IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 201

Originating Summons No 491 of 2020

Between

Serene Tiong Sze Yin

… *Plaintiff*

And

(1) HC Surgical Specialists Ltd
(2) Heah Sieu Min

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Statutory derivative action] — [Whether proposed action is prima facie in the interests of company] — [Whether applicant acting in good faith]

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Introduction

1 The plaintiff, Ms Serene Tiong Sze Yin, applied for leave pursuant to s 216A(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") to bring an action in the name of the first defendant, HC Surgical Specialists Ltd ("the Company"), against the second defendant, Dr Heah Sieu Min ("Dr Heah"). The plaintiff alleged that Dr Heah had breached his director's duties in connection with the Company's acquisition of a 19% stake in Julian Ong Endoscopy & Surgery Pte Ltd ("JOES").

2 I dismissed the application with costs. The plaintiff has appealed against my decision.

Background

3 The Company is listed on the Catalist Board of the Singapore Stock Exchange ("SGX"). It is a medical services group primarily engaged in the provision of endoscopic procedures and general surgery services with a focus on colorectal procedures across a network of clinics in Singapore. Dr Heah, a surgeon by profession, is and was at all material times an Executive Director and the Chief Executive Officer ("CEO") of the Company.

4 Dr Ong Kian Peng Julian ("Dr Ong") is a surgeon who operates JOES. On 1 February 2017, the Company acquired 51% of the shares in JOES from Dr Ong for $2,175,000 ("the 51% Acquisition"). Pursuant to the sale and purchase agreement between the Company and Dr Ong dated 1 February 2017 ("the 1st SPA"):[1]

(a) The Company employed Dr Ong as a specialist surgeon and to manage JOES.

(b) The Company agreed to purchase the remaining 49% of the issued share capital of JOES by 1 April 2021 or such other date to be agreed, at a price to be computed based on JOES being valued at ten times its audited profit after tax for the financial year ended 31 May 2020.

(c) Dr Ong provided a guarantee to the Company as to the profit after tax that would be attributable to the Company's 51% interest in JOES for a four-year period commencing from his employment, and a second guarantee as to the profit after tax that would be attributable to the Company's 49% interest in JOES for the six-year period commencing from the end of the four-year period referred to above

(collectively, "the Profit Guarantees"). In the event that the aggregate profit after tax attributable to the Company's 51% or 49% interest in JOES was less than the amount guaranteed, Dr Ong was to pay the shortfall within 30 days of the Company's written notice.[2]

5 In December 2016, the plaintiff met one Dr Chan Herng Nieng ("Dr Chan"), a psychiatrist. According to the plaintiff, her marriage was then "undergoing a rocky patch".[3] In January 2017, the plaintiff began an intimate relationship with Dr Chan. Dr Chan was a close personal friend of Dr Ong but he does not have any role in JOES or the Company.

6 In April 2018, the plaintiff and Dr Chan went to East Europe for a vacation. According to the plaintiff, Dr Chan kept insisting that they engage in more adventurous sex, including having a threesome or even a foursome. The plaintiff was not interested. However, Dr Chan's suggestions caused the plaintiff to wonder about his sexual proclivities.

7 One night, when they were in Prague, the plaintiff accessed Dr Chan's handphone while he was asleep. The plaintiff found WhatsApp messages between Dr Chan and Dr Ong ("the WhatsApp Messages") that revealed that, among other things, (a) Dr Chan had been engaging in sex with other women, including engaging in a threesome, (b) Dr Ong had expressed an interest in having a foursome involving the plaintiff to which Dr Chan had replied that the plaintiff should be "ok" with it, and (c) Dr Chan and Dr Ong had been sharing their sexual exploits with each other. Apparently, one of the women mentioned in these messages was Dr Ong's patient. The plaintiff took photographs of the WhatsApp Messages.[4]

8 The plaintiff confronted Dr Chan and insisted that he undergo a test for sexually transmitted diseases ("STD"). According to the plaintiff, she had had unprotected sex with Dr Chan based on his assurance that she was the only one for him. Dr Chan did not undergo the STD test after their return to Singapore. In May 2018, the plaintiff's relationship with Dr Chan ended.

9 On 31 May 2018, Dr Chan filed a police report[5] in which he alleged that:

(a) the plaintiff had demanded $10,000 from him, failing which she would send screenshots of the WhatsApp Messages to his parents; and

(b) he did not accede to her demand and the plaintiff sent screenshots of the WhatsApp Messages, to his parents and his younger sister.

10 By way of letters dated 13 June 2018 and 19 June 2018, the plaintiff lodged a complaint ("the Complaint") with the Singapore Medical Council ("SMC") against Dr Chan and Dr Ong.[6] In the Complaint, the plaintiff alleged as follows:

(a) Dr Chan was aware that the plaintiff was having marital issues and experiencing mild depression. In January 2017, he started to prescribe some drugs to the plaintiff to ease her discomfort.

(b) After more than a year, the plaintiff started to experience memory loss, have suicidal thoughts and to become more aggressive, easily agitated and restless. She discussed her symptoms with Dr Chan in November 2017 and Dr Chan advised her to increase the dosage of her medication.

(c) The plaintiff believed that the medication had an adverse effect on her judgment and made her addicted to the medication, and that her romantic relationship with Dr Chan was the consequence of the medication. Dr Chan took advantage of her situation knowing that she was emotionally unstable and under the influence of the medication.

(d) Dr Chan had been colluding with Dr Ong to take advantage of other vulnerable woman patients.

The plaintiff also forwarded a text of the Complaint to persons whom she believed were the superiors or colleagues of Dr Chan and Dr Ong.

11 Sometime in or around June 2018, Dr Ong informed Dr Heah that the plaintiff was making allegations of sexual misconduct against Dr Chan and himself, including the allegation that Dr Chan and he had improper sexual relations with their patients. Dr Ong maintained that the allegations were untrue and that he intended to take legal action against the plaintiff. Dr Heah asked Dr Ong to keep him updated. Dr Heah also informed his business partner, Dr Chia Kok Hoong ("Dr Chia"), who was an Executive Director of the Company, of his conversation with Dr Ong. Dr Chia and Dr Heah agreed to keep the Board of Directors of the Company ("the Board") apprised of developments.[7]

12 On 4 July 2018, Dr Ong filed a claim against the plaintiff for defamation in District Court Suit No 1894 of 2018 ("the Defamation Action").[8] The Defamation Action was based on the following statements in emails, which the plaintiff had sent to various persons:[9]

> I found out that he has been colluding with Dr Julian Ong, a surgeon from the private practice to take advantage of other vulnerable woman patients.

> …
>
> I suspect Dr Chan uses his reputation as a platform, together with Dr Ong to "source" and "groom" the patients turned victims.
>
> …
>
> Both doctors exchanged potential patients and colleagues who are deemed to be easily taken advantage to satisfy their immoral desires.

The plaintiff's defence in the Defamation Action pleaded justification, qualified privilege and fair comment.[10]

13 In July 2018, Dr Ong informed Dr Heah that he had filed the Defamation Action and that he also believed that the plaintiff had filed a complaint to the SMC against him. Subsequently, Dr Heah informed Dr Chia of these developments. Both of them agreed to take no further action at that point, and to review the situation if and when the complaint was referred to the disciplinary tribunal.[11]

14 On 19 July 2018, Dr Heah informed the Board of the conversations that he had with Dr Ong, and his discussions with Dr Chia. The Board agreed with the assessment that the Defamation Action was a private matter for Dr Ong. At that point, no notice had been received of the Complaint. The Board was of the view that if a complaint was lodged with the SMC, the SMC's investigations should be allowed to take their course. The Board asked Dr Heah to keep it updated on further developments.

15 In February 2019, the SMC formally notified Dr Ong of the Complaint lodged against him. On 27 February 2019, Dr Ong informed Dr Heah about the Complaint and that investigations by the SMC were underway. Dr Heah updated Dr Chia on this development soon after. Dr Heah and Dr Chia subsequently met

Dr Ong to seek further clarifications and voice their concerns. Dr Ong again reiterated that the plaintiff's allegations were untrue and mentioned that both Dr Chan and he had separately filed police reports against the plaintiff.

16 Dr Heah discussed the matter with Dr Chia. They concluded that (a) the SMC, as the medical profession's regulatory body, was best placed to make findings regarding the plaintiff's allegations of sexual misconduct, and (b) it did not appear that there was a risk of significant financial impact on the Company arising from the Defamation Action as that was a private matter and Dr Ong was not an executive officer of the Company.

17 Dr Heah and Dr Chia took the following actions:[12]

(a) They reminded Dr Ong of his obligations under the Ethical Code & Ethical Guidelines, which all doctors are to adhere to.

(b) They made it clear to Dr Ong that the SMC's findings could have implications for the Company and the Company might have to consider if further disciplinary action would be necessary when SMC had made its findings.

(c) They continued to monitor Dr Ong's conduct.

18 On 9 April 2019, Dr Heah and Dr Chia updated the Board about the Complaint, and their conversations with Dr Ong. The Board agreed that the SMC proceedings should be allowed to run its course, and to re-assess the course of action to take after the SMC had made its findings.

19 On 26 July 2019, the Company entered into an investment agreement with Vanda 1 Investments Pte Ltd ("Vanda"), pursuant to which Vanda invested

$5m in convertible bonds issued by the Company, bearing a coupon of 5.5% p.a. and maturing in 2022. In addition, the Company granted a share option to Vanda, entitling Vanda to subscribe for ordinary shares in the capital of the Company for an aggregate consideration of $5m, on terms. The Board intended to use the net proceeds from the investment by Vanda to finance its business expansion.

20 JOES had performed exceptionally well since the 51% Acquisition. It contributed 17% and 15% of the Company's revenue in the financial years ended 31 May 2018 and 31 May 2019 respectively. In or around July 2019, Dr Heah proposed to the Board that the Company use part of the net proceeds from the investment by Vanda to acquire a further stake in JOES. The Board agreed as this would allow the Company to immediately maximise its returns on the proceeds from the convertible bonds by using the proceeds to earn a larger share of the profits of JOES.

21 Negotiations with Dr Ong resulted in a sale and purchase agreement dated 3 September 2019 ("the 2nd SPA").[13] The 2nd SPA amended the Company's obligation under the 1st SPA to purchase the remaining 49% of the shares in JOES and replaced the Profit Guarantees under the 1st SPA with put options.

22 Pursuant to the 2nd SPA,

(a) the Company purchased an additional 19% of the shares in JOES for $3,795,000 ("the 19% Acquisition"), bringing the Company's total shareholding in JOES to 70%. The price was to be paid by way of cash ($2,846,712) and the issuance of 1,760,000 new shares in the Company. The amount of $3,795,000 was computed based on JOES being valued

at ten times its profit after tax for the financial year ended 31 May 2019. The multiplier of ten was as agreed under the 1st SPA (see [4(b)] above).[14] Completion of the 19% Acquisition was scheduled for October 2019;

(b) the Company agreed to buy the remaining 30% of the shares in JOES by 31 October 2021 or such other date to be agreed, at a price to be computed based on JOES being valued at ten times its audited profit after tax for the financial year ended 31 May 2021. Upon the purchase of the remaining 30%, the price of $3,795,500 for the 19% would be adjusted either upwards or downwards to take into account any increase or decrease of the profit after tax for the financial year ended 31 May 2021 compared to that for the financial year ended 31 May 2019 (cl 7.4 of the 2nd SPA); and

(c) the Profit Guarantees under the 1st SPA were replaced by put options ("the Put Options") pursuant to which the Company could require Dr Ong to re-purchase the Company's 70% of the shares in JOES or 100% of the shares in JOES (after the Company has purchased the remaining 30%), in the event that Dr Ong's employment with the Company was terminated. The re-purchase prices under the Put Options varied according to when Dr Ong's employment was terminated and the reason for termination (cl 4 of the 2nd SPA) and the prescribed prices were calculated to ensure that the minimum re-purchase price would be more that the amount paid by the Company for the 70% or 100% of the shares in JOES, as the case may be.[15]

23 On the same day (3 September 2019), the Company announced the 19% Acquisition to SGX and issued a press release containing the same.[16]

24 On 5 September 2019, the plaintiff called and spoke to the Company's Chief Financial Officer, Ms Ong Soo Ling ("Ms Ong"). The plaintiff informed Ms Ong that she was involved in an ongoing lawsuit with Dr Ong that pertained to Dr Ong "sending nude photos of his female patients around". The plaintiff requested to meet with Dr Heah to brief him about the case and show him the legal correspondence. Ms Ong told the plaintiff that she would inform Dr Heah and return the plaintiff's call.

25 Following the call, the plaintiff sent an email to the Company's investor relations firm, M/s GEM COMM, stating that she wished to bring to their attention her lawsuit with Dr Ong and the fact that she had made a complaint to the SMC against Dr Ong.[17] GEM COMM replied to the plaintiff on the same day, copying Ms Ong, and informed the plaintiff that the management was "aware of the case and will follow due *(sic*) with this".[18]

26 Ms Ong informed Dr Heah and Dr Ong of the plaintiff's call and email. Dr Heah did not see a need to meet up with the plaintiff as Dr Ong had already informed him of the matters.[19]

27 The Company's AGM was scheduled to be held on 26 September 2019. On 25 September 2019, the plaintiff bought 100 shares in the Company "with a view to attending the AGM and conveying [her] concerns about the [19% Acquisition]".[20]

28 On the day of the AGM (which was scheduled to start at 2.00pm),

(a) Dr Heah was contacted by a journalist from Business Times at around 12 noon requesting a call with Dr Heah to find out about the

Defamation Suit and why the Company was interested in acquiring JOES.

(b) The plaintiff turned up at the AGM but could not attend the AGM because she was not registered as a shareholder in time. She then passed her name card to the Company's staff, requesting to meet Dr Heah.

29 Dr Heah and Ms Ong met with the plaintiff after the AGM. Dr Heah left soon after as he had to attend to other matters and Ms Ong continued speaking to the plaintiff. The plaintiff asked if the Company would be proceeding to complete the 19% Acquisition and Ms Ong replied that this was a commercial decision, which would be made by the Company's management. According to Ms Ong, the plaintiff did not ask for any explanations on the commercial aspects of the 19% Acquisition.[21] The plaintiff told Ms Ong that she would be documenting the meeting and sharing it with journalists.[22]

30 On 6 January 2020, Dr Ong obtained a Protection Order under the Protection from Harassment Act (Cap 256A, 2015 Rev Ed). Among other things, the Protection Order prohibited the plaintiff from communicating with Dr Ong, the Company and JOES' officers and employees.[23]

31 On 16 January 2020, the police administered a warning to the plaintiff in lieu of prosecution for the offence of attempted extortion,[24] after completing investigations into the police report made by Dr Chan (see [9] above).

32 On 3 April 2020, the District Court dismissed the Defamation Action.[25] The District Court found that the statements about Dr Ong were defamatory in

their ordinary meaning, but that the defence of justification was made out. On 10 April 2020, the Straits Times reported the District Court's decision.

33 Dr Ong appealed against the District Court's decision, to the High Court. That appeal was pending before the High Court when I heard the present application.

34 On 11 April 2020, the Company issued a response to the Straits Times report on the dismissal of the Defamation Action and said that "the Board will await the decision of the SMC's Complaints Committee before determining if any further action will be necessitated".[26] This was followed by an update on 12 April 2020 in which the Company announced that Dr Ong "shall, with immediate effect, inform all patients of the matters alluded to in the [Defamation Action] prior to any consultation and obtain the consent of each patient to act as their physician if they should so agree, save for any emergency consultation".[27]

35 On 17 April 2020, the Company announced that it had mutually agreed with Vanda to the early redemption of the convertible bonds issued to Vanda, the cancellation of the share option granted to Vanda and the termination of the investment agreement with Vanda.[28] The announcement also stated that this was not expected to have any material impact on the consolidated earnings per share or net tangible assets per share of the Group for the then current financial year ended 31 May 2020.

36 On 21 April 2020, the Company announced that Dr Ong's accreditation and clinical privileges at Gleneagles, Mount Elizabeth, Mount Elizabeth Novena and Parkway East Hospitals had been suspended with effect from 20 April 2020 until and unless the Complaint was dismissed.[29] If the Complaint

was not dismissed by 1 July 2021, Dr Ong's accreditation and clinical privileges at the said hospitals would lapse.

37 Between 24 April 2020 and 20 May 2020, the Company made several announcements in response to queries from SGX.[30]

38 On 29 April 2020, the plaintiff's solicitors wrote to the Company seeking certain information relating to (a) the extent of the Board's, and in particular, Dr Heah's knowledge of the Complaint and the Defamation Action at the time of the 19% Acquisition, and (b) the steps that the Company will be taking as regards the 19% Acquisition "given what has been brought to light".[31]

39 By way of email on the same day, Ms Ong referred the plaintiff's solicitors to the Company's announcements on SGXNet.[32]

40 On 30 April 2020, the plaintiff's solicitors wrote to the Company and asked if the Company was prepared to take action against Dr Heah failing which the plaintiff would consider making an application under s 216A of the Companies Act.[33] In the letter, the plaintiff alleged that Dr Heah breached his duties under s 157 of the Companies Act, in particular, the duty to exercise reasonable diligence, in connection with the 19% Acquisition. The plaintiff alleged that Dr Heah, in handling the 19% Acquisition, adopted a "lackadaisical approach" in dealing with the Defamation Action and the Complaint, having dealt with it "in the most perfunctory manner".

41 On 8 May 2020, the Company's solicitors responded, rejecting the plaintiff's allegation that Dr Heah had acted in breach of his duty as a director.[34]

42 By way of letter dated 8 May 2020 from her solicitors, the plaintiff gave the Company 14 days' notice of her intention to apply to Court under s 216A of the Companies Act to commence an action in the Company's name against Dr Heah.[35] The letter enclosed a draft statement of claim of the intended action against Dr Heah.

43 In a subsequent letter dated 11 May 2020, the plaintiff's solicitors enclosed an amended draft statement of claim.[36] The amended draft statement of claim set out in explicit detail the WhatsApp Messages between Dr Ong and Dr Chan relating to their sexual exploits.

44 On 21 May 2020, the Company's solicitors replied to the plaintiff's solicitors, and pointed out, among other things, that the 19% Acquisition was a collective decision of the Board made in the interest of the Company.[37]

45 On 27 May 2020, the plaintiff filed the present Originating Summons.

46 On 15 June 2020, the Straits Times reported that the plaintiff had commenced suit against Dr Chan "for allegedly promising they would have an exclusive relationship when he had no intention of keeping his word".[38]

The plaintiff's application

47 As stated earlier, the plaintiff sought leave pursuant to s 216A(2) of the Companies Act to bring and prosecute an action in the High Court in the name and on behalf of the Company against Dr Heah in respect of Dr Heah's "breach of his directors' duties in connection with the Company's acquisition on 3 September 2019 of a 19% stake in [JOES]".

48 Section 216A(3) requires the Court to be satisfied of the following before granting leave under s 216A(2):

(a) that the plaintiff had given 14 days' notice to the directors of the Company of her intention to apply to the Court under s 216A(2) if the directors of the Company did not bring the action against Dr Heah;

(b) that the plaintiff was acting in good faith; and

(c) that it appeared to be *prima facie* in the interests of the Company that the action against Dr Heah be brought.

It was not disputed that the first requirement had been met (see [42] above). The dispute was over the second and third requirements. For the reasons set out below, I found that the plaintiff did not satisfy the second and third requirements.

Whether the claim against Dr Heah was *prima facie* in the interest of the Company

49 The Court of Appeal's decision in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") is authority for the following principles in relation to the requirement under s 216A(3)(*c*) that the statutory derivative action must be *prima facie* in the interests of the Company (at [53]–[56]):

(a) An applicant under s 216A must cross the threshold of convincing the court that the claim would be "legitimate and arguable", *ie*, it must have a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful. This may overlap with the good faith requirement under s 216A(2) as an applicant with a frivolous or vexatious claim will also typically be unable to demonstrate

an honest belief in the substantive merits of the proposed action or the absence of a collateral purpose amounting to an abuse of process.

(b) At this interlocutory stage, the standard of proof required is low and only the most obviously unmeritorious claim will be culled.

(c) The Court may also go further to examine whether it would be in the practical and commercial interests of the company for the action to be brought.

50 In her draft amended statement of claim for the intended action against Dr Heah,[39] the plaintiff alleged that Dr Heah breached his duties under s 157 of the Companies Act to act honestly and with reasonable diligence. The plaintiff particularised the breaches as follows:[40]

(a) Dr Heah knew or ought to have known that the allegations of misconduct in the Complaint, if true, would have an impact on whether the Company should continue with the 19% Acquisition and/or the determination of the purchase consideration.

(b) Dr Heah failed to demand Dr Ong to provide him with a copy of the Complaint and all documents filed in relation to the Defamation Action.

(c) Even if he did obtain a copy of the Complaint and the documents in respect of the Defamation Action, Dr Heah failed to cause the Company to commence a formal internal investigation into the allegations of misconduct against Dr Ong prior to acquiring the 19% stake in JOES. The plaintiff also asserted that Dr Heah should recuse himself from participating in any such internal investigation because he

had "brought the deal to the table". However, this assertion was moot because no formal internal investigation was commenced.

(d) Dr Heah allowed Dr Ong to be released from the Profit Guarantees as part of the terms for the 19% Acquisition.

(e) Dr Heah failed to recuse himself from the decision-making for the 19% Acquisition. The plaintiff asserted that Dr Heah should have recused himself because he was "the primary driving force behind the acquisition and made all the important decisions".

Failure to demand relevant documents and commence internal investigation

51 It was clear from her amended draft statement of claim that the plaintiff's case against Dr Heah was as follows (see [50(a)] above):

(a) had Dr Heah asked for the relevant documents and had there been a formal internal investigation, he would have realised that the allegations of misconduct in the Complaint were true, and

(b) this would have affected the decision to proceed with the 19% Acquisition and/or the decision on the purchase consideration.

52 The above was also clear from the plaintiff's affidavit in which she posed the following questions:[41]

> 68. If Dr Heah knew at the time of the [19% Acquisition] what he now knows about Dr Ong's escapades, would he still have gone ahead with it and, if so, would he have taken those matters into account in determining the consideration for the 19%? *Did the possibility that the allegations about Dr Ong's unprofessional conduct are true even cross his mind?*

(emphasis added)

53 In her written submissions, the plaintiff submitted that what was in question was Dr Heah's failure to consider whether there was a real risk that the SMC's findings and decision on the Complaint may have a material adverse impact on the Company.[42]

54 It was clear that the intended claim against Dr Heah was premised on the assertion that the decision to proceed with the 19% Acquisition ignored the Complaint or did not take into consideration the possibility that the allegations in the Complaint were true. However, the unchallenged evidence showed that this could not have been further from the truth.

55 The decision to proceed with the 19% Acquisition was made by the Board. Dr Heah kept the Board updated about the Complaint. There was no suggestion that he did not do so or that he failed to disclose relevant information about the Complaint to the Board. Dr Heah and the Board acknowledged that the Complaint was being investigated by the SMC and decided to let the SMC's investigation take its course.

56 In their affidavits, Dr Heah, Dr Chia and Mr Chong Weng Hoe ("Chong") explained why the Board considered the 19% Acquisition to be commercially favourable to and in the interests of the Company. Chong was the Non-Executive Chairman and an Independent Director of the Company. In brief, JOES had performed exceptionally well since the 51% Acquisition and the structure of the 19% Acquisition benefited the Company significantly in many ways.[43] These benefits to the Company were not challenged by the plaintiff. Indeed, the plaintiff asserted that she was not challenging the "commercial soundness" of the decision to proceed with the 19% Acquisition.[44]

The plaintiff accepted that purely from the commercial perspective, the decision to proceed with the 19% Acquisition was "not unsupportable".

57 The nub of the plaintiff's alleged concern was that Dr Heah failed to take into consideration the risks associated with the Complaint. However, the evidence was clear that Dr Heah and the Board had not ignored these risks. The Board had proceeded on the basis that the Complaint might be true. This was abundantly clear from the fact that Dr Heah and the Board satisfied themselves that there were sufficient safeguards in place to protect the Company *in the event of any adverse finding by the SMC*.[45] In this regard, Dr Heah and the Board were of the view that the Put Options provided sufficient safeguards.

58 The plaintiff challenged the position taken by Dr Heah and the Board that the Put Options were important safeguards against adverse findings by the SMC. The plaintiff argued that the Put Options were designed solely to replace the Profit Guarantees. In my view, there was a disconnect in the plaintiff's argument. It was true that the Put Options were intended to replace the Profit Guarantees. However, that did not mean that Dr Heah and the Board could not take the view that the Put Options provided sufficient safeguards against any adverse finding by the SMC. What was ultimately important in this regard was the fact that the Put Options existed.

59 It was clear that the Board had considered the benefits and risks (including the risk that the allegations in the Complaint might be true) and concluded that the 19% Acquisition was nevertheless still in the interests of the Company. The fact that Dr Heah did not ask for the relevant documents or cause the Company to commence a formal internal investigation was irrelevant to the Board's decision. The Board decided to let the SMC's investigation take its

course and assessed the 19% Acquisition on the basis that the allegations in the Complaint might be true. Clearly, the Board concluded that the 19% Acquisition was still in the interest of the Company even if the allegations were true.

60 It seemed to me that the plaintiff's real grievance was that she disagreed with the Board's assessment of the risks associated with the Complaint. Obviously, the plaintiff's view was that the Company should not have proceeded with the 19% Acquisition, and/or should not have paid $3,795,000 for it. However, it is not for the plaintiff or indeed, this court, to second-guess corporate decisions that are made by those in charge of a company who believe in good faith that the decisions are in the best interests of the company. As the court said in *ECRC Land Pte Ltd v Ho Wing On Christopher* [2004] 1 SLR(R) 105 at [49]:

> The court should be slow to interfere with commercial decisions taken by directors (see *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064). It should not, with the advantage of hindsight, substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interests of the company, even if those decisions turned out subsequently to be moneylosing ones.

There was no suggestion or evidence that the Board's decision to proceed with the 19% Acquisition was not made in good faith.

61 It is for a company's directors to weigh the risks against the benefits and decide if a transaction is worth entering into. A Court should not interfere so long as the decision has been made in good faith. As the High Court rightly cautioned in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [17], "[u]ndue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship".

Allowing Dr Ong's release from the Profit Guarantees

62 In her affidavit, the plaintiff stated as follows:

> 31. The consideration of S$3,795,000.00 was a huge premium over the S$2,175,000.00 the Company paid for the first 51% (S$2,175,000.00). Crucially, it was a term of the 2nd Acquisition that the Profit Guarantees which Dr Ong provided under the 1st Acquisition as a safeguard for the Company would be removed.

The suggestion seemed to be that Dr Heah was negligent in allowing the removal of the Profit Guarantees, which had been included in the 1st SPA as a safeguard for the Company, and that this was especially so given the "huge premium" paid for the 19% Acquisition.

63 However, the plaintiff's affidavit painted an incomplete picture. First, there was a simple explanation as to why the consideration for the 19% Acquisition under the 2nd SPA was higher than that paid for the 51% Acquisition under the 1st SPA. As stated earlier, under the 1st SPA, the Company was legally bound to purchase the remaining 49% of the shares in JOES by 1 April 2021 at a price to be computed based on JOES being valued at ten times its audited profit after tax for the financial year ended 31 May 2020 (see [4(b)] above). The 2nd SPA brought forward the acquisition of 19% to September 2019 whilst postponing the acquisition of the remaining 30% to October 2021.

64 The consideration for the 19% Acquisition was based on the valuation of JOES computed using the formula agreed to under the 1st SPA, except that for obvious reasons, the profit after tax figure was that for the financial year ended 31 May 2019. The consideration was higher than that paid for the 51% acquired under the 1st SPA because (a) under the 1st SPA, the agreed multiplier

for the 51% Acquisition was seven whereas the agreed multiplier for the remaining 49% was ten, and (b) JOES' profit for the financial year ended 31 May 2019 had grown by more than 250% compared to its profit at the time of the 51% Acquisition.[46]

65 Second, the Profit Guarantees were removed because on 25 April 2017, the Singapore Medical Association took the position that profit guarantees in doctors' contracts were incompatible with the Medical Council Physician Pledge and other ethical principles.[47] In the 2nd SPA, the Profit Guarantees were then replaced by the Put Options.

Failure to recuse from the decision-making for the 19% Acquisition

66 The plaintiff alleged that Dr Heah should have recused himself from the decision-making for the 19% Acquisition because he was "the primary driving force behind the acquisition and made all the important decisions". The plaintiff did not explain what "all the important decisions" referred to. The decision to proceed with the 19% Acquisition was made by the Board. Dr Heah did propose the 19% Acquisition to the Board. However, that was unexceptional; after all, he was the CEO of the Company. In my view, the plaintiff had not provided any credible reason as to why Dr Heah had to recuse himself from the decision-making for the 19% Acquisition.

Conclusion on alleged breaches of duties

67 In the circumstances, in my view, the intended claim against Dr Heah simply did not meet the "legitimate and arguable" threshold. Therefore, it did not satisfy the requirement under s 216A(3)(*c*) of the Companies Act.

Whether the plaintiff was acting in good faith

68 The Court of Appeal in *Ang Thiam Swee* also established the following principles with respect to the requirement of good faith under s 216A(3)(*b*) of the Companies Act (at [23], [29], [30] and [31]):

(a) No presumption of good faith applies in favour of an applicant under s 216A; instead, the onus is on the applicant to establish good faith.

(b) The test of good faith is a subjective one, *ie*, whether the applicant honestly or reasonably believed that a good cause of action exists.

(c) The applicant's good faith and the merits of his application may be, but are not necessarily, connected. The court may find that the applicant lacks good faith if no reasonable person in his position could believe that a good cause of action existed (citing *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313). An applicant might seek to bring a statutory derivative action in good faith even where there is no arguable or legitimate case to be advanced (although the proposed action in this scenario would arguably not be *prima* facie in the interests of the company). An applicant with a legitimate case may be found to be lacking in good faith if he is "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations" (citing *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 (*"Pang Yong Hock*") at [20]).

(d) Hostility alone cannot constitute bad faith but an applicant would lack good faith where his collateral purpose amounts to an abuse of

process. In this regard, it should be borne in mind that the purpose of the statutory derivative action is to provide (see *Pang Yong Hock* at [19]):

> … a procedure for the protection of genuinely aggrieved minority interests and for doing justice to a company 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.

(e) The onus is on the applicant to demonstrate that he is or may be a genuinely aggrieved shareholder and that his collateral purpose is sufficiently consistent with the purpose of doing justice to the company, so that he is not abusing the statute, and by extension, also the company, as a vehicle for his own aims and interests.

69 In *Chong Chin Fook v Solomon Alliance Management Pte Ltd and others and another matter* [2017] 1 SLR 348, the Court of Appeal explained (at [60]) that:

> … the mere presence of a collateral purpose would not preclude an application under s 216A if the [applicant] could demonstrate that his collateral purpose was sufficiently consistent with the purpose of doing justice to the Company. …

70 The applicant bears the legal burden of satisfying the court on the balance of probabilities that it is acting in good faith; this carries with it the evidential burden of producing evidence to establish its good faith: *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2018] 3 SLR 687 ("*Petroships*") at [67]–[68].

71 Applying the above principles to the present case, I concluded that the plaintiff failed to discharge her burden of proof.

72 First, the plaintiff asserted that she believed that the intended claim was legitimate and arguable. The reasons why the intended action did not meet the legitimate and arguable threshold have been dealt with earlier. The Court may find that the applicant lacks good faith if no reasonable person in his position could have believed that a good cause of action existed. The test remains a subjective test but in such a case, the applicant's claim of an honest belief in the merits of the intended action may be disbelieved. In my view, the present case was just such a case. The plaintiff has simply persisted in ignoring the fact that the Board had considered the risk that the contents of the Complaint may be true.

73 Second, the plaintiff was not concerned about the interests of the Company. The plaintiff showed no concern about the commercial aspects of the 19% Acquisition or with the Board's considerations. As stated at [29] above, when Ms Ong spoke to the plaintiff after the AGM, the plaintiff asked if the Company would be proceeding to complete the 19% Acquisition and Ms Ong replied that this was a commercial decision, which would be made by the Company's management. The plaintiff did not ask for any explanations on the commercial aspects of the 19% Acquisition.[48] Instead, she told Ms Ong that she would be documenting the meeting and sharing it with journalists.[49]

74 Clearly, the plaintiff was trying to stop the 19% Acquisition. In my view, her objective in doing so was to punish Dr Ong by preventing Dr Ong from receiving the consideration, which was worth $3,795,000. However, the plaintiff failed to achieve her objective and she held Dr Heah responsible for this. The plaintiff's case was that a formal internal inquiry (which Dr Heah did not commence) would have established that the allegations in the Complaint were true, and this would have had an impact on whether the Company should

have continued with the 19% Acquisition and/or the determination of the purchase consideration (see [51] above).

75 The plaintiff now had Dr Heah in her crosshairs. In my view, the plaintiff's intended statutory derivative action against Dr Heah was motivated by her desire to punish him. She held him responsible for the fact that the Company proceeded with the 19% Acquisition and consequently Dr Ong received the consideration of $3,795,000 (in cash and shares). However, as discussed earlier, the plaintiff's case was founded on the incorrect premise that the Board had ignored the Complaint. It was clear that in deciding on the 19% Acquisition, the Board (including Dr Heah) did not ignore the Complaint and had instead assumed that the allegations in the Complaint may be true. In the circumstances, in my view, the plaintiff's collateral purpose (*ie,* to punish Dr Heah) was not "sufficiently consistent with the purpose of doing justice to the Company".

76 Third, the evidence pointed inexorably to the conclusion that the plaintiff was "so motivated by vendetta, perceived or real, that [her] judgment will be clouded by purely personal considerations". The plaintiff had argued that she was the "most eminently sensible person" to take the lead on the intended action against Dr Heah because she is well acquainted with the facts that are the genesis of the problem. I disagreed. The primary issue in the intended action was whether Dr Heah had breached his duties as a director of the Company by failing to ask for the relevant documents and failing to commence a formal internal inquiry. The plaintiff's knowledge of the misconduct that she had alleged against Dr Chan and Dr Ong did not make her the "most eminently sensible person" to take charge of the intended action against Dr Heah. On the contrary, in my view, her position as the victim and her

anger against Dr Chan and Dr Ong (justified though it may have been) would have clouded her judgment.

77 Finally, the plaintiff was hardly the "genuinely aggrieved shareholder" that s 216A is meant to protect. She was not even a shareholder of the Company when she contacted the Company on 5 September 2019 to tell Ms Ong about the Defamation Action. She requested but did not get to meet Dr Heah. She had no personal knowledge of Dr Heah's or the Board's internal deliberations leading up to the 19% Acquisition. She then became a shareholder by buying the minimum traded lot of 100 shares in order to attend the Company's AGM so that she could tell the shareholders about the Complaint and the Defamation Action.

Conclusion

78 For the above reasons, I concluded that the plaintiff had not satisfied the requirements for leave under ss 216A(3)(*b*) and (*c*) of the Companies Act. Accordingly, I dismissed the application and ordered her to pay costs to both the Company and Dr Heah, fixed at $10,000 each plus disbursements to be fixed by me, if not agreed.

Chua Lee Ming
Judge

Ong Ying Ping and Kenneth Chua Kok Siong (Ong Ying Ping Esq) for the plaintiff;
Tan Chee Meng *SC,* Paul Loy Chi Syann and Janie Hui (WongPartnership LLP) for the first defendant;
Chua Sui Tong and Gan Jhia Huei (Rev Law LLC) for the second defendant.

1 Dr Heah's Affidavit affirmed on 19 June 2020 ("Dr Heah's Affidavit"), at pp 54–82.
2 Dr Heah's Affidavit at paras 23 to 28.
3 Plaintiff's affidavit affirmed on 26 May 2020 ("Plaintiff's Affidavit"), at para 13.
4 Plaintiff's Affidavit, at pp 46–69.
5 Dr Heah's Affidavit, at pp 148–149.
6 Plaintiff's Affidavit, at pp 71–74.
7 Dr Heah's Affidavit at para 34.
8 Plaintiff's Affidavit, at pp 76–80.
9 Plaintiff's Affidavit, at p 78.
10 Plaintiff's Affidavit, at pp 82–94.
11 Dr Heah's Affidavit at paras 35 to 36.
12 Dr Heah's Affidavit at para 41.
13 Dr Heah's Affidavit, at pp 108–133.
14 Dr Heah's Affidavit at para 66(c).
15 Dr Heah's Affidavit at para 72.
16 Plaintiff's Affidavit, at pp 96–101.
17 Ms Ong's Affidavit filed on 19 June 2020 ("Ms Ong's Affidavit"), at p 8.
18 Ms Ong's Affidavit, at p 13.
19 Dr Heah's Affidavit at para 79(b)
20 Plaintiff's Affidavit, at para 33.
21 Ms Ong's Affidavit, at para 14.
22 Ms Ong's Affidavit, at para 15.
23 Dr Heah's Affidavit, at pp 189–190.
24 Dr Heah's Affidavit, at p 150.
25 Plaintiff's Affidavit, at pp 106–123.
26 Plaintiff's Affidavit, at p 129.
27 Plaintiff's Affidavit, at p 132.
28 Plaintiff's Affidavit, at p 293.
29 Plaintiff's Affidavit, at p 135.
30 Plaintiff's Affidavits, at pp 200–236.
31 Plaintiff's Affidavit, at pp 238–239.
32 Plaintiff's Affidavit, at p 241.
33 Plaintiff's Affidavit, at pp 244–247.
34 Plaintiff's Affidavit, at pp 254–255.
35 Plaintiff's Affidavit, at pp 257–266.
36 Plaintiff's Affidavit, at pp 270–288.
37 Plaintiff's Affidavit, at pp 290–291.
38 Dr Heah's Affidavit, at pp 193–195.

[39] Plaintiff's Affidavit, at pp 272–288.
[40] At paras 26 and 27.
[41] Plaintiff's Affidavit, at para 68.
[42] Plaintiff's Written Submissions, at para 52.
[43] Dr Heah's Affidavit, at paras 58–62; Chong Weng Hoe's Affidavit filed on 19 June 2020 ("Chong's Affidavit"), at para 41.
[44] Plaintiff's Written Submissions, at para 52.
[45] Dr Heah's Affidavit, at paras 54 and 67; Dr Chia's Affidavit filed on 19 June 2020, at para 64; Chong's Affidavit, at para 45.
[46] Dr Heah's Affidavit, at para 66(a).
[47] Dr Heah's Affidavit, at para 69.
[48] Ms Ong's Affidavit, at para 14.
[49] Ms Ong's Affidavit, at para 15.