-free loans, and were indicated as such in the relevant directors' resolutions.[75] The monthly repayments went towards repayment of the principal loan and not towards any interest. In my view, this explanation was a convenient afterthought. To take Loan 1 as an example (the same reasoning applies to Loan 2),[76] it was clearly

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73 BAEIC Vol 2, Tab 13 at CTY-2, para 54.

74 BAEIV Vol 2, Tab 13 at CTY-2, para 73(c); NE 18 April 2019 at p 68.

75 BAEIC Vol 2, Tab 10 at [28]; BAEIC Vol 2, Tab 12 at [15].

76 AB Vol 1 at p 568.

stipulated that the "Amount of Loan" was $1,200,000 and the "Interest" was $240,000, amounting to a total of $1,440,000. The loan agreements were signed by Dr Lee. The loan agreement was only two pages long and Dr Lee, a sophisticated entrepreneur, must have realised that interest was payable on the loan. Further, Loan 1 provided for 120 monthly instalments of $12,000 each, which would amount to $1,440,000. This monthly repayment figure of $12,000 would therefore include the interest payable per month (*ie*, $2,000) and this was precisely the approach taken by Ms Chai in her analysis. Dr Lee's explanation that the *entire* $12,000 went towards repayment of the principal sum does not add up. In addition, her contention that the cash books did not record any interest is neither here nor there, since Ms Chai's opinion was that the cash books were wrongly recorded.[77]

95 The interest earned was a profit that put her personal financial interests and those of the Companies in conflict. A duty to disclose the loan to Ms Hatta thereby arose. By not doing so, the interest then constituted a secret profit. Dr Lee's argument, in this context, that Ms Hatta had not imposed any constraint upon her in the treatment of her investment is no defence to her breach of fiduciary duty. Millett LJ's summation of fiduciary duty in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, cited by the Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener)* [2009] 3 SLR(R) 109 at [135], is pertinent:

> *The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.* This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit

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77 NE 18 April 2019 at p 68.

> or the benefit of a third person without the informed consent of his principal.
>
> [emphasis added]

96 The $2m capital ought to have been injected directly into the Companies by Dr Lee. That was in any event what her investor expected. By imposing a loan, Dr Lee placed herself in a conflict of interest and the secret profit made thereby was in breach of her fiduciary duty.

(2) Discharge of the First ERA

97 Subsequently, the First ERA was thereafter discharged on 1 September 2012 without Ms Hatta's knowledge. In November 2012, Dr Lee began a conversation with Ms Hatta about a second $2m injection instead.

98 Ms Hatta, on her part, characterised Dr Lee and Mr Cintamani's First ERA and Revised ERA as an elaborate scheme. In fact, the plan was not an elaborate, but a simple, one. On the face of the First ERA, Ms Hatta agreed to invest $4m. Half was to be paid to Dr Lee, with the other half being first loaned to Fide and then paid to Dr Lee after 6 months. Both halves were banked into Fide's account, which Mr Cintamani then withdrew. While he gave the first half to Dr Lee, the second half remains unaccounted for. At trial, both parties distanced themselves from the First ERA. Ms Hatta contended that she only intended to make a $2m investment to the Companies, and that the further $2m was a loan to Fide. Dr Lee's evidence was that Ms Hatta intended from the outset to make a $4m investment in two tranches, while asserting that she was not aware of what the First ERA contained. The version that each party maintained at trial was consistent with the narrative they each sought to advance, but the plain language of the First ERA was consistent with events as they unfolded.

99 As the First ERA was signed on 2 February, the second payment to the Companies was due by 2 August. What followed instead was its discharge in September. At the centre of Ms Hatta's bitterness is an email sent on 1 September 2012 by Mr Cintamani to Dr Lee, in which Mr Cintamani makes the statement: "As you know the structure was suggested and put in place to act as a buffer between Anita and DrGL."[78] Various allegations as to Dr Lee's fraudulent intent are made as a result. I have dealt with this in the context of the misrepresentation claim, at [56]. In the context of the minority oppression claim, the issue that is relevant is Dr Lee's conduct after receipt of the email. Unknown to Ms Hatta, Dr Lee, on discovering no doubt that the money was not forthcoming from Fide, discharged the First ERA, releasing Fide (and Mr Cintamani) from any liability for the ERA.

100 At general law, this breach could only have been avoided if there was "full disclosure to all the shareholders of all the material facts and shareholders' agreement is subsequently obtained" (*Traxiar Drilling Partners II Pte Ltd (in liquidation) v Dvergsten, Dag Oivind* [2018] SGHC 14 at [106]; *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik* [2004] 4 SLR(R) 318 ("*Dayco*") at [13]). This should be distinguished from a director's *statutory* duty to disclose conflict of interests to the *board of directors* under s 156 of the Companies Act. Under these circumstances, Dr Lee needed to seek informed consent: the *only* individual who could provide such consent on the facts was Ms Hatta, the other remaining shareholder in the Companies.

101 Dr Lee contends that it would have been inappropriate for her to issue a demand to Fide for the sum owed to the Companies under the ERA as both Mr

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78 AB Vol 2 at p 905.

Cintamani and Ms Hatta were Fide's directors and shareholders.[79] This is a sleight of hand as the lack of enforcement of an obligation is wholly different from the discharge of an obligation. Much later, when Ms Hatta queried as to what happened to the First ERA on 13 May 2016, Dr Lee responded that the ERA was "a separate issue" from Ms Hatta's $2m investment for 5% of the Companies' shareholding, and that there was no need for either Fide or the Companies to perform their obligations under the First ERA.[80] In fact, the First ERA was not, as Dr Lee contended, a separate issue. Dr Lee also deliberately misled and omitted to update Ms Hatta on the discharge in her 1 June 2016 reply to Ms Hatta's queries of 31 May 2016:[81]

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79 BAEIC Vol 1, Tab 4 at [171].

80 AB Vol 9 at pp 4855–4856.

81 AB Vol 9 at pp 5059–5062.

Ms Hatta: Hi Georgia, I need your feedback on two points about the exclusive rights agreement, so that I can know what is happening and how we can consider our restructuring agreement.

1-*Did the 3 drgl companies and Fide agree not to enforce the exclusive rights agreement?*

2-If no, then we need to decide if CIEL and DrSpa's rights to claim payment from Fide under the exclusive rights agreement should be transferred to DrGL (as part of DrSpa's and CIEL's assets)?

As you said, Fide did organise the events for the 3 drgl companies.

Wouldn't this mean that the 3 companies have a valid claim against Fide for the $4m that was supposed to be paid under the exclusive rights agreement?

Dr Lee: Hi hi
Just finished training

1-*There was no agreement not to enforce the exclusive rights agreement.* However, since neither party performed their part of the bargain (maybe Fide produced one event for the DrGL Companies, but I'm really not sure), I don't think the DrGL Companies can ask Fide for payment of S$4m.

2-As I mentioned, I don't think the DrGL Companies can ask Fide for payment of S$4m. However, we can consider including the exclusive rights agreement as one of the many other agreements that DrSPA and CIEL should transfer to DrGL (although there were no events at all produced for DrSPA and CIEL)

[emphasis added]

102 The $2m liability of Fide to the Companies was an avenue for funding

that Mr Ku queried as well on 16 February 2016.[82] In fact, Dr Lee had a conflict of interest between her personal loyalty to Mr Cintamani, and her loyalty to the Companies. She ought to have informed Ms Hatta that she intended to discharge Fide from its obligation not only because Ms Hatta had supplied the remaining $2m (albeit on Ms Hatta's case as a loan to Fide), but because Dr Lee was placed in a position of conflict.

103 The fact that Ms Hatta was a shareholder in both Fide and the Companies ought not to have affected Dr Lee's fiduciary duty to act in the best interest of the Companies: what was required of her as a director was a single-minded loyalty to act in the Companies' best interests. Whilst Dr Lee contended that by the Revised ERA the Companies were released from their exclusive rights obligations, the continuance of those rights for Fide to manage the Companies' events would not have cost the Companies extra financing. Conversely the Revised ERA served to release Fide from its obligation to make a payment of $2m to the Companies (representing the second tranche of payments under the First ERA). This meant that the Companies, which continued to be insolvent, gave up their rights to $2m which could have been used to bolster their finances. Finally, when Ms Hatta asked whether there was any agreement with Fide "not to enforce the first ERA", Dr Lee furthermore omitted to explain that she had discharged the First ERA, saying instead that "there was no agreement not to enforce" the First ERA.

(3) Whether Dr Lee has misused the Companies' funds

104 Ms Hatta contends that Dr Lee had wrongfully misused the Companies' funds for her personal purposes and/or purposes that were not related to the

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82 AB Vol 6 at p 3572.

business purpose of the Companies.[83] The relevant transactions were identified in Appendix 10 of Ms Chai's second interim report.[84] Some 273 suspicious transactions were alleged.

105 The period in question is a 5-year time span. Some 40 of these 273 transactions occurred prior to Ms Hatta's involvement with the Companies. Ms Hatta's evidence-in-chief did not address the transactions which were prejudicial to her. It is possible to find from Ms Chai's evidence various instances of expenditure in the present case that could not be properly accounted for, specifically relating to payments of sums by the Companies to TLC and DrGeorgiaLee Pte Ltd, which were owned by Dr Lee.[85] For instance, Ms Chai pointed out that the third defendant was paying the full rental sum of $6,200 from May 2015 to December 2016 pursuant to the Tenancy Agreement between TLC and the third defendant, on the basis that an entire unit at Pacific Plaza was being loaned.[86] The third defendant continued to pay this monthly sum in full despite TLC moving into and sharing the same premises as the third defendant from 2 May 2015 onwards.[87] There was little reason for the third defendant to bear the full burden of rent when TLC was sharing the premises. In a similar vein, the Tenancy Agreement between DrGeorgiaLee Pte Ltd and the second defendant dated 1 December 2014 provided for the rent payable by the second defendant to be that of $5,500 per month.[88] Yet from September 2015 to

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83 Plaintiff's Written Closing Submissions at para 384.

84 BAEIC Vol 2, Tab 13 at pp 128–186.

85 NE 12 April 2019 at p 77.

86 AB Vol 4 at p 2267.

87 AB Vol 6 at p 3564.

88 AB Vol 4 at p 2408.

February 2017, the second defendant started paying rent of $11,770 per month (including GST) to DrGeorgiaLee Pte Ltd.[89] Save for a revision to the Tenancy Agreement, which was not shown during the proceedings, there is little reason for the second defendant to be paying in excess.

106 These allegations should nonetheless be approached with caution, for three reasons. First, the duty to exercise care, skill and diligence must be delineated from the duty of loyalty. The duty of care, skill and diligence is not imposed to exact loyalty from a director, and any breach must be sufficiently serious to found minority oppression: see *Sakae* at [135] and [152]. The function of the *Sakae* analytical framework is to differentiate derivative actions, which pursue wrongs against the relevant company, and minority oppression actions, which deal with injury to minority shareholders. This distinction is consistent with the requirement for serious prejudice to the minority shareholder in such cases. Serious prejudice was not articulated.

107 Related to the issue of the need for prejudice is that many of the decisions now criticised involve commercial judgment, such as whether it is reasonable (or less expensive) to bring a hairdresser to Hong Kong for a working trip; or whether it is necessary to settle a parking fine for a customer upon the complaint of a customer in respect of the lack of parking; or whether the road tax for a car that is used for company purposes may be paid in lieu of the cost of despatch services. For the entire duration of their association up to the time the writ was filed – indeed the amendments to the statement of claim relevant to the accounts were made only on 27 July 2018 – Ms Hatta was content to leave those commercial assessments to Dr Lee's judgment.

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89 BAEIC Vol 2, Tab 13 at p 113.

108 Finally, *Sakae* also makes the point, at [132], that the breach of duty of care, skill and diligence must be specifically pleaded. While there is reference in paragraph 9A of the statement of claim to the duty to act in the best interests of the Companies, paragraph 50 makes clear that allegations of minority oppression go towards breach of fiduciary duties and not the other duties owed to the Companies.

109 Of greater concern were the related party transactions that were entered into by Dr Lee. Ms Chai's evidence indicated that, despite the fact that the Companies were technically insolvent, Dr Lee had concealed the existence of related party transactions in the Companies' financial statements by procuring the Companies to borrow from third party finance companies such as Orix, while at the same time making repayments, in some cases with interest, towards herself and her related companies.

110 Dr Lee mounts the argument that there is no general bar against related party transactions, and that Ms Hatta has to demonstrate how she was prejudiced by them.

111 I find that the prejudice arose from Dr Lee obtaining third party loans in order to repay interest-bearing loans which were extended by herself and related companies. Dr Lee, as the sole director, was able to control the sources from whom the Companies would obtain loans from. She decided to procure loans from herself and her related companies which she had complete ownership of. By charging interest on these loans, she *profited* from them: this was secret profit earned in a conflict of interest. Furthermore, these repayments with interest were made at a time when the Companies were insolvent. Both Ms Hatta's investment and the Companies' financial health were put at financial risk.

112 Apart from Loan 1 and Loan 2 examined above, the other relevant loan is a $300,000 loan extended by TLC to the second defendant on 13 March 2013 ("Loan 3").[90] Although the loan agreement stated that it was interest-free, a monthly interest of $1,504.79 was paid to TLC and disclosed in the 2015 and 2016 financial statements, amounting to $58,690.41 in Ms Chai's period of review. The payment of interest to TLC was conceded by Dr Lee.[91]

113 Accordingly, Dr Lee was placed in a position of conflict and Ms Hatta's informed consent ought to have been obtained (see [100] above). In this regard, it is immaterial whether the Companies suffered any detriment (*Dayco* at [34]). It is also irrelevant if the terms of the loans were fair and in the company's interests (*Aberdeen Railway Co v Blaikie Brothers* [1843–1860] All ER Rep 249 at 252). A director in a position of conflict would not be permitted to assert that his actions were *bona fide* or thought to be in the interests of the company (*Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 at [53]).

114 This last breach was aggravated by a failure to answer Ms Hatta's queries. This failure is dealt with below, from [130], because the queries subsequently became intertwined with queries in relation to the Adval JV.

115 I note that there was no allegation that the loans provided by Dr Lee and TLC, constituted, in and of themselves, a breach of fiduciary duties. It is not disputed that there were other third party liabilities that needed to be paid. Therefore, the mere fact that the Companies made repayments to Ms Hatta and TLC pursuant to the loan agreements might not have amounted to a breach of

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90 BAEIC Vol 2, Tab 13 at CTY-2, para 73(b).

91 Defendant's Reply Written Submissions at para 206.

fiduciary duties. As stated by the Court of Appeal in *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* ("*Parakou*") [2018] 1 SLR 271 at [110], in seeking to prove a breach of fiduciary duties, the mere fact of repayments to related parties is not sufficient. On the facts, there was no evidence that Dr Lee had an "unmistakable desire to prefer" herself and TLC. In fact, Ms Chai's evidence was that she was "unable to determine whether the third party loans were obtained in order to make repayments to Dr Lee or her related companies".[92]

116 Moreover, the facts of the present case are materially different from that in *Parakou*. In *Parakou*, it was found that the repayments were unprecedented, in so far as there was "no evidence of any established past practice of similar payments" and the lenders did not provide the company with any "new credit" in consideration for the repayments (*Parakou* at [111(f)]. In the present case, apart from the Orix loans, the Companies relied wholly on loans provided by Dr Lee and TLC to sustain their operations (a point made by Adval in their due diligence report, see [118(a)] below). The loans, therefore, provided a constant stream of credit to the Companies and the mere fact that there were repayments is not sufficient to show a breach of fiduciary duties, and there was no evidence that Dr Lee and TLC were preferred at the expense of other creditors.

(4) The Adval JV

117 A host of allegations were made by Ms Hatta against Dr Lee in respect of the Adval JV. These were that Ms Hatta was wrongly excluded from the Adval negotiations, that Dr Lee was colluding with Adval to prejudice Ms Hatta's interests, that Dr Lee ignored Ms Hatta's legitimate queries, and that the

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92 BAEIC Vol 2, Tab 13 at CTY-2, para 88.

Adval JV was not in the best interests of the company.

118 I first note that it cannot be disputed that the Companies required assistance if they were not to be wound up. They were technically insolvent and needed fresh liquidity. As Ms Hatta did not wish to invest any further, it was commercially necessary for Dr Lee to seek another source of capital. It is also clear from what I have detailed above that the Companies lacked management and financial expertise. Adval, following their due diligence report, had expressed concern over a number of issues, including:[93]

(a) the fact that the Companies were under capitalised and that their operations were being sustained by loan facilities provided by Orix, TLC and Dr Lee;

(b) the lack of capital to expand the Companies' business;

(c) the over-diversification of the Companies' product lines;

(d) the high costs of capital expenditure, facilities and manpower; and

(e) the lack of a management team to strategise on the business direction of the Companies

119 The dire need for another source of capital established, the question of the identity of the new investor and deal offered is the only real question. In the light of my finding above that Dr Lee was charged with the management of the Companies, she had no reason to involve Ms Hatta in the operational details of

[93] AB Vol 8 at pp 4791-4792.

the joint venture. Choosing a suitable joint venture partner would also be an issue for Dr Lee's decision. Ms Hatta's accusations of being "excluded from negotiations" have no merit.

120 By the time of the closing responses, Ms Hatta clarified that she was not contesting that the Adval JV was not in the best interest of the Companies. Her contention is that Dr Lee's *conduct* in procuring the Companies to enter into the joint venture was not in the best interest of the Companies.[94] She appeared to question that other partners had not been considered, or that the offer made by Adval was not sufficiently generous. Criticism was also made of the fact that Adval was managed by a close friend of Dr Lee. In my view, there is insufficient evidence on these vague contentions. It is speculative to assume that any other third party investor who was not familiar with Dr Lee would want to come into a skincare venture, which, aside from the inherent risks of such ventures, had the particular risks which Adval's due diligence and financial checks identified. I therefore find that Ms Hatta has not made out her case that Dr Lee failed as a fiduciary in respect of the Adval JV.

Conclusion on fiduciary duties

121 In my judgment, Dr Lee has failed in her fiduciary duties in several important aspects. First, she failed to give Ms Hatta fair and accurate information regarding her $2m investment. Arising from the same investment, she imposed the burdens of Loan 1 and Loan 2 on the Companies and secured a personal advantage for herself, being the continued payment of interest, putting herself in a conflict of interest without obtaining the informed consent of Ms Hatta. Second, her subsequent discharge of Fide from its obligation to

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94 Plaintiff's Written Reply Submissions at para 68.

pay $2m arose from a conflict of interest. Putting priority on her personal relationship with Mr Cintamani, the discharge was made at the expense of the Companies, which continued to be insolvent and lost the benefit of a further $2m injection. Ms Hatta, who had supplied the additional $2m to Fide to fulfil its liability under the First ERA and who was in any event the only other shareholder, ought to have been informed and consent ought to have been obtained. Third, through using third party loans to pay Loan 3, she placed herself in a conflict of interest with Companies but did not disclose the profit she earned through interest payments (as with Loan 1 and Loan 2).

122 In closing this section, I address Dr Lee's contention that the various breaches of fiduciary duties were not sufficiently pleaded. At paragraph 9A of the Statement of Claim (Amendment No 2) dated 30 July 2018, it is pleaded that Dr Lee *owed* various fiduciary duties to the Companies, including the no-conflict and no-profit duties (see paragraphs 9A(d) and (e)). It is also pleaded at paragraph 50 that Ms Hatta was subject to unfair prejudice by reason of Dr Lee's breaches of fiduciary duties. However, *it was not specifically pleaded which fiduciary duties were breached by reason of Dr Lee's acts*. The pleaded case was as follows:

> (a) Use of Ms Hatta's $2m investment: it was pleaded that Dr Lee had failed to account for how the $2m was injected into the Companies.[95] It was not pleaded that Dr Lee had breached the no-conflict rule by imposing a loan on the Companies through the $2m investment and also breached the no-profit rule by charging interest on the loan.

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95 Statement of Claim at para 42a.

(b) Discharge of the First ERA: it was pleaded that Dr Lee had refused and/or failed to account for the proceeds under the First ERA.[96] While it was asserted that Dr Lee was not inclined to pursue the Companies' rights due to her friendship with Mr Cintamani, it was not pleaded that she had acted in conflict of interest by so doing.

(c) Misuse of Companies' funds: it was pleaded that Dr Lee had incurred expenses which were not for business purposes[97] and had made preferential repayments of loans which she extended to the Companies.[98] It was not pleaded that she had breached the no-conflict and no-profit rules by profiting from the loans which were interest-bearing.

123 I accept Dr Lee's contention with regard to [122(a)] and [122(c)] above. The pleadings are not sufficient to mount a case that Dr Lee had profited from interest-bearing loans at the expense of the Companies. For (b), I find that it would have been obvious to Dr Lee that the relevant duty breached was the no-conflict duty.

124 The general rule on pleadings was stated by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [38]–[40]:

> … the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue. …
>
> Procedure is not an end in itself, but a means to the end of attaining a fair trial. The age of forms of action is long gone. Hence, a court is not required to adopt an overly formalistic and

96 Statement of Claim at paras 45–49.

97 Statement of Claim at para 49A.

98 Statement of Claim at para 49B.

> inflexibly rule-bound approach even in those clear cases that to do so might lead to an unjust result. Nevertheless, it would be improper for a court to adopt the approach that "the ends justify the means" … Even when the desire to ensure the ends of substantive justice pulls in the opposite direction from the need to maintain procedural fairness to the opposite party, "a just outcome requires that neither consideration be made clearly subordinate to the other" …
>
> *Thus the law permits the departure from the general rule in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so. …*
>
> [emphasis added]

125 Furthermore, as noted by the Court of Appeal in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]:

> … It is trite law that the court may permit an unpleaded point to be raised if no injustice or irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party. … *In the same vein, evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced* …
>
> [emphasis added]

126 It is thus necessary for me to review the evidence at trial to determine if it can overcome the defect in the pleadings. In this regard, Ms Chai's evidence that Dr Lee was paid interest on the loans she or TLC extended to the Companies can be found at paragraph 73 of her third expert report.[99] I also find that the allegation that Dr Lee profited from interest-bearing loans was sufficiently put to Dr Lee, and that it would have been obvious that the relevant breaches of fiduciary duties were the no-conflict and no-profit rule:

> Q: Dr Lee, we put it to you that it is wrong if you had reflected the 2 million that Anita invested with you and

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[99] BAEIC Vol 2 Tab 13 at CTY-2, para 73.

> you reflected that as loans from you to the companies. Do you agree or disagree?
>
> A. I disagree.
>
> Q. It is even worse if you reflected those loans as interest-bearing loans. Do you agree or disagree?
>
> A: I disagree.
>
> Q: Because it is a double whammy. *Not only are you creating a liability for the companies, you benefit yourself by giving yourself the option to charge interest on those monies when you knew that it came from Anita.* Do you agree or disagree?
>
> A: I disagree.
>
> [emphasis added]

127 Dr Lee contested the allegation that she profited from interest-bearing loans. This was conceded for Loan 3. However, for Loan 1 and Loan 2, she contended that there was no interest payable. Her evidence, as well as that of her assistant Ms Chan, was that it was an inadvertent mistake for interest to be included in the loan agreements and that in any case, the monthly repayments were captured as principal repayments. This was emphasised again in her counsel's reply written submissions.[100] I have rejected at [94] above Dr Lee's defence that it was an inadvertent mistake. The evidence suggests that there was active concealment of the loans being interest-bearing. In my view, this could explain why there was no mention of the fact that Dr Lee profited from interest-bearing loans in the statement of claim. This fact only came to light upon Ms Chai's review of the accounts after the statement of claim was filed. The insufficient pleadings ought to be seen in that context, although they still should have been amended at a later stage.

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100 Defendant's Reply Written Submissions at paras 204–208.

128 In any event, Ms Chai was cross-examined at length on this point and it was suggested to her that the cash books reflected that the monthly payments went towards principal payments rather the interest.[101] I have rejected this contention at [94] and no other defence was articulated or suggested by her counsel. In all the circumstances, Dr Lee could not be said to be taken by surprise or irreparably prejudiced by the allegation that she breached the no-conflict and no-profit duties through extending interest-bearing loans.

Fair treatment based on their understanding

129 I have found at [83] that there was a legitimate expectation arising from their informal understanding, that Dr Lee would: (i) answer queries about the financial statements of the Companies reasonably; (ii) answer queries in relation to any proposed new investor or exit reasonably: and (iii) treat Ms Hatta fairly in any final deal involving a new investor. I turn to the question of whether these expectations were met.

(1) Whether Ms Hatta's queries were reasonably answered

130 On 15 December 2015, Ms Hatta wrote an email to Dr Lee raising questions on the Companies' 2014 Financial Statements.[102] Ms Hatta queried:

> (a) whether Dr Lee would be able to undertake that the Companies would be able to meet their liabilities and debt obligations as and when they fell due for the next 12 months, given the negative net assets of the Companies from 2012 to 2014;

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101 NE 18 April 2019, pp 65–69.

102 BAEIC Vol 1, Tab 1 at [73].

(b) what the new term loans obtained by the second and fourth defendant were used for;

(c) how the debts owing to Dr Lee were repaid;

(d) why there were substantial increases in the category "Other Payables" of the second and fourth defendants from 2012 to 2014; and

(e) why the operating costs of the Companies exceeded the Companies' earned revenues.

131 In response to Ms Hatta's email, Dr Lee informed her, through emails on 10 February 2016 and 11 February 2016, that she had been speaking to a business consulting firm, Adval, and that they had offered "some recommendations".[103] She also confirmed that the Companies were insolvent, that she had made repayment of the loans owing to her as a director from the working capital loans obtained, and that the substantial increases in the category "Other Payables" reflected in the 2014 Financial Statements were due to working loans issued by TLC to the Companies.

132 On 26 February 2016, Ms Hatta emailed Dr Lee and Mr Ku with certain queries concerning Adval's investment. This included a number of questions as to how Adval's proposed joint venture model would result in profitability. Dr Lee did not appear to address these queries, and simply proceeded to send an EGM notice on 3 March 2016.

133 Ms Hatta raised new queries through her proxy, Mr Jeff Khoo, at the EGM on 18 March 2016. As stated earlier at [20], these related to the purported

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103 BAEIC Vol 1, Tab 1 at [74].

lack of information provided to Ms Hatta about the proposed JV Structure, and the fact that the EGM appeared to be a mechanism to force the sale of the Companies without addressing Ms Hatta's concerns. A list of the queries raised at the EGM was sent to Mr Chan with a copy to Dr Lee on 22 March 2016, which included concerns about loans by TLC not being disclosed as related party transactions, but instead being booked under the category of Other Payables.[104] Dr Lee replied via email to Ms Hatta's concerns on 5 April 2016.[105]

134 On 17 April 2016, Ms Hatta sent another email to Dr Lee, seeking a response regarding her past queries that had not been sufficiently answered by Dr Lee and/or Adval.[106] Dr Lee replied to this email on 29 April 2016.

135 On 25 May 2016, Ms Hatta sent an email to Dr Lee, expressing her concern, amongst other issues, that it was crucial to understand how their 20% minority shareholding interest in the new joint venture entity with Adval would be protected.[107]

136 On 30 May 2016, Dr Lee emailed Ms Hatta, asking if she would consider approving of the joint venture proposal via written resolution rather than an EGM.[108] On 1 June 2016, Ms Hatta replied to Dr Lee's email, explaining that she felt that the EGM should only be held "after all the relevant issues for the EGM have been sorted out".[109] Dr Lee did not reply to this email.

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104 AB Vol 8 at p 4519.

105 BAEIC Vol 1, Tab 1 at [80].

106 BAEIC Vol 1, Tab 1 at [114].

107 BAEIC Vol 1, Tab 1 at [122].

108 AB Vol 9 at p 4982.

109 AB Vol 9 at p 5072.

137 On 14 June 2016, Ms Hatta set out her comments regarding the draft term sheets of the joint ventures, specifically regarding how JV Structure 4 was inconsistent with the previous JV Structures.[110] On 15 June 2016, Dr Lee replied with a request that their lawyers discuss the technicalities of the proposed joint venture and the draft term sheets.[111] Ms Hatta agreed.

138 Meanwhile, on 6 August 2016, Ms Hatta sent queries regarding the financial accounts for the year ending 31 December 2015. These queries included questions on related party transactions. They were forwarded to Mr Chan for action, with information on 7 August 2016 that she was away, and a brief response on staff consolidation (without a response on the query on the related party transaction).

139 On 24 October 2016, Ms Hatta requested for an update "on the Adval transaction".[112] Dr Lee replied to her with a WhatsApp message on 25 October 2016 saying that the discussions were progressing well, and she intended to update Ms Hatta once there was an in-principle agreement, "so as to avoid going back and forth before we are clear on the details of the key issues".[113] On 28 November 2016, Dr Lee sent an email to Ms Hatta, setting out the "key aspects" of the Final JV Structure for which in-principle approval had been reached.[114] The relevant documents were not attached.

140 On 6 December 2016, Ms Hatta replied, asking for the detailed

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110 BAEIC Vol 1, Tab 1 at [134].

111 BAEIC Vol 1, Tab 1 at [135]; BAEIC Vol 1, Tab 4 at [185].

112 BAEIC Vol 1, Tab 1 at [151].

113 AB Vol 10 at p 5647.

114 BAEIC Vol 1, Tab 1 at [158].

documentation, and cautioned Dr Lee on the importance of taking more time to review the documents. She raised issues such as whether the liabilities of the second and third defendant would be taken over by ADB; whether the fourth defendant was part of the transaction; and whether Dr Lee or TLC had extended any other loans to the Companies after 18 March 2016 and whether such loans would be written off.[115] Dr Lee did not provide any response to this email.

141 On 24 December 2016, Ms Hatta followed with a WhatsApp text message to Dr Lee, reiterating her concern that they had to ensure that the Companies were properly valued before they proceeded with the joint venture. Dr Lee was abroad and replied on that same day that she was suffering from altitude adjustment.[116] On 27 December 2016 they exchanged WhatsApp messages about a Chinese wellness company. On 6 January 2017, Mr Chan sent an email which enclosed the final documents on the venture and a notice of the proposed members' resolution.[117] The notice and email did not reflect a deadline by which Ms Hatta was to respond. On 19 January 2017, Ms Hatta received an email from RC attaching a notice of a passed Members' Resolutions in Writing of the second and third defendants, signed by Dr Lee, which approved the substantial sale of the assets of the second and third defendants to ADB.[118] Between 21 to 26 January 2017 the two women appeared to still be texting about trying out a spa together. On 26 January 2017, Ms Hatta sent an email shortly after 2pm expressing her disagreement with the Adval deal. Rather oddly, the two appear to have met to go to Four Seasons together the same evening after

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115 BAEIC Vol 1, Tab 1 at [161].

116 AB Vol 6 at p 3245.

117 BAEIC Vol 1, Tab 1 at [162].

118 BAEIC Vol 1, Tab 1 at [164].

8pm.[119]

142 A degree of reasonableness has to be applied in assessing the correspondence. It was clear that negotiations had taken a long time, almost a year. Ms Hatta's approach was to object and urge caution in the deal without proactively providing a solution, in the face of what could be considered urgency on the part of insolvent Companies with wasting stock. Dr Lee would not be expected to address every single concern that Ms Hatta would have on the potential profitability of the Companies. But she must, at the very least, address significant concerns.

143 Two significant concerns remained at the end of the process. The first pertained to the accounts, and the treatment of related party transactions within the financial statements. Closely connected to this was the second, which was whether Ms Hatta would be encumbered by Dr Lee's loans. This was raised by Ms Hatta several times. Dr Lee assured her twice: at paragraph 12 of her response on 5 April 2015, Dr Lee stated that she was "prepared to have TLC write off any outstanding loan to the DrGL Companies after completion of the Proposed Sale". This was reiterated in paragraph 6 of her response of 29 April 2016:[120]

> 6. The DrGL Companies will not be "hollow and debt-ridden" after the proposed sale of the assets of the DrGL Companies to TLC Medical Practice Pte Ltd ("**TLC**") (the "**Proposed Sale**"). I had informed you at paragraph 12 of my 5 April Response that I am prepared to have TLC write off any outstanding loans to the DrGL Companies after the completion of the Proposed Sale. *I am also prepared to write off any outstanding debt DrGL owes me personally and personally pay off the loans from Orix Leasing Singapore Limited ("**Orix**") to the*

119 AB Vol 17 at pp 9765–9772.

120 AB Vol 8 at p 4790.

> *DrGL Companies. Essentially, I am willing to personally clear all the debts of the DrGL Companies after the Proposed Sale.*
>
> [emphasis in original in bold; emphasis added in italics]

144 This answer was not reflected in the documentation that Ms Hatta saw. She repeated the query on 6 December 2016 in respect of the Final JV Structure:[121]

> …
>
> As evidenced by what happened earlier this year, when the draft documents received were completely inconsistent with the in-principle understanding, it bears repeating that it is extremely important that we protect our interests from the onset – particularly if we end up as minority shareholders with no say in the joint venture company.
>
> *In this regard, I note that no mention was made about (a) whether the liabilities of DrGL and DrGL Spa would also be taken over by A DrBrand Pte Ltd, (b) whether CIEL is part of the transaction and what will happen to the company if it isn't, and (c) whether you or TLC entities have extended any other loans to the companies after 18 March 2016 and if so, whether these loans would be written off as well.* Would be grateful for your clarification on these 3 points pending receipt of the detailed documentation.
>
> [emphasis added]

145 In the same email, she also asked for the detailed documentation in respect of the in-principle agreement which Dr Lee mentioned in a prior email on 28 November 2016. This documentation appears not to have been sent to her until Mr Chan's 6 January 2017 email asking for the members' resolution.

146 I therefore find that Ms Hatta's legitimate queries on the financial statements and the Adval JV were not reasonably answered by Dr Lee.

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121 AB Vol 12 at p 6898.

(2) Whether the Final JV Structure was fair to Ms Hatta

147 Ms Hatta's queries on the loans were well-founded, as may be seen from the Adval negotiations. Mr Ku's queries during the calculation process show a concern with the Companies' finances. Subsequently, Adval went into the joint venture free of the loans that Ms Hatta expressed concerns about. Ms Ong-Hahl was also clear, when giving evidence on the stand, that Adval would not take on the Companies' existing debt portfolio. This advantage, given to Dr Lee's new partners, was not accorded to her existing partner, raising a question of fairness. While Dr Lee contended that she would herself be liable for the same liabilities, she was in a different position from Ms Hatta. She had benefitted from the Orix loan being used to repay her loans, and the remainder liabilities are presently owed to her.

148 A further point is her promise to write off the loans owed to Dr Lee and TLC, made on 5 and 29 April 2016 (at [143], above). The final deal did not fulfil Dr Lee's promises of 5 and 29 April 2016 to write off the loans, and amounted to a breach of this informal understanding. Returning to Lord Hoffmann's judgment in *O'Neill*, it was said at 1101 that:

> … [T]here may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law.

149 Although Lord Hoffmann had referred to quasi-partnerships in the sentence preceding this passage, I do not consider that this proposition is contingent on a finding that the company was a quasi-partnership. The emphasis in his judgment, and in the present case, is on the ongoing commercial agreement between parties. As stated by the Court of Appeal in *Sakae* at [172],

"it is trite that any understanding between the shareholders of a company, whether contained in a formal agreement or merely in the form of an informal understanding, can and generally will form the backdrop against which the court determines whether there has been commercial unfairness".

150 In determining whether there is an informal understanding and a breach of the understanding such that it amounts to commercial unfairness, the court ought to consider matters in the round. In this case, there are only two shareholders in the company: Dr Lee was the entrepreneur who managed the Companies solely, while Ms Hatta was an investor who injected working capital into the Companies in exchange for a minority stake. The nature of Ms Hatta's association with the Companies was as an investor: she must have contemplated that any exit from the Companies would be fair to her in order to protect her investment, in so far as reasonable. Against this backdrop, Dr Lee expressed her wish before Ms Hatta's entered into her $2m investment that the latter would "enjoy the fruits of my endgoal from the hardwork". A joint venture that would significantly compromise that exit right would thus be of concern to Ms Hatta. When a joint venture was contemplated with Adval, Dr Lee assured Ms Hatta that she would write off TLC's and her personal loans to the Companies. These loans were not written off in the Final JV Structure. In all the circumstances, the failure to honour her promise of writing of the loans amounted to commercial unfairness within the meaning of s 216 of the Companies Act.

Conclusion on minority oppression

151 I conclude, therefore, that there has been commercial unfairness, entitling relief under s 216 of the Companies Act.

Relief

152 At present, the only substantive asset in the Company is the 20% shareholding of ADB. Based on Ms Hatta's 5% shareholding in the Companies, this asset would translate into the value of a 1% holding in ADB. The liabilities include the various loans which the evidence in this case has called into question.

153 In determining the appropriate relief for an action under s 216 of the Companies Act, the court possesses a "very wide" jurisdiction to make an order that it thinks fit as long as such order is made "with a view to bringing to an end or remedying the matters complained of" (*Sakae* at [197], citing *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 at [71]). As noted by the Court of Appeal in *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd and others* [1999] 1 SLR(R) 773 ("*Yeo Hung Khiang*") at [72], for example, "the determination of share value need not be in accordance with strict accounting principles. The role of the court [is] merely to determine a price that is fair and just in the particular circumstances of the case."

154 The parties presented a number of different options and I deal with each in turn.

Buy-out of Ms Hatta's shares at $2m

155 Ms Hatta suggested that fairness in the present case could be achieved through an order for Dr Lee to purchase Ms Hatta's shares at the price Ms Hatta paid.

156 In support of this, reliance was placed on the case of *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 ("*Tullio*"), where the Court of Appeal

at [20] ordered the respondent to purchase the shares of the appellant at the price at which the respondent had sold them to the appellant.

157 The facts of *Tullio* are markedly different from the present case. There, the appellant purchased half the shares in an inactive company in order to re-activate the company. Shortly after payment, the shareholders could no longer reach an agreement, and the appellant found himself kept out of management. The Court of Appeal stated at [20]:

> … Although in the case of a company which has always been active a valuation would produce the fairest result, it would not necessarily be so where, as in this case, the company had been inactive and was being resuscitated by the injection of fresh capital. Each case must depend on its own particular facts…

158 In *Tullio*, the appellant requested a return of his money less than three weeks after he became a shareholder. Here, Ms Hatta did not seek to rescind her investment for almost 6 years. More importantly, the Companies were active and the evidence indicates that Ms Hatta was well aware they were loss-making at the time of her investment. Ms Hatta bought into the shares of the Companies with the specific knowledge that her investment would be used for the development of skincare products in a bid to grow the company and realise profits later. Consistent with that knowledge, save for the misconduct highlighted earlier in this judgment, her money was indeed expended to grow the company. Risks are plain in such entrepreneurial ventures. A return of $2m would not be apt.

Dr Lee to purchase Ms Hatta's shares at a price to be determined by an independent valuer

159 Ms Hatta's alternative proposal is for Dr Lee to purchase Ms Hatta's shares of the Companies with the value of the Companies to be determined by

an independent valuer, with the adoption of broad parameters such as the repayment of the sums that Dr Lee had misused back to the Companies' funds and rectification of the Companies' accounts to reflect that Ms Hatta's payment of $2m was to be injected directly into the Companies as working capital. It was further suggested to me that the valuation should take into account the projection of future earnings of the Companies: this would require a valuation based on the profits and future cash flows of ADB, of which the Companies owned 20%.

160 Such a valuation will be a complex one, and necessarily expensive. The volume of documentation would be extensive. The likely significant cost to parties rules this out as a practicable solution. As discussed above at [153], the role of the court is merely to determine a price that is fair and just in the particular circumstances of the case.

161 Further, as stated by Cox J in *Re Bagot Well Pastoral Co Pty Ltd; Shannon v Reid* (1992) 9 ACSR 129 at 147, cited by the Court of Appeal in *Yeo Hung Khiang* at [72]:

> No more than an approximate appraisal of the relevant factors is required. *Apart from the impossibility of achieving exactness, the expense of pursuing that goal would probably not be economically worthwhile. Enough information, probably with expert advice, to make a fair estimate is all that is needed.*
>
> [emphasis added]

Valuing Ms Hatta's shareholding based on the Companies' net asset value

162 Dr Lee suggested that a valuation based on the Companies' net asset value ought to be applied, as such a method was useful for valuing a company with readily realisable assets carrying on a loss-making business.

163 A valuation based on net asset value would result in a negative value. Physical assets have been transferred to ADB. Liabilities remain. I note that, in this regard, even Adval, during the course of negotiations, was reluctant to deal with the issue of the Companies' existing liabilities, and had suggested a number of options including liquidation to deal with the outstanding loans owed to third parties.[122] Adopting a valuation based on net asset value will not be equitable to Ms Hatta.

Winding-Up of the Companies

164 Ms Hatta further suggests winding up the Companies. Dr Lee resists this course of action. In any event, such a solution would not give Ms Hatta any financial return. Her sole interest in advancing this option is to have a liquidator question and take action against Dr Lee.

My decision on the applicable remedy

165 In my judgment, the applicable remedy is to order Dr Lee to purchase Ms Hatta's shares in the Companies, which the court is empowered to do so under s 216(2)(*d*) of the Companies Act. The observations of the authors in Hans Tjio, Pearlie Koh & Lee Pay Woan, *Corporate Law* (Academy Publishing, 2015) at para 11.088, which were cited by the Singapore International Commercial Court in *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1 ("*Dystar*") at [277], are relevant in this regard:

> … the buyout order is probably the most common relief sought and obtained under section 216 of the Companies Act. Section 216(2)(*d*) contemplates a situation in which the shares of the applicant are purchased from him. This is by far the more usual

122 AB Vol 6 at p 3533.

> form of the order and *allows the applicant to realise his investment in the company at a fair value*. As we have already seen, *many applications under section 216 involve private companies*. The position of the minority shareholder in such companies is aggravated by virtue of the fact that *there is no ready market for the shares and he is thereby locked in*. A buyout order of this nature therefore is likely to be in keeping with the minority's wishes, and provides the most appropriate solution in the circumstances.
>
> [emphasis added]

166 There is, in the present case, no residual goodwill or trust left between Ms Hatta and Dr Lee. Dr Lee acknowledged in cross-examination that there is no prospect of the two working together moving forward.[123] A buyout would hence be the "most expeditious means to bring to an end the matters about which complaints have been made" (*Dystar* at [278]).

167 What should be the terms of the buyout? The court has a discretion to order that which is just and equitable between parties. In my view, the order made must bear a close nexus to the oppressive acts established. This is supported by the approach taken by the Singapore International Commercial Court in *Dystar*. In *Dystar*, the majority shareholder had committed various oppressive acts which resulted in loss to the company. The Singapore International Commercial Court considered that these losses should be taken into consideration and incorporated into the company's value (*Dystar* at [279] and [281]).

168 In this case, Dr Lee's oppressive acts may be summed up as follows:

(a) with respect to Ms Hatta's initial $2m investment, imposing the burden of interest-bearing loans on the Companies instead of directly

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123 NE 17 April 2019 at pp 61–62.

injecting the $2m as working capital, and not seeking Ms Hatta's informed consent on the undisclosed profits;

(b) discharging the second tranche of $2m owing from Fide which was intended for the Companies, and concealing this discharge from Ms Hatta;

(c) profiting through interest from loans which were extended to the Companies, placing the insolvent Companies at further risk;

(d) failing to reasonably answer Ms Hatta's questions in relation to (a), (b) and (c);

(e) failing to write off the loans she extended to the Companies despite repeated promises to Ms Hatta in respect of Ms Hatta's remaining shares in the Companies after the Adval JV.

169 The oppressive acts stated at (a), (c) and (e) may be *partially* resolved by giving Ms Hatta a price that does not carry any loan liability (Dr Lee's profiting from the interest on the loans is a separate point which is considered at [172] below). Therefore, a buy-out with a *price fixed by reference to a percentage of ADB's shareholding* would be the most practicable and fair method. This would obviate detailed analysis of the loans, which Adval also avoided when they made their investment. I use ADB's value as a point of reference because Ms Hatta's investment facilitated the period of development that led to Adval's interest. Without Ms Hatta's initial investment, the Companies, being insolvent, may have folded prior to Adval's entry.

170 In view of Dr Lee and Ms Hatta's total shareholding being translated into 20%, Ms Hatta's original 5% would, as a starting point, be a 1% share. This

would also give Ms Hatta the value of JV Structure 1 (see [18]). This starting point addresses two issues: being debt-free, it resolves the issue of the loans and the minimising of Ms Hatta's interest in ADB; it also resolves Dr Lee's omission to answer the financial queries in relation to the Adval JV. This 1% would be the starting point, because, as Ms Hatta's counsel pointed out in closing oral submissions, using the 1% value alone would not reflect the other acts of oppression. The issue, however, is whether more than 1% can be given and if so, how much more, on a principled basis.

171 It was suggested for Ms Hatta at the closing oral arguments that 5% could be used on two alternative bases. The first was that Mr Ku, in an email to Dr Lee on 4 February 2016, suggested that Dr Lee could consider offering 5% of the joint venture company to Ms Hatta. This was a suggestion mooted in the context of reaching a compromise with Ms Hatta, and is not a principled basis for calculation. The second suggestion was that the 5% could be based on the one quarter to three quarter (2:6) financial contribution of Ms Hatta and Dr Lee towards the Companies, based on Adval's calculations. This would not be equitable to Dr Lee as the $6m estimate does not encompass the whole of her contribution.

172 The value of ADB is not known, although it is not disputed that it is a going concern and such valuation may be completed on an income basis. There would necessarily be an element of rough justice in any percentage allocated, even on a principled basis. Nevertheless, the First ERA, signed by both parties, envisaged that Ms Hatta's $4m would be invested into the Companies in specific sums. Considering that the second tranche of $2m owed by Fide was discharged by Dr Lee in breach of her fiduciary duties, this should be taken into account in the order made. There is no indication on the First ERA as to whether there is any shareholding the second tranche of $2m would be translated into,

or by whom the shares would be held. Dr Lee's evidence was that Ms Hatta and her had an agreement that $4m would be invested in the Companies for 10%, with $2m paid first and another $2m within six months after, which she considered "a fair figure/bargain".[124] This would have been consistent with another 5% shareholding being transferred to Ms Hatta if the First ERA had been carried into effect, although Ms Hatta was adamant that the second $2m was a loan to Fide. There is also Dr Lee's offer of 23 November 2012 to Ms Hatta for 5% of shares in exchange for $2m. I think it fair that an additional 1% be added on account of this breach.

173 A final issue relates to the payment of interest from third party loans in conflict of interest. The failure to furnish proper information on the financial statements may be considered in this respect. Having regard to all the circumstances of the case, I hold that the price for Ms Hatta's buyout should be 3% of the value of ADB, with the valuation to be completed by an independent valuer.

174 In so ordering, I hold that no discount should be made for the minority interest. In *Thio Syn Pyn v Thio Syn Kym Wendy and others and another appeal* [2019] 1 SLR 1065 ("*Thio Syn Pyn*"), the Court of Appeal clarified that in the context of non-quasi-partnerships, whether a discount should be applied would depend on all the facts and circumstances of the case. There is no presumption that a discount should apply (*Thio Syn Pyn* at [19]).

175 Turning to the facts and circumstances of this case, the result of this buyout is that Dr Lee will now be the sole shareholder of the Companies free of

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124 BAEIC Vol 1, Tab 1 at [21].

any minority interest. This in turn will give her unimpeded authority in respect of its most valuable asset, being the 20% shareholding in ADB. The importance of this factor was stated at *Thio Syn Pyn* at [39], and the Court of Appeal referred to the earlier decision of *Over & Over* at [132] where no minority discount was applied as the majority would become the sole shareholder following the buyout. Whilst Dr Lee has a minority interest in ADB, the value of that minority interest to her is significantly enhanced by her sole ownership of it.

176 For the date of valuation of Ms Hatta's 2% of shareholding, I hold that it should be fixed on the date of this court order. In *Re London School of Electronics Limited* [1986] Ch 211 at 224, Nourse J was of the view that "*[p]rima facie* an interest in a going concern ought to be valued at the date on which it is ordered to be purchased". Chua Lee Ming J was of the same view in *Koh Keng Chew and others v Liew Kit Fah and others* [2018] 3 SLR 312 ("*Koh Keng Chew*") at [9], that using the date of the court order "best reflects what the shareholder is selling". While this is not an immutable rule (see *Koh Keng Chew* at [10]; *Poh Fu Tek v Lee Shung Guan* [2018] 4 SLR 425 at [53]), I hold that it is appropriate to the facts of the present case. Dr Lee contends that the date should be 18 January 2017, prior to the Adval JV. This proposal would not be fair to Ms Hatta, as it does not capture the benefit of Adval's participation. It was Ms Hatta's investment that allowed the Companies to come into the current Adval platform. At the same time, using any date later than date of judgment would not be fair to Dr Lee. The future of ADB is now the responsibility of Adval and herself.

Conclusion

177 In the result, I order the first defendant to purchase the plaintiff's shares at 3% of the valuation of ADB, with the value to be determined on an income

basis by an independent valuer, as at today. Counsel indicated that they should be able to agree on a valuer. I shall hear counsel on costs and any consequential orders required.

Valerie Thean
Judge

Wong Hin Pkin Wendell, Chen Jie'An Jared and Ang Xin Yi, Felicia (Drew & Napier LLC) for the plaintiff;
Chong Yee Leong, Tan Pang Leong, Nicholas and Sheryl Lauren Koh Quanli (Allen & Gledhill LLP) for the defendants.