IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 38

Originating Summons No 666 of 2018

Between

(1) Jian Li Investments Holding Pte Ltd
(2) Ting Choon Meng
(3) Chua Ngak Hwee

… *Plaintiffs*

And

(1) HealthSTATS International Pte Ltd
(2) Lian Chin Chiang
(3) Chang Hon Yee

… *Defendants*

JUDGMENT

[Companies] — [Oppression] — [Minority shareholders] — [Statutory derivative action]

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Jian Li Investments Holding Pte Ltd and others
v
Healthstats International Pte Ltd and others

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20 February 2019 Judgment reserved.

Ang Cheng Hock JC:

Introduction

1 This is an application for leave to commence a statutory derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) (the "CA"). In a nutshell, the co-founders of a company seek leave to commence a derivative action against two directors appointed by the majority shareholder for not sufficiently protecting the company's "trade secrets" – its key product's software source code and algorithm. The co-founders allege that the directors have thereby breached their fiduciary duties to the company. The company and the directors resist the plaintiffs' application on the basis that the application is not brought in good faith and the contemplated action is not *prima facie* in the interests of the company. Aside from claiming the proposed derivative action has no merits, the company and the directors also argue that the co-founders are bringing this application for collateral purposes – retaliation for their removal

as directors of the company and an attempt to wrest back control over the company.

Factual background

2 The first defendant, HealthSTATS International Pte Ltd ("Healthstats"), is a Singapore incorporated company. Its principal business is the manufacturing of medical or clinical diagnostic instruments.[1] Its main product is the BPro device, a non-invasive and wireless blood pressure monitoring system that can record blood pressure in 15-minute intervals and provide 24-hour readings.[2] It is worn on the wrist and designed like a watch. This is quite different from the usual way of measuring blood pressure using an inflatable cuff.[3]

3 The BPro device is driven by its software. The source code of the software, including the algorithm contained within the source code, are Healthstats' trade secrets ("the Trade Secrets").[4] The parties do not dispute that the Trade Secrets are of considerable value to Healthstats. In fact, more than one counsel referred to the Trade Secrets at the hearing as the "crown jewels" of Healthstats, a description which appears to me to be a fair one on the facts as disclosed in the affidavits.

4 The second plaintiff, Dr Ting Choon Meng ("Dr Ting"), and the third plaintiff, Mr Chua Ngak Hwee ("Mr Chua"), are the founders and former directors of Healthstats.[5] Up to 2 March 2018, Dr Ting held the position of

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1 TCM 1st affidavit, para 4.

2 TCM 1st affidavit, para 4A.

3 TCM 1st affidavit, paras 4–4A.

4 TCM 1st affidavit, para 7.

Executive Chairman of Healthstats and Mr Chua held the position of Chief Technology Officer.

5 Dr Ting holds shares of Healthstats through the first plaintiff, Jian Li Investments Holding Pte Ltd ("Jian Li"). Both Dr Ting and Mr Chua conceptualised and created the BPro device, and they were the ones that formulated the source code and algorithm that enabled the device to record blood pressure levels in 15-minute intervals over a 24-hour period.[6] They were removed as executives and directors of Healthstats in circumstances that will be elaborated upon later in this judgment.

The Investment Agreement

6 Despite having such a technologically innovative product like the BPro device and its competitors not having a device with similar capabilities, Healthstats operated at a loss annually since its inception in 2000.[7] Over the years, there have been investors in the company but its business has never really taken off.

7 In May 2017, Dr Ting and Mr Chua approached One Tree Partners Pte Ltd ("OTP") to discuss the possibility of finding investors for Healthstats. OTP was a Singapore-based private asset management firm.[8] At that time, the Chief Executive Officer of OTP was Mr Tan Shern Liang ("Mr Tan"). Mr Lian Chin Chiang ("Mr Lian"), the second defendant, was also a director of OTP.[9] It is

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5 TCM 1st affidavit, para 6.

6 TCM 1st affidavit, para 7.

7 MC 1st affidavit, para 19.

8 LCC 1st affidavit, para 10.

9 LCC 1st affidavit, para 10.

not in dispute that Mr Tan was instrumental in putting Dr Ting and Mr Chua in touch with the eventual investors.

8 In the ensuing months, the representatives of OTP, Dr Ting and Mr Chua discussed the possibility of finding investors for Healthstats. There was some initial scepticism on the part of Mr Lian about the profitability of this investment given Healthstats' financial position.[10] But it appears that what moved the needle for OTP and the eventual investors was that an Australian biomedical product development company, Planet Innovation Pty Ltd ("PI"), had expressed interest in working together with Healthstats.[11]

9 PI is a leader in the field of innovation, development and commercialisation of biomedical products. It has won several accolades for being the most innovative company in Australia in 2013, 2015 and 2016.[12] It was developing a medical device known as the "Vitalic Medical" system ("the Vitalic"). This is essentially a bedside patient monitoring system that provides nurses with early signs of deterioration and potential patient falls so that nurses can attend to patients' needs more proactively.[13]

10 Dr Ting and Mr Chua were aware that the potential collaboration with PI was a big selling point for Healthstats. They therefore made it a point to share with OTP their proposed plans to work with PI. They even invited the representatives of OTP (Mr Tan, Mr Lian as well as another colleague, Mr Michael Sidaway ("Mr Sidaway")) to meet with senior officers from PI in

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10 LCC 1st affidavit, para 55.

11 LCC 1st affidavit, para 56.

12 LCC 1st affidavit, para 56.

13 LCC 1st affidavit, para 57(b).

Australia.[14] On 8 August 2017, Mr Tan, Mr Lian, Dr Ting, Mr Chua and Mr Marcus Chua, who is the Chief Financial Officer of Healthstats, flew to PI's offices in Australia.[15] There, they were introduced to the business of PI and attended a presentation on proposed partnership opportunities, including the potential "integration" of the BPro device into the Vitalic.[16]

11 OTP found investors who were prepared to invest in Healthstats. In September 2017, OTP incorporated Tupai Singapore Private Limited ("Tupai") as well as established an investment fund, Tupai GP (Cayman Islands) ("Tupai Fund").[17] OTP and Healthstats entered into an investment agreement on 14 September 2017 ("the Investment Agreement"). OTP subsequently novated its rights and obligations under the Investment Agreement to Tupai.[18] The investment was funded by two limited partners of the Tupai Fund, namely Mr Chang Hon Yee ("Mr Chang"), who is the third defendant, and Mr Charles Chen ("Mr Chen").[19] Mr Chang and Mr Chen had invested S$11m and S$10m respectively in the Tupai Fund, and S$20m out of the S$21m was invested, through Tupai, in Healthstats.

12 Two clauses in the Investment Agreement are of note. They are facilitative of the key consideration for Tupai's investment in Healthstats, which is ultimately the commercial exploitation of the Trade Secrets. Clause 4.4(b) of

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14 LCC 1st affidavit, para 59.

15 LCC 1st affidavit, para 61.

16 LCC 1st affidavit, para 62.

17 LCC 1st affidavit, paras 10–11.

18 LCC 1st affidavit, paras 10–11.

19 LCC 1st affidavit, paras 13.

the Investment Agreement provided that upon payment of the investment, Healthstats shall immediately:

> grant to Mr. Tan Shern Liang (or such other person nominated by the Investor) full and unrestricted access to all trade secrets, know-how, software and other data or information relating to the algorithm for calculation of the 24-hour ambulatory blood pressure monitoring system owned and developed by the [Healthstats] Group.

Clause 6.4 of the Investment Agreement provides that:

> Each Covenantor hereby irrevocably and unconditionally undertakes to and covenants with the Investor and the Company that following Completion, each Covenantor shall, as and when required by the Investor and/or the Company provide them with all reasonable assistance, do all things necessary and/or provide such information or documents as necessary to enable the Investor and/or the Company to use, exploit, apply, implement and/or develop the algorithm, software and/or know-how related to the calculation of the 24-hour ambulatory blood pressure monitoring system including, without limitation, making available to them all trade secrets, software, data and/or information.

13 In consideration for its S$20m investment, Tupai became the 69.55% majority shareholder of Healthstats. Jian Li's and Mr Chua's shareholding decreased from 16.41% and 11.49% to 4.92% and 3.45% respectively.[20] Mr Tan, Mr Lian and Mr Chang were also appointed as directors of Healthstats.[21] Mr Lian was also appointed as Chief Executive Officer ("CEO") of Healthstats on 31 October 2017.[22]

14 During the course of the parties' oral submissions, there was considerable disagreement on the role of one Mr Paul Phua ("Mr Phua"). Mr

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20 LCC 1st affidavit, para 12.

21 TCM 1st affidavit, para 11.

22 LCC 1st affidavit, para 115.

Chang referred to him as an advisor "from whom [he sought] advice on [his] investments from time to time".[23] The plaintiffs, on the other hand, allege that Mr Phua was the ultimate beneficial owner of Mr Chang's share of the Tupai Fund.[24] This allegation was largely premised on some correspondence where Dr Ting refers to the investment as Mr Phua's and Mr Phua did not immediately refute or correct him.[25] However, this impression was later contradicted by one of Mr Phua's messages, where he states that "[t]his is Hon's [meaning Mr Chang's] investment, not mine."[26] This was the only direct statement made by Mr Phua as regards ownership and interest in the Healthstats investment.

15 Further, there is evidence to show that Mr Tan, who was one of the key people who put together the deal, had updated Mr Chang in August 2017 on the potential collaboration between Healthstats and PI after the visit to PI's office in Australia.[27] This was before Tupai's entry into the picture and it suggests that Mr Chang was being updated as a potential investor in Healthstats. In this regard, I accept counsel for Mr Chang's submission that Mr Tan should be in a position to state whether Mr Phua was the true investor, and not Mr Chang, but Mr Tan never stated so despite having filed an affidavit in support of the plaintiffs' case. This again suggests that there is no basis to doubt Mr Chang's assertion that he is not a nominee for Mr Phua.

16 But, in any event, I do also agree with the submission made by counsel for Mr Chang that this question of whether Mr Chang or Mr Phua was the true

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23 CHY 1st affidavit, para 9.

24 Minute Sheet dated 19 Nov 2018; TCM 4th affidavit, para 69.

25 TCM 4th affidavit, paras 64–66.

26 TCM 4th affidavit, p 141.

27 CHY 1st affidavit, exhibit CHY-1.

investor was ultimately irrelevant to the determination of the issues in these proceedings.[28]

Collaboration with PI

17 On 21 November 2017, a Memorandum of Understanding between Healthstats and PI ("the MOU") was signed.[29] Mr Lian was the signatory on behalf of Healthstats and Mr Sidaway witnessed this.[30] The terms of the MOU record what is described as a "Strategic Alliance" between PI and Healthstats. Parties in these proceedings have referred to this as the "API Strategic Alliance", as explained below. Clause 1 of the MOU provided that Healthstats' role was to use its best endeavours to provide an Application Programming Interface ("API") to process data obtained from the BPro device into periodic and 24-hour blood pressure readings. This information would then be relayed to the Vitalic hub.[31] Clause 2 provided that PI's role was to work with Healthstats to "integrate the BPro to the Vitalic hub".[32]

18 The MOU also included terms relating to confidentiality and the protection of intellectual property (which is defined widely in the MOU). Clause 4 provided that neither party will use intellectual property owned by the other party without the other party's prior consent, and that any intellectual property belonging to the parties that is used during or for the period of the "Strategic Alliance" will remain the property of the party who owned it. Clause 6 was a confidentiality clause which provided that parties to the MOU cannot

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28 Minute Sheet dated 20 Nov 2018.

29 LCC 1st affidavit, para 123; TCM 1st affidavit, p 156.

30 TCM 1st affidavit, p 12. TCM 1st affidavit, p 160.

31 TCM 1st affidavit, para 21.

32 TCM 1st affidavit, p 157.

disclose the terms of the MOU or information received pursuant to the MOU to third parties. In addition, usage of information received cannot be channelled to any purpose other than for the "Strategic Alliance" contemplated by the MOU. It is not disputed by the plaintiffs that the clauses in the MOU do sufficiently protect the intellectual property of Healthstats for the purposes of this "Strategic Alliance".

19 As mentioned, the plaintiffs refer to the "Strategic Alliance" envisioned by the MOU as the "API Strategic Alliance",[33] in contradistinction to what Dr Ting refers to as the "Real Time Strategic Alliance". The plaintiffs allege that Mr Lian and Mr Chang breached their fiduciary duties to Healthstats by permitting, authorising or facilitating Healthstats' entry into a Real Time Strategic Alliance. In reply, it is denied by the defendants that Healthstats ever entered into a "Real Time Strategic Alliance" with PI.

20 I should preface the discussion as to what these two alliances mean by elaborating a little on the current capabilities of the BPro device. As mentioned earlier, the BPro device is capable of measuring blood pressure at 15-minute intervals (see [2] above). These readings are taken over a period of 24 hours and then compiled into a single report.[34]

21 The API Strategic Alliance does not involve modifying or enhancing the capabilities of the BPro device. It involves the creation of an API that would translate output coming from the BPro device into readable input for the Vitalic hub to understand. Put simply, the API would only be a tool that plays a translatory function between the two devices. The API itself would not contain

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33 TCM 1st affidavit, para 21.

34 TCM 4th affidavit, para 9(2).

any confidential information and the building of the API itself would not require any prior knowledge or access to the source code and algorithm of the BPro device software.[35]

22 The Real Time Strategic Alliance, on the other hand, as alleged by the plaintiffs, requires the *modification* (and inevitably, the disclosure) of the source code and algorithm of the BPro device software so that the software can be further developed to measure blood pressure in real-time on a beat-to-beat basis, not just at 15 minute intervals.[36] In short, the Trade Secrets will have to be disclosed to PI for the purposes of the Real Time Strategic Alliance so that they can be worked upon. For completeness, Dr Ting also refers to the modification and re-programming of the BPro device to include the capability to "live-stream" blood pressure readings every five to ten minutes, which he describes as being "very similar to" or "aligned" with the goals of the Real Time Strategic Alliance.[37]

23 Dr Ting and Mr Chua allege that the Trade Secrets of Healthstats should never be disclosed to any third party, and by agreeing to a Real Time Strategic Alliance with PI, the defendant directors had sanctioned or permitted a disclosure of the Trade Secrets in breach of their duties. Mr Lian's and Mr Chang's terse response is that there is no Real Time Strategic Alliance, and hence no requirement for modification of the source code and algorithm of the BPro software. As such, there is no disclosure of the Trade Secrets to PI or any third party.

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35 TCM 1st affidavit, para 24.

36 TCM 1st affidavit, para 25A.

37 TCM 4th affidavit, paras 9(2) and 9(3).

24 It is relevant to note that it was common ground between the parties that the terms of the MOU itself, on their face, did not contemplate or cater for a Real Time Strategic Alliance.[38] But, whether Healthstats and PI had, without the knowledge of Dr Ting and Mr Chua, entered into a Real Time Strategic Alliance that was encapsulated in some other agreement that was not disclosed was the hotly contested factual dispute between the parties. This issue is dealt with in more detail later in my judgment.

The events leading up to the termination of Dr Ting and Mr Chua

25 On 22 February 2018, Mr Lian conveyed his intention to Mr Tan that he wanted to step down as CEO of Healthstats.[39] On 28 February 2018, Mr Tan told him to step down with effect from 1 March 2018 and that he would take over as CEO. It appears that this was a result of Mr Lian having "irreconcilable differences" with Dr Ting, Mr Chua and Mr Tan in Healthstats.[40] According to Mr Lian, he then sought Tupai's and Mr Chang's approval for his resignation. But, after Mr Chang learnt from Mr Lian how Dr Ting and Mr Chua had allegedly mismanaged the company (see [33] below), Mr Chang did not want him to resign and insisted that he should stay on as the CEO to safeguard the interests of Healthstats. Mr Chang also told Mr Lian that he intended to ask Mr Tan to step down from Healthstats. This was because Mr Chang wanted to sever his working and business relationship with Mr Tan due to certain differences that had arisen between them, mostly in connection with other investments that were unrelated to Healthstats.[41]

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38 TCM 1st affidavit, para 26; LCC 1st affidavit, para 134.

39 TCM 1st affidavit, p 164.

40 CHY 1st affidavit, para 34.

41 LCC 1st affidavit, para 290; CHY 1st affidavit, para 35.

26 My review of the facts suggests that there might have been some manoeuvring within OTP between Mr Tan and Mr Lian, perhaps because it appeared that Mr Tan was too friendly with Dr Ting and Mr Chua in relation to issues within Healthstats. But, whatever might have been the truth, the fact remains that Mr Chang, who controlled Tupai, decided that it was Mr Tan that should leave Healthstats and he managed to persuade Mr Lian to stay on.

27 On 1 March 2018, Mr Tan signed a separation deed with Mr Chang ("the Separation Deed") in Hong Kong, pursuant to which he agreed to resign from his position as director of Healthstats as well as a number of other companies, including Tupai and OTP.[42] The Separation Deed was signed at about 10.00pm that night. The circumstances surrounding the signing of the Separation Deed are disputed – the plaintiffs allege that the deed was entered into under duress, but this was refuted by the defendants. I elaborate on this below at [104].

28 On the same day, at around 8.00 to 9.00pm, Mr Lian requested access to Healthstats' R&D office. The R&D engineer, Ms Soo Pei Fen ("Ms Soo"), told him that it was one Ms Helen Lee ("Ms Lee"), the office cleaner, who held the keys to the office. Ms Soo then informed Mr Chua – while Mr Lian was *en route* to Ms Lee's home – that he was looking for the keys to the R&D office. Mr Chua then called Ms Lee and told her not to pass the keys to Mr Lian, and that he would call the police if she did so.[43] Mr Lian did not press Ms Lee for the keys and he was thus not able to enter the R&D office.[44]

29 On the next day, 2 March 2018, at around 9.40am, Mr Lian gathered all

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42 LCC 1st affidavit, p 1329.

43 TCM 1st affidavit, para 18 item 9.

44 LCC 1st affidavit, para 294.

the staff of Healthstats in a conference room and announced that Dr Ting and Mr Chua had been suspended from their executive positons, and that he would be replacing Mr Tan as director and chairman of Healthstats. The e-mail accounts and access cards of Dr Ting and Mr Chua were disabled.[45]

30 Mr Lian then went into the R&D office and got one of the engineers to copy the Trade Secrets, which were stored in one of the computers (and also the servers), into a hard disk ("the Hard Disk"). This was done openly in the presence of several Healthstats' employees, including Mr Chua's brother, Mr Chua Ngak Kwong. According to Mr Lian, this was done because he was concerned that Dr Ting and Mr Chua would "sabotage Healthstats by damaging the BPro algorithm and other confidential source codes of Healthstats in retaliation for their suspension".[46] He further explained that his "primary concern at the time was to secure a backup copy of the BPro algorithm so that Healthstats would not be held ransom by" Dr Ting and Mr Chua.[47]

31 Mr Lian left the office before the copying of the Trade Secrets into the Hard Disk was completed. But before he left, he gave instructions that the Hard Disk was to be handed to Ms Serene Chang, a manager in Healthstats, for safekeeping. Ms Serene Chang has been an employee of Healthstats since 2009.[48] She brought the Hard Disk back home, but brought it back to the office on 7 March 2018. Since then, the Hard Disk has remained in the office of Healthstats under lock and key.[49]

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45 TCM 1st affidavit, p 170; TCM 1st affidavit, para 18 item 11.

46 LCC 1st affidavit, para 296.

47 LCC 1st affidavit, para 304.

48 Serene Chang's 1st affidavit, para 1.

49 LCC 1st affidavit, para 312-313.

32 On 9 March 2018, Dr Ting and Mr Chua issued a letter to Healthstats seeking an explanation for their suspensions. This letter also contained a notice of intention to bring a derivative action under s 216A of the CA against Mr Lian and Mr Chang.[50] In gist, the allegations in this notice are that Mr Lian's copying of the Trade Secrets and the steps that he had taken to exclude Mr Chua and Dr Ting from the operations and management of Healthstats indicate that he was not acting in good faith in Healthstats' interests. It was also stated that there was concern that Mr Lian's actions in relation to the Trade Secrets would cause irreparable damage to Healthstats. Mr Chang was accused of being equally culpable because he had supported or acquiesced in the actions taken by Mr Lian.

33 On 28 March 2018, Healthstats' solicitors replied to the notice, detailing various reasons for Dr Ting's and Mr Chua's suspensions. Chief among these reasons was Dr Ting and Mr Chua had attempted to procure payments to themselves in the amounts of S$791,477.71 and S$832,476.25 respectively for the repayment of loans (with interest) and accrued salary.[51] These attempted payments were said to be wrongful on several grounds, including that, there was no board meeting to discuss the payments and therefore there was no chance to consider whether Healthstats had the financial resources to make them. I do not have to detain myself with the full details of all the reasons given by Healthstats for the suspensions, or their correctness, because they are not material to the application before me. The plaintiffs' application for leave to commence a statutory derivative action does not allege that Mr Lian and Mr Chang had breached their fiduciary duties in deciding to suspend, and later remove, Dr Ting and Mr Chua from their executive positions.

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50 TCM 1st affidavit, p 168.

51 TCM 1st affidavit, pp 175–176.

34 On 27 April 2018, the plaintiffs' solicitors issued another notice under s 216A of the CA to Healthstats' solicitors. Many allegations were made against Mr Lian and Mr Chang in this lengthy letter.[52] The material ones that are relevant to this application are that (i) they had conspired with others to "steal, transfer and/or otherwise sell" the Trade Secrets to PI, (ii) there was a surreptitious attempt to physical remove the Trade Secrets in "the dark of night" on 1 March 2018,[53] and (iii) there was a "hijacking" of the Trade Secrets on 2 March 2018 when they were copied to the Hard Disk and then taken from the office.

35 On 2 May 2018, Dr Ting and Mr Chua were terminated from their executive positions at Healthstats. The reasons given were that they had breached their duties as executive directors and employees of Healthstats.[54] Again, the full reasons for their removal, or their correctness, are not material to this application and it is thus not necessary to set them out here.

36 On 30 May 2018, Dr Ting and Mr Chua were removed as directors of Healthstats by way of a shareholders' resolution in writing requisitioned by Tupai.[55]

The application under s 216A of the Companies Act

37 On 30 May 2018, the plaintiffs filed this application for leave under s 216A of the CA seeking leave of court to bring a derivative action against Mr Lian and Mr Chang for allegedly breaching their fiduciary duties by:[56]

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52 TCM 1st affidavit, p 183-191.

53 TCM 1st affidavit, p 187.

54 TCM 1st affidavit, p 192-197.

55 LCC 1st affidavit, exhibit LCC-1.

(a) Failing to sufficiently protect, or protect at all, the Trade Secrets in relation to the dealings with PI. This will be referred to as the "Collaboration with PI claim".

(b) Copying the Trade Secrets to the Hard Disk and removing it from Healthstats' R&D office for a period of six days, from 2 March to 7 March 2018. This will be referred to as the "Hard Disk claim".

38 Pursuant to s 216A(5) of the CA, the plaintiffs also seek access to the premises of Healthstats and Healthstats' records to obtain documents relating to (i) the collaboration with PI to modify the BPro software source code and algorithm, and (ii) documents relating to the removal of the Trade Secrets from Healthstats' office and what happened to them during those six days.[57]

39 In their originating summons, the plaintiffs also had a separate prayer for an interim injunction pursuant to s 409A(1) of the CA. But, after counsel for Mr Lian presented arguments as to why the prayer for an interim injunction was flawed as a matter of law, this prayer was withdrawn from the court's consideration by counsel for the plaintiffs.[58] As such, I shall say no more about it.

Issues to be determined

40 The parties' submissions for the leave application focused on the well-known requirements under s 216A of the CA:

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56 HC/OS 666/2018

57 ACBCP Vol I, Tab 1.

58 Minute Sheet dated 21 Nov 2018.

(a) first, whether the plaintiffs are acting in good faith in applying for leave to bring the derivative action in respect of the Collaboration with PI claim and the Hard Disk claim (s 216A(3)(*b*) of the CA); and

(b) secondly, whether the bringing or prosecution of the derivative action for these two claims will be *prima facie* in the interests of Healthstats (s 216A(3)(*c*) of the CA).

The applicable legal principles – s 216A(3)(*b*) and (*c*)

Good faith

41 The starting point in relation to the "good faith" requirement is that there is no presumption of good faith, and the onus is on the applicant to establish that he is acting in good faith: *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [23].

42 There are two main facets to the "good faith" requirement: *Ang Thiam Swee* at [29]–[30]; *Maher v Honeysett and Maher Electrical Contractors* [2005] NSWSC 859 at [28]. The first relates to the merits of the proposed derivative action. The applicant must honestly or reasonably believe that a good cause of action exists for the company to prosecute. It follows as a corollary that an applicant may be found to lack good faith if it is shown that no reasonable person in his position, and knowing what he knows, could believe that the company had a good cause of action to prosecute: *Ang Thiam Swee* at [29].

43 The merits of the proposed derivative action are also relevant to the requirement of "*prima facie* in the interests of the company" under s 216A(3)*(c)* of the CA, as will be explained below. But, it must be stressed that, for the requirement of "good faith", the consideration here is not an objective

determination of the merits of the claim that the company can bring. Rather, the question is whether the applicant could be said to honestly or reasonably believe that the company has a claim that should be brought. If this question cannot be answered affirmatively, the applicant's purpose for bringing the derivative action must be carefully scrutinised. As the Court of Appeal in *Ang Thiam Swee* observed at [29], the "conceptual integrity of the good faith requirement demands that any considerations of legal merits under this head must be yoked to the intents and purposes of the applicant who is seeking to initiate a derivative action".

44 Secondly, an applicant may be found to be lacking in good faith if it can be demonstrated that he is bringing the derivative action for a collateral purpose: *Ang Thiam Swee* at [30]. The onus is on the applicant to demonstrate that he or she is "genuinely aggrieved", and that any collateral purpose is sufficiently consistent with the purpose of "doing justice to a company" so that he or she is not abusing the statutory remedy and, by extension, also the company, as a vehicle for the applicant's own aims and interests: *Ang Thiam Swee* at [31], citing *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [19].

45 As regards this second facet of the good faith requirement, it will not suffice to show dislike, ill-feeling or personal animosity between the parties as hostility between warring factions within a company is commonplace. However, if it can be shown that the applicant is "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations", then this would constitute a lack of good faith: *Pang Yong Hock* at [20]. A history of grievances against the majority shareholders or the board would make it easier to characterise the derivative action as having been brought

for no other purpose other than the satisfaction of the applicant's private vendetta: *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313 at [41], cited with approval in *Ang Thiam Swee* at [13]. An applicant's good faith will also be in doubt if he appears set on damaging the company out of sheer spite or for the benefit of a competitor: *Pang Yong Hock* at [20]; *Wong Kai Wah v Wong Kai Yuan and another* [2014] SGHC 147 ("*Wong Kai Wah*") at [70].

46 In addition, any lack of good faith must relate to the commencement of the derivative action and not all past conduct of the applicant in general: *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 ("*Fong Wai Lyn Carolyn*") at [75] and [79]; *IGM Resources Corp v 979708 Alberta Ltd* [2004] AJ No 1462 at [36]. In *Fong Wai Lyn Carolyn*, Judith Prakash J, as she then was, rejected the argument that the plaintiff lacked good faith because the plaintiff herself had allegedly committed breaches of fiduciary duties owed to the company. Even if it was assumed that the breaches were committed, they were distinct and unrelated to the *defendant's* breach of duties which the plaintiff was seeking to prosecute.

47 In considering the requirement of good faith, a distinction between "motive" and "purpose" should be drawn. The element of good faith is "dependent less on the motives" behind the application and "more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests": *Ang Thiam Swee* at [16]. In other words, it is not the questionable motivations of the applicant *per se* that amounts to bad faith; instead bad faith may be established where questionable motivations constitute a personal purpose which will be pursued at the expense of or in lieu of the company's interests. In this sense, the requirements under s

216A(3)(*b*) and s 216A(3)*(c)* of the CA are quite clearly inter-linked: *Ang Thiam Swee* at [13] and [16], citing *Pang Yong Hock* at [20].

48 The good faith enquiry may also extend beyond the two main facets earlier identified, honest and reasonable belief in the merits, and purpose for bringing the application. It can also encompass considerations of the applicant's conduct in the proceedings: Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 6.043. For instance, the failure to be fully candid before the court would indicate a lack of good faith. In *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 ("*Agus Irawan*") at [9], Choo Han Teck JC, as he then was, considered this to be relevant, and held that good faith would have required the applicant to "set out the story in full from the beginning but he did not do so". This was cited with approval in *Wong Kai Wah* at [66], where Lee Kim Shin JC held that "[h]ints of lack of candour may justify an inference of a lack of good faith".

Prima facie in the interests of the company

49 In order to satisfy the requirement that the proposed derivative action be "*prima facie* in the interests of the company", the applicant must show that the claim is "legitimate and arguable": *Ang Thiam Swee* at [53]. This means that the claim must have a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful. Further, the claim must be such that if it is proved, the company will stand to gain substantially in money or money's worth: *Ang Thiam Swee* at [53]–[54], citing *Agus Irawan* at [8] and *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 ("*Urs Meisterhans*") at [25]. The expected benefit to the company must be real to justify the costs and effort of pursuing the action when the company itself had not proceeded with it. Therefore, the applicant must not only identify causes of action, he must also

show that the company has sustained or may sustain real loss or damage as a result of the failures and that there are some prospects of obtaining relief or redress through the proposed action: *Law Chin Eng and another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)* ("*Law Chin Eng*") [2009] SGHC 223 at [25].

50 At the leave stage, only affidavit evidence is before the court. The court should not be drawn into an adjudication on the disputes of facts; it only has to examine if there is *prima facie* merit: *Law Chin Eng* at [11]; *Urs Meisterhans* at [25]; *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426 ("*Teo Gek Luang*") at [15]. The threshold for the applicant to meet is therefore low and only the most obviously unmeritorious claims are excluded: *Ang Thiam Swee* at [55]; *Yeo Sing San v Sanmugam Murali and another* [2016] SGHC 14 at [23]; *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others* [2015] SGHC 145 ("*Petroships*") at [152]. The court should be mindful that the applicant may not, in the nature of things, have access to all the information: *Wong Lee Vui Willie v Li Qingyun and another* [2016] 1 SLR 696 ("*Willie Wong*") at [51]. But this may not invariably be the case – the applicant may have access to the necessary information despite being a minority shareholder: see, *eg*, *Ang Thiam Swee* where the Court of Appeal noted that it was the applicant who had the upper hand in terms of information and it was the defendant who was agitating for access to the company's books (at [55]).

51 In addition, leave to commence the derivative action would not be granted if there is only a mere "suspicion of wrongdoing". As Aedit Abdullah JC, as he then was, noted in *Willie Wong* at [36]:

> …Many actions or transactions could conceivably be perceived on the surface as being tainted or coloured, only to be cleared when the evidence is sufficiently tested. *Claims founded only on*

> *suspicion are bound to be unsuccessful at the end of the day*. To permit claims to proceed only on the basis of suspicion would, to my mind, create great difficulty in the administration of companies, especially once friction arises between the directors or shareholders, as it invariably does. [emphasis added]

52 Previous decisions have also stressed the need to show a reasonable basis for the applicant's complaint so as to avoid unnecessary interference with company administration. In *Teo Gek Luang*, Lai Kew Chai J noted that management decisions should be left to the board; members generally cannot sue in the name of the company, and the court should be wary of any attempt by a minority shareholder to abuse the s 216 CA procedure (at [14]). In *Pang Yong Hock*, the Court of Appeal held that the requirement that the applicant show a "legitimate and arguable" case was consonant with the legislative intention of protecting the interests of the genuinely aggrieved minority while ensuring that the company's directors are not unduly hampered in their management decisions by "loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat" (at [19]).

53 As already alluded above, there is an inter-play here with the requirement of "good faith" because an applicant with a frivolous or vexatious claim will also usually be unable to show that he has an honest or reasonable belief in the merits of the proposed derivative action or the absence of a collateral purpose amounting to an abuse of process: *Ang Thiam Swee* at [55]. Commentators describe the overlap between s 216A(3)(*b*) and s 216A(3)(*c*) of the CA to be "clear" and "substantial" (see Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 10.063 and Wee Meng Seng & Dan W Puchniak, "Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth" in *The Derivative Action in Asia: A Comparative and*

Functional Approach (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at p 347). But, again, I would emphasise that unlike the "good faith" requirement under s 216A(3)(*b*) of the CA, the "*prima facie* in the interests of the company" requirement under s 216A(3)(*c*) focuses on an objective assessment of the legal merit of the claim: *Ang Thiam Swee* at [58].

54 Even if a claim is meritorious, the court may come to the view that it may not be in the company's interests for the derivative action to be brought. For instance, the company may have genuine commercial considerations for not wanting to pursue certain claims, such as where there is a good, long-term and profitable relationship that might be damaged: *Ang Thiam Swee* at [56]; *Pang Yong Hock* at [21]. The "interests of the company" requirement entails a multi-factorial inquiry that can take into account the character of the company, the availability of alternative remedies, the ability of the defendant to satisfy the claim, the costs and benefits of the proposed action and the effect of the litigation on the conduct of the company's business among other considerations: *Willie Wong* at [50]; see generally *Petroships* at [153].

55 The views of the shareholders may provide some indication as to whether the commencement of a derivative action is in the interests of the company. In *Ang Thiam Swee*, the Court of Appeal observed there was "no positive affirmation from the majority shareholder that the Company views the action as worthwhile"; the shareholder's silence suggested instead that the action was *not in* the company's interests (at [57]).

56 Having set out the applicable legal principles, I turn now to determine the two issues in this application.

Issue 1 – Whether the plaintiffs are acting in good faith

57 I will consider the "good faith" requirement in relation to the plaintiffs' application for leave to bring derivative actions against Mr Lian and Mr Chang for both the Collaboration with PI claim and the Hard Disk claim.

58 The essence of the plaintiffs' case in this regard is that, if one examines the conduct of Mr Lian and the chronology of events, the inference must be that that Dr Ting and Mr Chua were abruptly removed from their executive positions in Healthstats on 2 March 2018 so as to give the opportunity to Mr Lian to access the Trade Secrets. Mr Lian did this by giving instructions for the copying of the Trade Secrets to the Hard Disk. This must have been done pursuant to a scheme by Mr Lian and Mr Chang to pass the Trade Secrets to PI for the Real Time Strategic Alliance, and not the API Strategic Alliance as documented in the MOU.

59 As such, the Collaboration with PI claim and the Hard Disk claim are intimately connected because, according to the plaintiffs, they are part and parcel of the same scheme to wrongfully pass on Healthstats' Trade Secrets to PI. The plaintiffs submit that they are acting in good faith because they honestly and reasonably believe, from these facts, that Healthstats has valid claims against Mr Lian and Mr Chang for breaching their duties as directors by failing to safeguard the company's interests because they permitted or sanctioned the passing of the Trade Secrets to PI.

The Collaboration with PI claim

60 The plaintiffs' case that there was an intention to disclose the Trade Secrets, or that there was actual disclosure, to PI is premised on this court

finding that there is evidence to show an arguable case that Healthstats and PI have indeed agreed to work together on the Real Time Strategic Alliance. As explained at [22] above, such a Real Time Strategic Alliance, according to the plaintiffs, would require Healthstats to share the Trade Secrets with PI, and it is alleged that this would be highly detrimental to Healthstats because these "crown jewels" should never be shared with any third party.

61 Counsel for the plaintiffs candidly admitted that there was no direct evidence to show that Mr Lian or Mr Chang had, on behalf of Healthstats, agreed to a Real Time Strategic Alliance with PI, and pursuant to that, had agreed to disclose the Trade Secrets or had actually disclosed the Trade Secrets to PI. However, it was submitted that there is sufficient circumstantial evidence for the court to draw the necessary inferences that there is such a Real Time Strategic Alliance.

62 To establish the existence of the Real Time Strategic Alliance, the plaintiffs rely on the events of 1 and 2 March 2018 and also to a number of documents. I shall deal with the specific arguments in relation to the events of 1 and 2 March 2018 later in the context of the Hard Disk claim. I address first the various documents relied on by the plaintiffs.

63 First, the plaintiffs refer to an e-mail from Mr Eduardo Vom ("Mr Vom"), the Executive Vice President of the Connected Health Department of PI, dated 16 January 2018. This e-mail was sent to Mr Lian and Mr Sam Lanyon ("Mr Lanyon"), the Chief Commercial Officer of PI. Mr Sidaway and Mr Marcus Chua were also copied. This e-mail was meant to be a draft of a "Master Service Agreement" which would be the starting base of the partnership with PI.[59] It includes the following excerpt:[60]

> Functionality:
>
> …
>
> Live streaming of BPro every 5-10 minutes
>
> …
>
> Healthstats:
>
> Bluetooth connectivity
>
> API
>
> 5-10 minutes data logging and transmitting
>
> PI:
>
> Vitalic integration
>
> Bpro and QBox integration
>
> …
>
> Follow-up actions:
>
> PI will need access to the BPro software/API…

64 Secondly, following the e-mail above, there was an internal e-mail from Mr Marcus Chua to Mr Lian and Mr Sidaway dated 17 January 2018. In this e-mail, Mr Marcus Chua considered the "fastest way" to produce a minimum viable product:[61]

> For the fastest way to get the QBOX Basic (MVP) out would be to put in the following:
>
> . DESKTOP SOFTWARE with expiry (say Dec 2018 with demo water mark):
>
> . USB connection to it
>
> . API to pull the 6 page report from the software
>
> BENEFITS:
>
> …

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59 P Core Bundle Tab 2, p 81.

60 P Core Bundle Tab 2, p 83.

61 TCM 4th affidavit, para 9(6); P Core Bundle Tab 2, p 88.

> No need to allow coding access to our BPro desktop software
>
> REQUIREMENTS:
>
> . API – this means either we supply one or Planet can create one for us
>
> . If the latter it means giving access to software coding – sensitivities need to be considered
>
> . CREATING AN API BY HEALTHSTATS means it might cause delays to the 6-8 weeks deliverable timeframe…
>
> …
>
> For both your thoughts on the above for our consideration and hopeful meeting opportunity with mr chua on Friday...

65 Thirdly, the plaintiffs refer to an e-mail on 23 February 2018 from Mr Marcus Chua to Mr Lian, where Mr Marcus Chua said that he was cognisant that PI "cannot expect the source code/secret recipe".[62]

66 Fourthly, the plaintiffs refer to a text message from Mr Marcus Chua to Mr Chua on 16 March 2018, where Mr Marcus Chua asked whether there was a reason why readings were taken in 15-minute intervals instead of shorter intervals.[63] This was at a time after Mr Chua had been suspended from his executive role in Healthstats.

67 The plaintiffs argue that the above emails and text messages show that the question of whether the source code and algorithm for the BPro software would be passed to PI was a live issue at that time. The plaintiffs say that it must be inferred that PI had requested for the source code and algorithm so that modification can be done to allow real time or live streaming of data in relation to the patients' blood pressure readings.

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62 P Core Bundle Tab 3, p 902.

63 TCM 1st affidavit, paras 18 (item 13A) and 25.

68 In Mr Chua's affidavit, he explained that Dr Ting and he were concerned *at that time* in February 2018 because Mr Lian, Mr Sidaway and Mr Marcus Chua were not technical experts, and that they *might* have entered into an agreement which involved Healthstats giving away the Trade Secrets to PI, or entering into an agreement without sufficient safeguards for Healthstats' intellectual property in the Trade Secrets (though this latter point is not the focus of the plaintiffs' submissions in this application).[64] Their concern was compounded by two things. First, the delay by Mr Marcus Chua in providing them with a complete copy of the MOU with PI (the MOU was sent to Dr Ting and Mr Chua on 26 February 2018, some months after it was signed in November 2017). Secondly, they had been kept out of the loop in the discussions with PI by Mr Marcus Chua on the instructions of Mr Lian, and thus did not know whether there were any other agreements signed between PI and Healthstats.

69 Fifthly, the plaintiffs refer to an e-mail dated 19 March 2018, sent to Dr Ting from Mr Alexander Gosling ("Mr Gosling"), an Australian technopreneur known to both Mr Sam Lanyon and Dr Ting.[65] In this e-mail, Mr Gosling mentioned that PI needed "access to the code". The relevant passage is as follows:[66]

> I just spoke to Sam Lanyon. He confirmed that PI has no engagement with Marcus, and in any case would not be willing to work with Healthstats while the company is in the current state of flux. He also confirmed that they are interested in the BPro product for integration with their Vitalic hospital system, and would be very pleased to hear from your [*sic*] when the present situation is resolved. They have in the past explained

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64 P Core Bundle, Tab 4, p 16. CNH 1st affidavit, para 23(3).

65 TCM 4th affidavit, para 10A.

66 P Core Bundle Tab 6, p 117.

> to Marcus that they would need access to the code to add to it the functionality for communicating with their Vitalic system.
>
> So I think you can now put your concerns at rest about PI colluding with Marcus…

70 It appears to me that the above email must have been sent after Dr Ting had informed Mr Gosling that he had been suspended from his position as Executive Chairman at Healthstats and that he suspected that PI was interested in getting access to Healthstats' Trade Secrets.

71 Sixthly, the plaintiffs refer to an e-mail dated 26 July 2018 sent by Mr Marcus Chua to Mr Lian and Mr Sidaway. The e-mail contains a deck of slides prepared by PI for Healthstats ("the PI slides") detailing a proposal for a project on how it can improve the usability of the BPro device. The PI slides also make reference to a challenge organised by the Westmead Applied Research Centre of the University of Sydney ("WARC") to find the "most accurate and most usable technology solution which can continuously monitor blood pressure".[67] The proposed fee for the project is slated to be A$333,350.[68] In addition to these, there was a comment by Mr Marcus Chua in the cover e-mail that he had suggested to PI certain improvements, but which was not included in the scope of works for the project. This included "#5 BPro desktop software".

72 The plaintiffs submit that this email of 26 July 2018 (which they were able to produce even though Dr Ting and Mr Chua had been suspended from Healthstats since 2 March 2018) showed that Healthstats is prepared to pay PI to develop the BPro device and its software so that it can record blood pressure on a real time, beat-to-beat basis.

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67 TCM 4th affidavit, p 98.

68 TCM 4th affidavit, p 110.

73 In all, the plaintiffs submit that the foregoing pieces of documentary evidence showed that there was an arguable case that there existed a Real Time Strategic Alliance, or at the very least, plans to modify the BPro device software such that it could perform "live streaming" every five to ten minutes. This in itself meant that the defendants had given or were planning to divulge the Trade Secrets to PI.[69]

74 Having considered the evidence put forth by the plaintiffs and the parties' submissions, I find that the evidence relied upon by the plaintiffs does not establish an arguable case that Healthstats and PI have agreed to a Real Time Strategic Alliance, or that Healthstats has disclosed or agreed to disclose the Trade Secrets to PI.

75 The MOU, which was intended to record the "principal terms of the Strategic Alliance being entered into between the parties"[70] made it clear that only the API Strategic Alliance was envisaged. In fact, it was common ground that a Real Time Strategic Alliance was not covered by the MOU's terms. Also, I find that none of the communications that the plaintiffs have referred to support a claim that Mr Lian and Mr Chang have actually agreed to disclose the Trade Secrets to PI.

76 First, as regards the 16 January e-mail from Mr Vom, it must be pointed out that neither the BPro software nor the API, to which PI had asked for access, contain the Trade Secrets. As counsel for Healthstats noted, even Dr Ting has agreed that the BPro software cannot be reverse-engineered to produce the underlying source code and algorithm.[71] As such, simply allowing PI to access

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69 P Submissions, para 42; TCM 4th affidavit, paras 9(7)–9(11).

70 TCM 1st affidavit, p 156.

the BPro software and the API would not entail divulging the Trade Secrets to PI.

77 Not only that, on a proper reading of this e-mail, any Master Service Agreement to be entered into envisaged a division of labour whereby Healthstats would be in charge of creating the "5-10 minutes data logging and transmitting" capability whereas PI would be in charge of "Vitalic integration" and "Bpro and QBox integration". So, it appeared that if there was to be any modification to the BPro software source code or algorithm, this would be done by Healthstats and not PI.

78 Secondly, the 17 January e-mail from Mr Marcus Chua, following from Mr Vom's email, does not assist the plaintiffs to show that Mr Lian and Mr Chang permitted, or would have permitted, the disclosure of the Trade Secrets to PI. In fact, it shows that the need to protect Healthstats' Trade Secrets weighed on the mind of Mr Marcus Chua and was communicated to Mr Lian. Hence, in deciding between developing the API in house and allowing PI to create the API, Mr Marcus Chua cautioned that for the latter, "sensitivities need to be considered". In addition, reference is made, at the foot of the e-mail, to a meeting with Mr Chua on 19 January 2018. On that day, there was a conference call with PI to discuss matters raised in the e-mail. Mr Chua attended the call, but he has not given evidence that PI asked for the Trade Secrets at that call.[72]

79 Thirdly, the 23 February e-mail from Mr Marcus Chua was followed with a query by Mr Sidaway as to whether PI had asked for the source code. Mr Marcus Chua's reply on 24 February 2018 was that PI has "never asked for the

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71 TCM 4th affidavit, para 15 to 17.

72 1D Submissions, para 21(e); LCC 3rd affidavit, para 22.

source code, just whats [*sic*] necessary to meet the minimum requirements".[73] This is further supplemented by a statutory declaration by Mr Vom where he stated that "[PI] had never requested and/or had access to Healthstats' source codes, algorithms or Trade Secrets".[74] Mr Vom added that, as a world leader in the business of developing and commercialising their clients' products, PI had the utmost respect for intellectual property rights and would never ask for access without the necessary safeguards and protections for third parties and their partners.

80 In fact, I would add that there is little need for speculation and conjecture as to what eventually was agreed between Healthstats and PI. This is because the terms of the proposed Master Services Agreement that was being discussed in these emails was actually executed by the parties on 13 June 2018.[75] The executed Master Services Agreement does not, on its terms, contemplate the giving of the Trade Secrets to PI whether for a Real Time Strategic Alliance or for some other purpose.[76] The agreement simply sets an umbrella framework where Healthstats will engage PI to perform services on a project-by-project basis.

81 Also, quite apart from the clauses 4 and 6 in the MOU (see [18] above), the Master Services Agreement also contains confidentiality and intellectual property protection clauses.[77] Amongst these, clause 5.2 of the Master Services Agreement states that confidential information may only be shared between PI

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73 P Core Bundle Tab 3, p 903.

74 LCC 1st affidavit, p 951.

75 LCC 3rd affidavit, para 25

76 LCC 3rd affidavit, p 52.

77 LCC 3rd affidavit, para 25.

and its clients, "provided that those PI Personnel or Client Personnel, as the case may be, are subject to appropriate confidentiality obligations in favour of the other party". In their submissions, the plaintiffs do not attack the clauses in the Master Services Agreement as being insufficient to protect the interests of Healthstats *even if* the Trade Secrets are to be disclosed to PI in the course of future projects. It bears reiterating that the plaintiffs' case is that the fact of disclosure is in itself injurious to the interests of Healthstats and a breach of duties of Mr Lian and Mr Chang, which is a point I will come to later in this judgment.

82 Fourthly, the question posed to Mr Chua on 16 March 2018 was prompted by a question from an academic, Professor Avolio, who asked for the "statistical justification" for a "15min reading",[78] and had nothing to do with the alleged Real Time Strategic Alliance between Healthstats and PI. This was evidenced by an email from one Mr Michael Stafford of Pacific One Medical Pty Ltd to Mr Marcus Chua, who relayed Professor Avolio's query.[79]

83 Fifthly, as regards the e-mail from Mr Gosling, while it mentioned that "[PI] would need access to the code to add to it the functionality for communicating with their Vitalic system", this must have been a reference to the API Strategic Alliance which involves the transmission of data to the Vitalic hub, rather than a modification to the BPro software source code and algorithm to enable real time blood pressure readings. The confusing reference to the "access to the code" can probably be attributed to the fact that Mr Gosling was hearing second-hand from PI's officers about the nature of the collaboration with Healthstats and their discussions with Mr Marcus Chua, and he might have

78 MC 1st affidavit at paras 82–83.

79 MC 1st affidavit, p 631.

misunderstood that further development of the source code and algorithm was needed for the API Strategic Alliance.

84 But, more significantly, Mr Gosling confirms that PI had no engagement with Mr Marcus Chua and that PI would not be willing to work with Healthstats while the company was in a state of flux. Mr Gosling therefore told Dr Ting that he could "put [his] concerns at rest about PI colluding with Marcus". Subsequently, in another e-mail on 30 March 2018, Mr Gosling assures Dr Ting again that PI was not interested in dealing with Mr Marcus Chua until the situation at Healthstats was resolved.[80]

85 That is not all. Following Mr Gosling's e-mails on 19 and 30 March 2018, Mr Lanyon and Mr Gosling reached out to Dr Ting in April 2018 to set up a "candid discussion" to explain PI's dealings with Healthstats and to clear up any misunderstandings.[81] While Dr Ting initially seemed willing to respond to their offer, he subsequently stonewalled PI and no meeting took place.[82] In the correspondence, Mr Lanyon explains that they were asked to quote on "API integration" in the past, and offered to "provide any answers to any questions [Dr Ting] may have regarding [PI's] interactions with Healthstats to date".[83] This was an ideal opportunity to clear the air between the technical experts, but Dr Ting refused to take this up, and as Mr Lanyon later lamented, it revealed a tendency of Dr Ting "to create conspiracies and then refuse to take the opportunity to discuss them openly" with PI.[84]

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80 TCM 4th affidavit, p 119.

81 LCC 1st affidavit, pp 931, 943.

82 LCC 1st affidavit, para 140, pp 917–928.

83 LCC 1st affidavit, pp 922 and 939.

84 LCC 1st affidavit, p 931.

86 Dr Ting justifies his decision not to meet with PI on the basis that he was wary after receiving Mr Gosling's e-mail because it was at odds with Mr Vom's statutory declaration, which I have referred to at [79] above.[85] He saw no point in meeting with Mr Gosling and Mr Lanyon because he was "focused on finding evidence that PI had indeed sought access to the source code" and because he had "lost all faith, trust and confidence in the representatives of PI to be honest with [him]".[86] This explanation is problematic for at least two reasons. In the first place, Mr Vom's statutory declaration was made on 2 August 2018,[87] and it thus could not have influenced Dr Ting's decision whether to meet with Mr Lanyon in April 2018. Secondly, I found Dr Ting's complaint that he was in the dark as to the dealings between Healthstats and PI quite inconsistent with him declining to take up the opportunity to learn about the Healthstats-PI collaboration straight from the horse's mouth, in a manner of speaking. In my view, this suggested that he was intent on looking for evidence to support his allegation that there was a Real Time Strategic Alliance, and was not prepared to listen to or look at anything that suggested a more benign explanation. I can only conclude that Dr Ting was actually motivated by other objectives, and I shall touch on this again below when I turn to the other facet of the "good faith" requirement.

87 Sixthly, the PI slides do not assist the plaintiffs in showing that Healthstats and PI were working on a Real Time Strategic Alliance. The PI slides themselves state that focus of the proposed project was to improve the BPro's usability, and on addressing problems that have the "highest adverse impact on sales conversions", including issues that lead to invalid or poor

85 TCM 4th affidavit, paras 10C–10D.

86 TCM 4th affidavit, para 19.

87 LCC 1st affidavit, p 956.

results, discomfort, or software and hardware issues that make the product inconvenient to use.[88] There was no mention of shortening the reporting interval or to add a "live-streaming" function to the device.

88 Again, there is little need to speculate because a "Statement of Work" for this project was executed between the parties on 14 August 2018. In that statement, it is set out that Healthstats was engaging PI to deliver services as follows:[89]

> Planet Innovation working with HealthSTATS will provide the following proposed services:
>
> - Develop investor relations material e.g. animation
> - Confirm the right market segment to target first for BPro
> - Update the useability of BPro watch to increase market attractiveness and comfort
>
> The agreed deliverables are:
>
> - An animation to effectively communicate BPro product and the future vision.
> - Prototype design iteration to improve useability
> - Usability report

Again, there is no mention of anything that would corroborate the existence of a Real Time Strategic Alliance, and there is nothing to suggest that "live-streaming" was on the agenda for the BPro's future development. The reference to the WARC competition also did not amount to anything – Healthstats simply entered the competition with the BPro G2 device without further modification.[90]

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88 TCM 4th affidavit, p 106.

89 LCC 3rd affidavit, p 66.

90 LCC 3rd affidavit, para 29.

89 For completeness, I have also considered Dr Ting's allegation that Mr Lian had attempted to poach an engineer, Mr Gyulai Vencel ("Mr Vencel"), from GlucoSTATS System Pte Ltd, a company which Dr Ting and Mr Chua held the majority of the shares, with "the specific intention of getting Mr Vencel to integrate HealthSTATS' technology/Trade Secrets with the Vitalic device so that the Vitalic device can measure real-time blood pressure" [original emphasis omitted].[91] Mr Vencel filed an affidavit essentially refuting the entirety of Dr Ting's account.[92] Mr Vencel also disclosed messages between him and Dr Ting in March 2018 where he denied working with Healthstats at the material time.[93] Mr Vencel adds, in his affidavit, that even after joining Healthstats in May 2018, he had not been tasked to integrate the Trade Secrets with the Vitalic device (or even given an assessment on the possibility of doing so).[94] This being so, all I am left with is an allegation by Dr Ting that remains unsubstantiated.

90 An important part of the plaintiffs' submissions that they were acting in good faith is the allegation that they were excluded from the negotiations leading up to the MOU and also, more generally, kept in the dark in relation to the discussions of the potential collaboration between Healthstats and PI.[95] This was relied upon by the plaintiffs to reinforce their point that Mr Lian and Mr Chang must have been planning to disclose the Trade Secrets to PI, and they knew that Dr Ting and Mr Chua would object to such an ill-advised course of action.[96] The claim that Dr Ting and Mr Chua was not kept informed of the

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91 TCM 1st affidavit, para 18 (item 12).

92 GV affidavit, paras 6–8.

93 GV affidavit, p 47.

94 GV affidavit, para 59.

95 TCM 1st affidavit, para 18 (items 2 and 5A).

96 1D Submissions, para 45.

material developments was also used to support the point that the court should assess whether they have been acting in good faith in light of the limited amount of information they had about the dealings with PI.

91 Dr Ting asserts that Mr Lian had instructed Mr Marcus Chua to exclude Dr Ting from the negotiations between PI and Healthstats.[97] To establish this, Dr Ting relies on a message he sent to Mr Chua on 19 January 2018 (recording what Mr Marcus Chua had verbally told him),[98] and an exchange he had with Mr Marcus Chua on 16 March 2018[99] where the latter acknowledged that he was instructed in November 2017 by Mr Lian that he would not have to keep them up to date about the discussions with PI. Mr Marcus Chua's exact words were "I was told I don't have to loop you both".[100]

92 Dr Ting also relies on the circumstances surrounding their discovery of the MOU. Dr Ting said that he was shocked to find out, on 23 February 2018, that the MOU had already been finalised and signed, and that the deadline for Healthstats to give the API to PI was looming.[101] On 26 February 2018, both Dr Ting and Mr Chua contacted Mr Marcus Chua to obtain a complete copy of the MOU and any other agreements that Healthstats entered into with PI.[102] As Dr Ting accepted, he got particularly irate when Mr Marcus Chua did not answer, and eventually gave him an ultimatum: "You can either call now or no need to

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97 TCM 4th affidavit, paras 22–23.

98 TCM 4th affidavit, p 122.

99 P Core Bundle Tab 6, p 22.

100 TCM 4th affidavit, p 123.

101 P Core Bundle Tab 4, pp 15–16.

102 P Core Bundle Tab 2, pp 124–125, 127.

call at all after this".[103] Dr Ting points to this text message as showing that he and Mr Chua genuinely did not know about the terms of MOU.[104]

93 In my judgment, however, there is good reason to believe that at the very least, the plaintiffs had knowledge of the general terms of the collaboration with PI all along.

94 In the first place, Dr Ting and Mr Chua accept that they were involved in the discussions with PI to some extent. In Dr Ting's fourth affidavit, he accepted that they were copied in some of the e-mails in October and November 2017, and drafts of the MOU were included in those e-mails (the final MOU signed contained the same terms as the draft previously circulated in November 2017), and that they were invited to comment on these draft MOUs.[105] Mr Chua acknowledged that he had participated in teleconferences and meetings with PI on the creation of the API.[106] It would be recalled that, on 19 January 2018, Mr Chua was involved in a call with PI (see [78] above).

95 The documentary evidence showed that, from September 2017 to February 2018, Mr Marcus Chua had sent the plaintiffs numerous updates and notifications about the PI collaboration.[107] There were also physical weekly updates delivered by Mr Lian and Mr Tan to Dr Ting and Mr Chua at Healthstats' office in October and November 2017.[108] Mr Chua had replied to a number of email updates. In an e-mail dated 19 September 2017, Mr Chua had

103 P Core Bundle Tab 2, p 128; TCM 4th affidavit, para 28.

104 TCM 4th affidavit, para 29.

105 CNH 1st affidavit, para 23(5); TCM 4th affidavit, para 25.

106 CNH 1st affidavit, para 23(2).

107 1D Submissions, para 47; LCC 1st affidavit, paras 96 – 130, p 798 *et seq*.

108 LCC 1st affidavit, para 95(b).

indicated that, after the MOU is signed, "[he] will draft the API connection to show to [PI] how to connect/export data from the portal".[109] From 21 to 26 February 2018, Mr Chua was also liaising with Mr Marcus Chua on PI-related matters.[110] Hence, notwithstanding that Mr Lian told Mr Marcus Chua that he no longer needed to update Dr Ting and Mr Chua, it was evident that Mr Marcus Chua continued to do so.[111]

96 The plaintiffs' real grievance is that they were excluded from *some* e-mails. This differs from Dr Ting's earlier position that they were "deliberately cut off from *all* negotiations/correspondences between HealthSTATS and PI relating to the collaboration" [emphasis added], [112] and that they were not notified of the signing of the MOU. Counsel for Healthstats pointed out that the plaintiffs had changed tack,[113] and submitted that the position taken by Dr Ting and Mr Chua was contrived. On the one hand, they were content to let Mr Lian run the company but, on the other hand, they expected to be informed of every development.

97 But, more significantly, I could not accept the allegation by the plaintiffs that they were not aware of the material developments because it transpired that Mr Chua, and probably Dr Ting, have had access to all outgoing e-mails of Healthstats since 14 December 2017. Mr Chua has been able to access them through an e-mail account he set up – outgoing@healthstats.com – that would

109 LCC 1st affidavit, p 803.

110 LCC 1st affidavit, pp 910–911.

111 1D Submissions, para 49.

112 TCM 1st affidavit, para 18 (item 2).

113 1D Submissions, para 52.

automatically forward all outgoing e-mails to him.[114] Dr Ting is also aware of this account.

98 On 14 December 2017, Mr Chua informed Dr Ting that he has "[m]anaged to get all the outgoing email FOR ALL the emails from [Healthstats]".[115] In addition, on 18 December 2017, Dr Ting asked Mr Chua "who [was] at the outgoing@healthstats?", to which Mr Chua replied to say he would explain in person when they met.[116] Counsel for the plaintiffs confirmed that Mr Chua had access to Healthstats' e-mails even as late as 26 July 2018, which was well after they were suspended in March 2018 and removed as directors in May 2018. This came to light after Healthstats' solicitors had written to them on 7 November 2018 to enquire how they obtained the e-mail with the PI slides (see [71] above), and the plaintiffs' solicitors replied on 8 November 2018 to say that the e-mail was an unsolicited e-mail from outgoing@healthstats.com.[117]

99 The existence of this auto-forwarding system is significant for three reasons:

(a) First, it is remarkable that, even though Mr Chua and Dr Ting had access to all outgoing e-mails and documents passing through Healthstats' servers since December 2017, they were unable to produce a single document or e-mail that showed the existence of a Real Time Strategic Alliance between Healthstats and PI. For the reasons above

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114 LCC 3rd affidavit, paras 37–38.

115 LCC 3rd affidavit, p 90.

116 LCC 3rd affidavit, p 100.

117 LCC 3rd affidavit, paras 33 and 41.

from [76]–[89], none of what the plaintiffs has produced thus far passes muster.[118]

(b) Secondly, it appears to me that the plaintiffs have not acted with candour and honesty. They had acted as if they had no knowledge of Healthstats' discussions with PI even though they were able to secretly access the outgoing e-mails of Mr Marcus Chua, Mr Sidaway and Mr Lian up to, at the very least, 26 July 2018. With such access, they would be in a position to know what these individuals were saying to PI's officers by email. As I have stated above, the applicant's lack of candour is relevant to whether the plaintiffs have brought this application in good faith (see [48] above).

(c) Thirdly, it is contrived for the plaintiffs to continue maintaining that they need to conduct further investigations to substantiate their Collaboration with PI claim. The present case was quite unlike the usual situation where the minority shareholder is not privy to the conduct of the company's affairs (see [50] above). Counsel for the plaintiffs acknowledged that, if it was proven that Dr Ting and Mr Chua had access to all of the e-mails in relation to the collaboration with PI, that would be "relevant to good faith".[119] However, counsel for the plaintiffs argued that there is no evidence that they did indeed enjoy such access until 26 July 2018. I cannot accept this submission. Mr Lian's evidence was that the outgoing@healthstats.com account was only discovered when it was disclosed to Healthstats' solicitors on 8 November 2018. The tenor of the e-mails forwarded by Mr Chua from the account to Dr

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118 1D Submissions, para 58(a).

119 Minute Sheet dated 19 Nov 2018.

> Ting and his own personal account also suggest that they were surreptitiously accessing Healthstats' e-mails unbeknownst to Mr Lian, Mr Marcus Chua and the rest of the company.[120] For instance, an update sent by Mr Marcus Chua only to Mr Lian and Mr Sidaway appears to have been secretly accessed by Mr Chua and then forwarded by him to Dr Ting. The latter two then corresponded briefly by email on 15 December 2017 on how Mr Marcus Chua had not sent them this same update, and with Dr Ting pejoratively referring to Mr Marcus Chua as a "dog" [that] has recognised a new master".[121]

100 For the reasons above, I do not think that a reasonable person in the position of Dr Ting or Mr Chua, and with the plaintiffs' level of knowledge, would have honestly thought that a good cause of action existed in respect of the Collaboration with PI claim. The evidence that could conceivably support the existence of a Real Time Strategic Alliance was sparse – the e-mail on 16 January 2018 comes closest, and even then it was Healthstats, and not PI, that was supposed to enhance the BPro device to equip it with "5-10 minutes data logging and transmitting" capability. Further, even if it was the case that PI had asked if they could access the Trade Secrets, there is no evidence to suggest that Mr Lian, Mr Chang or any other officer of Heatlthstats agreed to disclose the Trade Secrets to PI.

101 As I have stated, the plaintiffs have tried to convey the impression, through their affidavits, that they were kept in the dark as to Mr Lian's dealings with PI, and that they are seriously concerned, based on what little they know and from the conduct of Mr Lian on the day of their suspension, that the Trade

120 LCC 3rd affidavit, pp 17–19.

121 LCC 3rd affidavit, p 97.

Secrets of Healthstats have been surreptitiously disclosed to PI without proper safeguards. However, I find that the true picture appears quite different. It seems to me that the plaintiffs were sufficiently aware of the dealings with PI, or were in a position where they could clarify their doubts with PI or with Mr Lian, without rushing to make serious, but ultimately unsubstantiated, allegations of breach of fiduciary duties involving the improper disclosure of Healthstats's Trade Secrets to PI. The fact that the plaintiffs were prepared to so act leads me to seriously question the true purposes of this application. This is a point that will be addressed later in this judgment.

The Hard Disk claim

102 As already explained, while the plaintiffs submit that the copying of the Trade Secrets to the Hard Disk forms part of the factual matrix which shows that Mr Lian and Mr Chang had a plan to take the Trade Secrets and pass them to PI for the purpose of the Real Time Strategic Alliance, it is also argued that such conduct gives rise to an arguable case that Mr Lian and Mr Chang had breached their fiduciary duties to Healthstats by the removal of the Hard Disk from the office premises for a period of 6 days.

103 The crucial factual backdrop, according to the plaintiffs, is the sudden removal and suspension of Mr Tan, Dr Ting and Mr Chua on 1 and 2 March 2018, which, they say, created the opening for Mr Lian and Mr Chang to "freely access and hijack the Trade Secrets".[122]

104 Beginning first with Mr Tan's dismissal, the plaintiffs' version of events is that, on 1 March 2018, Mr Tan was made to sign the Separation Deed under

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122 P Submissions, para 32.

"threat of life and limb and duress".[123] Mr Tan filed an affidavit recounting the sequence of events.[124]

105 He flew to Hong Kong on the afternoon of 1 March 2018 at Mr Phua's request. He was told that he would be meeting someone to discuss a property deal in Singapore. At about 10.30pm, he was led to Mr Phua's room at the Gloucester Hotel by a security person. In the room, he was made to surrender his mobile phone. Mr Phua then accused him of mismanaging Tupai's investment in Healthstat, and in particular, for allowing Dr Ting and Mr Chua to obtain payments for their accrued salaries and loans to the company.

106 He was then given the Separation Deed to sign. When he wanted to seek independent legal advice, his request was denied. He was made to think that, if he did not sign the documents, Mr Phua's bodyguards would inflict physical harm on him. After agreeing to sign the documents, Ms Flora Lam, a Hong Kong solicitor, entered the room to witness the signing, without having heard the earlier conversation between Mr Phua and Mr Tan.

107 On the night of 1 March 2018, at about the same time as the signing of the Separation Deed, Mr Lian attempted to but failed to access the Trade Secrets in Healthstats' R&D office (at [28] above). On the following day, Dr Ting and Mr Chua were suspended from their executive positions. The Trade Secrets were then taken out of the office in a Hard Disk and then later brought back to the office on 7 March 2018.

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123 P Submissions, para 33.

124 TSL affidavit, para 10.

108 In his affidavits, Mr Lian's explained why he gave instructions for the Trade Secrets to be copied to the Hard Disk and kept by Ms Serene Chang at her home. He believed that, once Dr Ting and Mr Chua learnt of their suspension from Healthstats, the two of them would react badly and try to retaliate. Since the Trade Secrets were the *raison d'être* for Tupai's investment in Healthstats, he wanted to be sure that a copy of the Trade Secrets would be kept safely out of harm's way, at least until he could be sure that Dr Ting and Mr Chua could not access the office and hence the Trade Secrets. Hence, he gave the instructions for the downloading and safekeeping of the Trade Secrets with Ms Serene Chang. Counsel for Mr Lian argued that there was nothing surreptitious about such conduct since the instructions were given openly in the presence of Healthstats' employees, and this indicated that Mr Lian had genuinely made a judgment call about the best way to protect the Trade Secrets given the situation he was faced with.

109 After considering the parties' submissions, I was unable to agree with the plaintiffs that there was an arguable or even plausible case that Healthstats had a good cause action against Mr Lian and or Mr Chang in respect of the removal of the Trade Secrets from Healthstats' office for a period of 6 days from 2 March to 7 March 2018.

110 Assuming *arguendo* that the plaintiffs' version of events is true, it is difficult to understand why the defendants would go to such an extent to get access to the Trade Secrets when clause 4.4(b) of the Investment Agreement grants Tupai "full and unrestricted access to all the trade secrets" of the Healthstats, and clause 6.4 of the Investment Agreement stipulated that Healthstats was to "do all things necessary and/or provide such information or

documents as necessary" to enable Tupai to use Healthstats' algorithm, software and other information.

111 Indeed, the context of Tupai's investment should also be borne in mind. Prior to the investment, Healthstats was not in the pink of financial health, and had averaged losses of S$2m a year, with accumulated losses between 2000 to 2017 exceeding S$44m.[125] Full and unrestricted access to the Trade Secrets was fundamental to Tupai's decision to invest in Healthstats. It was something that Tupai had specifically negotiated for. This being the case, one would have expected Tupai to get hold of the Trade Secrets in a more direct way, rather than to come up with an elaborate and coordinated plan to get rid of Mr Tan, Dr Ting and Mr Chua in order to get to the Trade Secrets.

112 Counsel for the plaintiffs' answer to this was that, notwithstanding the existence of these rights under the Investment Agreement, if Tupai had asked for the source code, Mr Chua would in all likelihood have refused to comply, and there would then be a dispute that would proceed to arbitration.[126] Counsel submitted that this would be more cumbersome, and that it was thus easier to proceed in the way as that Mr Lian did. I am unpersuaded by this argument. I do not see how Mr Phua's alleged treatment of Mr Tan would be clearly less cumbersome than the assertion of what was a clear and unequivocal contractual right.

113 More fundamentally, the central question that remains unanswered by the plaintiffs is how the copying of the Trade Secrets to the Hard Disk and the removal of it from Healthstats' R&D office could, in and of itself, be a breach

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125 MC 1st affidavit, para 19.

126 Minute sheet dated 20 November 2018.

of fiduciary duty. It is well-established that fiduciary obligations take colour from the relationship between the parties. In *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [193], the Court of Appeal cited the following observation with approval:

> … the relationship will often provide crucial context for the construction of an undertaking. For instance, in a case where the fiduciary duties are undertaken as part of a contract, the relationship will not be 'superimposed' upon those duties. Instead, it will inform their content.

Although the Investment Agreement was not the contract governing the relationship between Healthstats and Mr Lian and Mr Chang *qua* directors, it would be contradictory to the permissive clauses of the Investment Agreement for the copying of the Trade Secrets to the Hard Disk at the instructions of Mr Lian to amount to a breach of fiduciary duty on his part.

114 The plaintiffs point out that there is an Intellectual Property, Confidentiality and Non-Competition Deed ("Confidentiality Deed") that all employees of Healthstats had to enter into. Clause 3.3(a)(*v*) of the Confidentiality Deed provides that the employees "shall not without the prior authority of the Company remove from the Company premises or copy or allow others to copy the contents of [any medium] that contains Confidential Business Information...", which encompasses the Trade Secrets.[127] But this does not take the plaintiffs very far as authorisation from a company may only be given by its directors and there is no reason to delink "the Company" from its directors (*ie*, Mr Lian and Mr Chang). The plaintiffs also point to a "practice" of not downloading the Trade Secrets from the main server without Mr Chua's instructions (Mr Chua Ngak Kwong, a R&D engineer, and who is also Mr

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127 CNH 1st affidavit, p 29.

Chua's brother, deposed in his affidavit that this was accepted or understood to be so).[128] This is contradicted by the evidence of a few other members of staff of Healthstats' R&D department.[129] However, even assuming there was such a "practice" or that Mr Lian and Mr Chang were bound by the Confidentiality Deed, the content of any fiduciary duty on these Tupai-nominated directors of Healthstats must be defined in a manner that is compatible with Tupai's right and entitlement to the Trade Secrets.

115 Moreover, the act of downloading or storage, without dissemination or reproduction, is neutral. The act of copying and storing of Healthstats' Trade Secrets in the Hard Disk cannot possibly threaten or damage the commercial interests of Healthstats. The plaintiffs accept that downloading or storage of the Trade Secrets in the Hard Disk in and of itself may not suffice, but they assert that they would be a breach of fiduciary duty if Mr Lian and Mr Chang had passed on the information to third parties, aside from Tupai, or were preparing to do so.[130] But, the insuperable obstacle to the plaintiffs' case, as they have acknowledged, is that there is no evidence that the Trade Secrets were copied from the Hard Disk, reproduced or disseminated in any way after they were taken out of the R&D office.[131]

116 The plaintiffs have conducted a forensic analysis of the Hard Disk and, according to their Digital Investigation Report, it cannot be detected, from a forensic examination of the external storage device, whether there were files copied or transferred out of the Hard Disk.[132] The report goes on to state that

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128 CNH 1st affidavit, paras 13 and 19; CNK 1st affidavit, para 16.

129 See, *eg*, PWL 1st affidavit, para 7.

130 Minute Sheet dated 20 Nov 2018.

131 P Submissions, para 39(3); TCM 4th affidavit, para 34.

the only way to determine if folders and files were copied or transferred out would be to carry out a forensic examination on *receiving* devices. The plaintiffs, however, have not identified what these receiving devices are or might be. In this regard, it should also be noted that Ms Serene Chang has filed an affidavit to state that she had brought the Hard Disk back to her home and locked it in a drawer without copying any information from it or passing it to anyone.[133] Six days later, after receiving threatening messages from Dr Ting, she returned it to Healthstats' office, where it remains under lock and key.

117 Needless to say, the plaintiffs' inability to show even some evidence that there has been improper disclosure of the Trade Secrets would fall short of what is required to satisfy the element of "good faith" element under s 216A(3)(*b*) of the CA. To explain, if the plaintiffs are only able to say that they do not know whether information had been copied from the Hard Disk or where such information might be copied to, they cannot possibly assert that they have a honest or reasonable belief that Healthstats has a valid cause of action against Mr Lian and Mr Chang.[134] Such a claim would be purely speculative.

118 In fact, the plaintiffs, at present, are none the wiser as to whether Healthstats may have a case for wrongful disclosure of the Trade Secrets from the Hard Disk or from other computers at Healthstats' office to unauthorised third parties, but they are effectively seeking leave of court to investigate the matter further. In their written submissions, the plaintiffs argue that they are now seeking leave of the court to conduct a forensic examination of the main server and the desktop of Mr Tan Boon Hui. These are the two original places

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132 WSD 1st affidavit, p 12 (para 4.9).

133 CWNS 1st affidavit, paras 25–26.

134 3D Submissions, para 15.

where the Trade Secrets were stored. The plaintiffs wish to see if there has been any wrongful transfer or dissemination of the Trade Secrets from this computer and the servers for the period of 2 March 2018 to 27 April 2018, apart from the copying of the Trade Secrets to the Hard Disk on 2 March 2018.[135]

119 However, this is not the purpose envisaged by the remedy of the statutory derivative action. As counsel for the plaintiffs candidly admitted, he has not come across any authorities for the proposition that the court will grant leave under s 216A of the CA for the plaintiff to investigate whether it even has a cause of action at all that may be brought. As such, I would reject the plaintiffs' submissions in this regard.

120 Given my views on the Hard Disk claim, there is no need for me to examine in detail the veracity of Mr Tan's account of what happened on 1 March 2018. However, I will make a few brief comments.

121 First, I find that the plaintiffs have overstated the coincidence between the signing of the Separation Deed and what was going on in Healthstats' R&D office. According to Mr Chang's evidence, the Separation Deed was entered into because of differences between Mr Tan and Mr Chang[136] and, as I have mentioned above at [27], it also extended to several other companies besides Healthstats.

122 Secondly, there were several other facts that militated against a finding that there was any duress exercised on Mr Tan. For one, one would have expected Mr Tan to let Ms Fiona Lam, a solicitor, know of the circumstances

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135 P Submissions, para 39(3); TCM 4th affidavit, para 38.

136 CHY's 3rd affidavit, para 20.

he was under when signing the Separation Deed, but he strangely did not do so. Further, while Ms Fiona Lam may not have been in Mr Phua's room initially, she was sitting with Mr Tan for about 30 minutes in the period shortly thereafter, as she explained the Separation Deed to Mr Tan and witnessed his signing. During this process, she asked if he needed independent legal advice and he replied in the negative. In her affidavit, she stated that he "appeared… at all times to be calm, composed and collected".[137]

123 Thirdly, even after returning to Singapore, Mr Tan's "main concern was to ensure that the Monetary Authority of Singapore ("MAS") … was duly informed, by [him], of the changes in the ownership and directorship of the numerous companies which were the subject of the Separation Deed". He even sent a message to Mr Phua to request for a change to the date of the Separation Deed so that he would not fall afoul of MAS requirements.[138]

124 While he claimed to have initially thought about making a police report, he eventually decided against it. On his own initiative, he instructed Walkers (Singapore) Limited Liability Partnership to draft documents "to effect the transactions reflected under the Separation Deed".[139] In other words, he complied fully with all the resignations and transfers required under the Separation Deed without any complaint.[140] In May 2018, Mr Tan repaid a S$1m personal loan to Mr Chang. He also sent an email thanking Mr Chang for extending the loan to him and for being patient by giving him time for repayment.[141] He even sent Mr Chang warm birthday wishes that month.[142]

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137 LYFF 1st affidavit, paras 8–10.

138 TSL 1st affidavit, para 12, p 21.

139 ACBCP Vol IV, Tab 22, Exh Ch–8.

140 CHY 1st affidavit, para 46.

Bearing in mind that Mr Tan was the CEO of a fund management company, I found his behaviour to be markedly at odds with the assertion that he had signed the Separation Deed under duress.

125 In summary, I find that there is a complete lack of evidence to show that the Trade Secrets were copied from the Hard Disk and passed on to third parties. I also find that the Hard Disk claim is entirely dependent on further investigations and favourable findings therefrom. As I have stated, that cannot be the purpose of the statutory remedy of a derivative action. While it is understood that the plaintiffs may not, because of the nature of things, have access to all available information, it is another matter altogether to bring a speculative claim that is unsupported by any objective evidence (see [50]–[51] above). In my judgment, the plaintiffs, in so doing, have not satisfied the requirement of showing that they honestly or reasonably believed that a good cause of action exists in respect of the Hard Disk claim.

Collateral objectives and abuse of process

126 Given my conclusion that the plaintiffs could not have had an honest or reasonable belief that Healthstats has arguable claims against Mr Lian and Mr Chang for breaches of duties, the question arises as to the plaintiffs' intent and purpose in making this application. Counsel for the defendants submitted that it was clear that Dr Ting and Mr Chua were motivated by their collateral purpose of using the s 216A process to try to seize back control of the company insofar as the dealings with PI are concerned. As such, it was argued that the plaintiffs

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141 CHY 3rd affidavit, p 34–36.

142 CHY 3rd affidavit, p 33.

were plainly attempting to misuse the statutory remedy. In short, this application was an abuse of process.

127 I have already noted the plaintiffs' lack of candour in respect of the e-mail auto-forwarding system, and the fact that they had access to the outgoing emails from Healthstats throughout the material time. In my judgment, this is indicative that the plaintiffs are quite prepared to present an incomplete portrayal of the facts so as to achieve their objective. This suggests to me that the plaintiffs have allowed their personal considerations to cloud their mind, and this is an indicia of lack of good faith.

128 But, apart from this, on a careful review of the various allegations and counter-allegations by the parties, I find it likely that this application has been brought in retaliation against Mr Lian and Mr Chang for having removed Dr Ting and Mr Chua from their positions in Healthstats. Dr Ting and Mr Chua appear intent on trying to insert themselves back into control in the company and take charge of the future collaboration with PI. I also find that the evidence does support counsel for Mr Lian's submission that, to achieve their objective, the plaintiffs are quite prepared to damage the interests of Healthstats.

129 It is not in dispute that, prior to the entry of Tupai as an investor, Dr Ting and Mr Chua enjoyed almost total control over Healthstats for many years. Their removal from Healthstats did not sit well with them, and this can be gleaned from the vitriol they expressed towards their former subordinates, among many other instances raised by counsel for Healthstats:

(a) First, Dr Ting accused Mr Vencel of playing a part in his suspension. He told Mr Vencel that the company had been "forcefully

snatched from [him]", and threatened that "when [they] hit back [Mr Vencel] will not be spared".[143]

(b) Secondly, after learning that Ms Serene Chang had taken the Hard Disk, Dr Ting sent her a long message describing what Mr Lian had done as "premeditated theft using convoluted legal means" and a "blatant criminal act". He also ominously stated "I am warning you for your sake" and "I really don't want anything bad to happen to you as you have a lovely family."[144]

(c) Thirdly, in reply to one of the updates that Mr Chua had forwarded him from outgoing@healthstats.com, Dr Ting compared Mr Marcus Chua to "the dog [that] has recognised a new master".[145]

130 This vendetta against Mr Lian and Mr Chang, who he believed had caused his and Mr Chua's removal from Healthstats, led Dr Ting on a search to find "evidence that PI had indeed sought access to the source code". As I have mentioned above at [86], Dr Ting was so focused on this that he "did not see any point in engaging with any conversation with Mr Lanyon or PI after 13 April 2018".[146] I find that Dr Ting had become so blinded by personal considerations that he had forsaken the opportunity to find out the truth from PI.

131 As for Mr Chua, despite knowing about the lack of any real evidence that Mr Lian and Mr Chang had wrongfully disclosed the Trade Secrets to third

143 LCC 1st affidavit, para 336.

144 CWNS 1st affidavit, p 9.

145 LCC 3rd affidavit, p 97.

146 TCM 4th affidavit, para 10D.

parties, he filed this application as co-plaintiff with Dr Ting and Jian Li. In so doing, he had aligned himself with Dr Ting and it must be inferred that he too was intent on retaliating against the persons he perceived were responsible for his removal.

132 In my judgment, the clearest evidence that Dr Ting and Mr Chua had the collateral objective of trying to take back control of Healthstats insofar as its dealings with PI are concerned is found in the affidavit of Mr Chen filed on behalf of the plaintiffs. It will be recalled that Mr Chen was the other investor in Tupai who contributed the sum of S$10m. He holds 47.6% of Tupai Fund LP, with Mr Chang holding the remaining 52.4%.

133 After this application for leave was filed on 30 May 2018, Mr Chen wrote a letter Dr Ting and Mr Chua dated 27 June 2018. He asked Dr Ting to forward on a "message" to all the shareholders of Healthstats.[147] In that "message" to the shareholders, Mr Chen writes that he had received a visit from Mr Tan and Dr Ting in Taipei who explained what had happened within Healthstats and that Mr Lian and Mr Chang were now in control of the company. Mr Chen explained that he was not consulted prior to such actions being taken and then states:

> I urged [*sic*] all of you, as I have done, to fully back Dr Ting in his attempt to regain control and lead the company to success.

134 I infer from this that Dr Ting, and probably Mr Chua, had sought Mr Chen's support for this application that had been filed. Mr Chen must have been told that the objective of this legal process was for Dr Ting and Mr Chua to regain control of the company insofar as its dealings with PI are concerned.

147 CHC 1st affidavit, Exhibit CHC-1.

This is confirmed by what Mr Chen in his affidavit where he affirms that he stands by what he stated in his message to the shareholders. He goes on to say:[148]

> … I fully supported Dr Ting being in control of the technical and R&D aspects of the company and its suite of products given that he and Mr Chua are the founders of the company and the creators of the relevant technologies. They are the only ones who have the required technical knowledge to bring HealthSTATS forward.

135 It was explained by counsel for Healthstats that how this could eventually transpire is that, if the court does grant leave for the plaintiffs to bring derivative actions against Mr Lian and Mr Chang for breaches of their duties in wrongfully disclosing the Trade Secrets to PI, it would not be a stretch to imagine that the two of them would probably have to take a hiatus from any dealings with PI until the claims against them are determined, or that Mr Chang might decide to pull out of this investment in Healthstats and sell his interest to Dr Ting and Mr Chua. In fact, there was evidence before me that Dr Ting had offered to buy out Mr Chang's interest in Tupai after the dispute arose and some preliminary but abortive discussions had taken place.[149] In either situation, there was a significant possibility that the shareholders would be forced to turn to Dr Ting and Mr Chua to take charge of the collaboration with PI given their technical know-how in relation to Healthstats' products.

136 Given Mr Chen's statements, I am driven to conclude Dr Ting and Mr Chua have commenced these proceedings with a collateral objective of retaliation and trying take back control of the technical aspect of the company's dealings. Such an outcome would also increase Dr Ting's and Mr Chua's

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148 CHC 1st affidavit, para 8.

149 TCM 4th affidavit, para 64, p 139-154.

leverage in any discussions concerning Mr Chang divesting his interest in Tupai and Healthstats to them. This would also explain why the plaintiffs are prepared to forge ahead with the allegations that Mr Lian and Mr Chang are in breach of their fiduciary duties despite the paucity of evidence in this regard. It also explains why Dr Ting and Mr Chua have been less than candid with the court in terms of their degree of knowledge of Healthstats' dealings with PI.

137 I also find that these collateral objectives have led the plaintiffs to act in a manner which has potentially damaged the interests of Healthstats. In the series of e-mails between Dr Ting and Mr Lanyon in April 2018, he has repeatedly presented a picture of bitter infighting within Healthstats, souring the PI collaboration opportunity in Mr Lanyon's eyes. To illustrate, Dr Ting resorted to telling Mr Lanyon that Mr Lian "has hijacked the whole company illegally and suspended both of us by force" and how "Lian, thru [*sic*] very scheming manipulations have kicked [Mr Tan] out completely".[150]

138 In reply, Mr Lanyon lamented that "[i]n all our dealings, we believed that we were dealing with Healthstats management who represented the company – and a court is now needed to work out if the HS representatives were correct in their representations".[151] It is quite inexplicable to me why a person who has the interests of Healthstats at heart would actually resort to informing a third party of the internal issues within the company. The plaintiffs' actions demonstrate that they have really no qualms about jeopardising Healthstats' collaboration with PI, which was the very thing of value that prompted Tupai's investment in the first place. This suggests a recklessness on the part of the plaintiffs in trying to achieve their collateral objectives.

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150 LCC 1st affidavit, p 923.

151 LCC 1st affidavit, p 921.

139 I have only referred to a few pieces of evidence as set out above, but the record is replete with several other instances where the court can readily infer that Dr Ting and Mr Chua are motivated by such hostility against Mr Lian and Mr Chang to the extent that they are no longer thinking about what is in the best interests of Healthstats. In such circumstances, I have little difficulty in finding that the plaintiffs' actions are so clouded with personal considerations as to amount to a lack of good faith for the purposes of the leave application under s 216A of the CA.

Issue 2 - Whether it is *prima facie* in the interests of the company that the derivative action be brought

140 Given my finding that the plaintiffs are not acting in good faith, the question as to whether the proposed derivative action is *prima facie* in the interests of Healthstats becomes academic. "Good faith" and "*prima facie* in the interests of the company" are cumulative requirements under s 216A of the CA. As Vinodh Coomaraswamy J pithily stated in *Petroships* at [79], "[i]f the court [finds] that the applicant lacks good faith, its application will fail, no matter how strong the merits of the derivative action are" (see also *Petroships* at [172]).

141 Having said that, however, it should be fairly obvious based on my findings in relation to the requirement of "good faith" that I am of the view that the plaintiffs have clearly not discharged their burden of showing, on an objective analysis, that either the Collaboration with PI claim or the Hard Disk claim have any legitimate or arguable basis. The claims are so speculative that it is not possible to determine whether Healthstats will stand to gain substantially in money or money's worth if leave to pursue the claims is granted.

Simply put, there is just no real evidence showing that the Trade Secrets have been disclosed to PI or to any other unauthorised third party.

142 I would add that, apart from the lack of evidence, there appears to me to be a serious flaw in the plaintiffs' case on breach of fiduciary duties. Even if one was to assume that the board of Healthstats, in a good faith exercise of their judgment, has decided to disclose the Trade Secrets to some third party in pursuance of some project that the parties are pursuing, the mere fact of disclosure would not constitute breaches of duties on the part of the directors *unless* it can be shown that they put the Trade Secrets at risk by, for example, failing to insist on contractual clauses for the protection of the company's intellectual property. Thus, the Collaboration with PI claim is, as framed, unsustainable, frivolous and vexatious because it proceeds on the basis that disclosure in whatever circumstances would be a breach of fiduciary duties. The considerations above at [52] apply with force here. Sanctioning the plaintiff's derivative action in the absence of any evidence of impropriety in respect of the company's dealings with PI would unduly interfere with the affairs of Healthstats.

143 Finally, it is also significant that based on a survey conducted by Mr Lian, 18 out of 25 shareholders (representing 81% of Healthstats' shareholding) replied and agreed to put on record their disagreement to the proposed action.[152] This is probably explained by the fact that most of the shareholders are hoping that the new investor can lead the company into a potential venture that would successfully exploit the Trade Secrets of Healthstats. Given the loss-making history of Healthstats, one can probably understand their anxiety about the company putting at risk its chance of a successful collaboration with PI because

[152] 3D Submissions, para 66; LCC 1st affidavit, p 237.

of a speculative lawsuit. This consideration contributes to my assessment that it would not be *prima facie* be in the interests of Healthstats for leave to be granted.

Conclusion

144 For the foregoing reasons, I dismiss the plaintiffs' application for leave to commence the derivative action as set out in Originating Summons No 666 of 2018. The plaintiffs' application under s 216A(5) of the CA for the inspection of documents relating to the Collaboration with PI and Hard Disk claims (see [38] above) is also dismissed because the power to give directions under this provision is only enlivened if leave is granted: *Lew Kiat Beng v Hiap Seng & Co Pte Ltd and another appeal* [2012] 1 SLR 488 at [27]; see also *Chong Chin Fook v Solomon Alliance Management Ltd and others and another matter* [2017] 1 SLR 348 at [3] and [90].

145 I will hear the parties separately on the question of costs.

Ang Cheng Hock
Judicial Commissioner

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Koh Swee Yen, Liu Sheng, Nicholas and Anand Shankar Tiwari (WongPartnership LLP) for the third defendant.
