**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2020] SGHC 268**

Suit No 793 of 2018

Between

(1) Bluestone Corporation Pte Ltd

… *Plaintiff*

And

(1) Phang Cher Choon
(2) Bluestone Healthcare Sdn Bhd
(3) Lim Hooi Loo

… *Defendants*

Suit No 794 of 2018

Between

(1) Bluestone Corporation Pte Ltd

… *Plaintiff*

And

(1) Lim Hooi Loo
(2) Bluestone Healthcare Sdn Bhd

… *Defendants*

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# GROUNDS OF DECISION

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[Confidence] — [Breach of confidence]

[Employment Law] — [Contract of service] — [Breach]
[Employment Law] — [Termination] — [Without notice]
[Equity] — [Defences] — [Acquiescence]
[Equity] — [Defences] — [Limitation]
[Equity] — [Fiduciary relationships] — [When arising]
[Equity] — [Fiduciary relationships] — [Duties] — [Breach]
[Tort] — [Confidence]
[Tort] — [Conspiracy] — [Unlawful means]
[Tort] — [Passing off]

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# Bluestone Corp Pte Ltd
# v
# Phang Cher Choon and others and another suit

**[2020] SGHC 268**

High Court — Suit Nos 793 and 794 of 2018
Mavis Chionh Sze Chyi JC
25–28 February, 3–6, 9–11 March, 1 July 2020

4 December 2020

**Mavis Chionh Sze Chyi JC:**

## Introduction

1 The plaintiff in this case is Bluestone Corporation Pte Ltd ("Corporation"), a company incorporated in Singapore on 10 March 1999 and said to be in the business of supplying medical equipment and consumables. Its majority shareholder at all material times was (and continues to be) one Tay Chai Khiang Henry ("Henry"), who was (and continues to be) one of its directors. The first defendant, Phang Cher Choon ("Phang"), was (and continues to be) a minority shareholder in Corporation. Phang was also a director of Corporation up until 24 August 2018, when his employment was terminated. The second defendant, Bluestone Healthcare Sdn Bhd ("Healthcare"), is a company incorporated in Malaysia on 16 February 2004 and said to be in the business of dealing in all kinds of medical products. As at mid-2018 just prior to the filing of the present suit, Phang held 99% of the shares in

Healthcare, with the remaining 1% being held by the other director of Healthcare, the third defendant Lim Hooi Loo ("Hooi Loo"). Hooi Loo was also employed by Corporation in its Malaysian branch office from 7 May 2003 until the latter terminated her employment on 24 August 2018.

2 In the present suit, Corporation alleged various breaches of fiduciary duties owed by Phang as its director. *Vis-à-vis* Hooi Loo, it was alleged that she had breached various terms of her contract of employment with Corporation. The breaches by Phang and Hooi Loo were said to arise primarily from the incorporation of Healthcare in Malaysia in competition with Corporation and their alleged diversion of business or business opportunities from Corporation to Healthcare. Phang, Hooi Loo and Healthcare were also alleged to have engaged in a "conspiracy to defraud" Corporation.

3 The trial before me was *not* bifurcated as to issues of liability and damage. At the conclusion of the trial, I dismissed Corporation's claims against all three defendants. As Corporation has filed an appeal, I am setting out below the reasons for my decision. I will first summarise the case advanced by each party and the evidence adduced at trial.

## Summary of Corporation's case and the evidence led in support of its case

### *Background*

4 Corporation's main witness at trial was Henry. Henry held 65% of the shares in Corporation while Phang held the remaining 35%. The company was founded by both men; and Henry testified that they were its only two executive directors. The company's operations were split into two divisions – medical equipment and medical consumables. Henry took charge of medical equipment



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and Phang took charge of medical consumables. In November 2005, Henry's parents (Tay Buan Say and Sg Wang Kim) were also appointed as directors of Corporation, although Henry claims that they were meant to be "non-executive" directors[1].

### *The "ground rules" agreed between Henry and Phang for the management of Corporation's business – and the incorporation of Absolmed Sdn Bhd*

5 According to Henry, when Corporation was set up, he and Phang agreed on a set of "ground rules" for the management of the company's business. Henry's version of these "grounds rules" was as follows[2]:

> We both agreed, if there were business opportunities in the medical and healthcare industry, made available to either one of us, it would be disclosed and offered to each other. If not accepted, we would be free to pursue such interests independently. We were free to pursue our independent interests in non-related businesses.

6 Henry claimed that in accordance with these ground rules, when an opportunity to market and sell Sonosite machines in Malaysia came up in 2012, he had informed Phang sometime about it[3]. These machines were already being sold by Corporation in Singapore. Henry claimed that selling the machines in Malaysia would have required Corporation to expand its Malaysian operations by setting up a Sendirian Berhad ("Sdn Bhd", the Malaysian equivalent of a private limited company); and that when Phang showed a lack of interest in doing so, he had "informed [Phang he] would go ahead to sell Sonosite

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[1] [10] and p 85 of Henry's affidavit of evidence-in-chief ("AEIC").

[2] [21] of Henry's AEIC.

[3] [38] of Henry's AEIC.



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machines in Malaysia" but that Phang had not responded. Henry then proceeded to set up a Malaysian-registered company called Absolmed Sdn Bhd ("Absolmed"), which dealt with the distributorship of Sonosite until it closed sometime in 2016 or 2017. It was not disputed that Absolmed was for all intents and purposes Henry's own company, although he did not hold the shares in his name, nor did he have himself appointed as director.

7 As will be seen later, Phang denied that he was informed by Henry about his intention to set up Absolmed to sell Sonosite machines in Malaysia[4].

***Medisol Pte Ltd***

8 In March 2006, Corporation set up a company called Medisol Pte Ltd ("Medisol") offering tele-radiology services in Singapore. Corporation held 75% of the shares in Medisol, with the remaining shares being held by Henry's friend, one Ernest Phua Eng Tong ("Phua"), through a company called Bridgevision Pte Ltd ("Bridgevision")[5]. Henry claimed that Phang had refused to get involved in the operations of Medisol and that he had left Henry and Phua to manage this company.

9 Medisol was sold to RadLink-Asia Pte Ltd ("RadLink") in 2017.

***The Malaysian branch office***

10 On 20 March 2000, Corporation registered a branch office in Malaysia ("the Malaysian branch office"). As Phang was a Malaysian citizen who spoke

[4] [104]-[108] of Phang's AEIC.

[5] [35] of Henry's AEIC.



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fluent Malay, it was agreed that he would oversee the Malaysian branch office[6]. For the purposes of the trial, it was not disputed that the Malaysian branch office is not a Sdn Bhd; and that not being a Sdn Bhd, it cannot accept orders directly from customers in Malaysia. However, the circumstances in which the Malaysian branch office were set up and the objective behind it were a matter of dispute as between Henry and Phang. According to Henry[7]:

> The object of the Malaysian office was to explore business opportunities, market [Corporation's] consumable products, and at the same time explore, identify and develop business opportunities in Malaysia. Enquiries from Malaysian customers through the Malaysian office would be channelled to [Corporation's] Singapore office. The plan was to later incorporate the Malaysian office into a fully-fledged Sdn Bhd entity when [Corporation] had sufficient resources, and when [Phang] was ready.

[6] [13] of Henry's AEIC.

[7] [12] of Henry's AEIC.



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11 Henry claimed that it was Phang who had always been unwilling to expand the scope of Corporation's operations in Malaysia. Indeed, as seen earlier, he claimed it was this refusal on Phang's part to contemplate the incorporation by Corporation of a Sdn Bhd in Malaysia which had led him to set up Absolmed on his own: his story was that when he approached Phang about the idea of incorporating a Sdn Bhd to market Sonosite machines in Malaysia, Phang had fobbed him off by saying, "… We are not ready yet. Difficult lah, difficult."[8]

***The employment of the third defendant, Hooi Loo***

12 A few months after the Malaysian branch office was set up, Hooi Loo – a Malaysian citizen – was hired by Corporation to work in the branch office as a product specialist. Hooi Loo's contract of employment, which Phang signed on behalf of Corporation, provided, *inter alia*, as follows[9]:

> 6. Confidentiality and restraints
>
> 6.1 During your employment, you shall not disclose at any time any unauthorized individual, any information concerning the interest or business of the company or any of its subsidiary or associated companies or any of their clients nor make or possess without prior permission, copies of documents, papers or other media on which such information is recorded.
>
> 6.2 Should you leave the employment of the company, you agree not to solicit customers, suppliers or employees of the company or any of its affiliates on behalf of yourself or any other person, partnership or corporation, or seek to hire any employee (directly or indirectly) of the company or any of its affiliates for a period of one year after the cessation of your employment.

[8] [38] of Henry's AEIC.

[9] pp 54-56 of Hooi Loo's AEIC. Grammatical and typographical errors are from the original document.



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> 6.3 Legal action will be taken against you should there be a breach of the confidentiality and restraints
>
> 7. Restraints on activities
>
> 7.1 You will not reveal and will not at any time (whether during your employment or after the termination of your employment for whatever reason) use your own or another advantage, or reveal to any person, for or [*sic*] company any of the trade secrets, business methods of information which you knew or ought reasonable [*sic*] to have known to be confidential concerning the business or affairs of the company so far as they will have come to your knowledge during your employment with the company
>
> 7.2 You will not be allowed to sell, service or support any of the agency product lines in Bluestone Corporation Pte Ltd or its associated companies should you leave the company. Should this term be breached, legal action will be taken against you.
>
> …
>
> 9. Code of Conduct
>
> 9.1 As an employee of the company you are required to obey all applicable laws. You will also practice high ethical standards in your daily dealings of company affairs.

### *The breakdown of the relationship between Henry and Phang*

13 Henry testified that he and Phang ran their respective divisions – medical equipment (Henry) and medical consumables (Phang) – independently of each other[10]. Moreover, as he found Phang "a forceful personality", he also sought to "minimise conflict" with Phang by "giv[ing] way"[11]. Corporation's business was doing well and turning a profit every year – until the year 2016, when the

[10] [22] of Henry's AEIC.

[11] [24]-[25] of Henry's AEIC.



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relationship between Henry and Phang started to deteriorate for several reasons[12].

14 *Inter alia*, Henry was aggrieved at Phang's refusal to give a personal guarantee to secure certain bank facilities, and at Phang's decision to declare bonuses for himself and his team in early 2017 before the finalisation of Corporation's audited accounts for 2016. When he learnt that Phang had already encashed his bonus cheques, he took back possession of Corporation's cheque books from Phang[13]. Henry's sense of grievance against Phang was also increased by discovering – from the accounts forwarded to him by Corporation's bookkeeper, Chong Yok Fong ("Yok Fong") – that there was "a sum of more than S$90,000.00/RM300,000.00 in the Malaysian [branch] office's account". He felt "disappointed" that Phang had not taken the initiative to transfer this sum to the Singapore office's account; and in July 2016, he told the latter to transfer S$100,000 from the Malaysian account to Corporation's Singapore bank account[14]. These incidents paled in comparison, however, to his discovery of the existence of Healthcare and of Phang's and Hooi Loo's involvement in Healthcare.

15 In his affidavit of evidence-in-chief ("AEIC"), Henry claimed that he had previously heard some mention of "Bluestone Healthcare" from Yok Fong and another staff, Phua Peck Sian Jasmine ("Jasmine"), but had not inquired into the matter. According to Henry, he had asked Phang about Healthcare on "an occasion early on" after Jasmine mentioned to him that "there was an entity

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[12] [43] of Henry's AEIC.

[13] [43] and [45] of Henry's AEIC.

[14] [44] of Henry's AEIC.



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bearing the name 'Bluestone Healthcare' in Malaysia", but when Phang "brushed [him] off" by telling him "you don't have to know", he had taken Phang at his word and asked no further questions[15]. As to the fact that Healthcare had been mentioned in Corporation's audited accounts over the years as a related party[16], Henry claimed that he had never noticed these references. He said that he was out of the office most of the time and had left it to Phang to give instructions on the preparation of the accounts[17]. He conceded that as Corporation's director, he had signed off yearly on these accounts, but claimed that he would sign "[a]fter hearing affirmatively from Jasmine or Yok Fong [that Phang] had seen and signed off on the year-end accounts"[18]. He also claimed that he "was not in the practice" of perusing the accounts unless either Phang or Yok Fong brought specific issues to his attention; and neither of them had ever brought to his attention the fact that Healthcare was stated in the accounts to be a related party[19].

16 Henry claimed that he only "came to know of [Healthcare's] incorporation, [Phang's] and [Hooi Loo's] involvement in [Healthcare], on or after 2.2.2018"[20] – after the new auditor he had engaged for Corporation assisted him to carry out some searches in Malaysia. According to Henry, it was only when he received the search results from the new auditor that he realised for the first time that Phang had set up Healthcare in Malaysia "as far back as 2004",

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[15] [53] of Henry's AEIC

[16] [200] of Henry's AEIC.

[17] [197] of Henry's AEIC.

[18] [199] of Henry's AEIC.

[19] [198] and [201] of Henry's AEIC.

[20] [47] of Henry's AEIC.



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and that both Phang and Hooi Loo were directors and shareholders of Healthcare[21].

17 On 9 August 2018, Henry visited Kuala Lumpur together with his brother-in-law David Loh Mun Choong ("David"), his solicitor Mr Martin De Cruz (who subsequently had conduct of the proceedings in the present suit), and a representative from a computer forensics firm. Henry said he was convinced that Healthcare was indeed carrying out business in Kuala Lumpur after David reported to him that the room rented by Corporation's Malaysian branch office was being occupied by a Healthcare employee and that the "office block business directory disclosed [Healthcare's] name, but not [Corporation's]"[22].

18 On 8 August 2018, prior to visiting Kuala Lumpur, Henry had already filed writs of summonses and statements of claim against all three defendants, although he had yet to serve the papers on them. At that stage, Phang and Healthcare were named as the defendants in the present suit (HC/S 793/2018), while Hooi Loo and Healthcare were named as the defendants in a separate suit (HC/S 794/2018).

19 On 24 August 2018, Henry returned to Kuala Lumpur together with David, who attended at Corporation's Malaysian office premises with representatives from the computer forensics firm and from Corporation's Malaysian lawyers. According to David, he had joined Corporation's employment on 24 August 2018 itself and had been appointed the general manager on the same day[23]. David served on Hooi Loo a notice of termination

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[21] [52] of Henry's AEIC.

[22] [55] of Henry's AEIC.

[23] See transcript of 28 February 2020 at p 4 line 3 and p 5 lines 8-16.



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of employment and also extended her a copy of the writ of summons and statement of claim. Subsequently, Henry met up with Hooi Loo on the same day because he wanted to hear from her about her involvement in Healthcare. Henry claimed that he concluded during their meeting that she had acted with the knowledge that "what she did was wrong"[24]. HC/S 793/2018 was consequently amended to add Hooi Loo as the third defendant, so that Corporation could proceed against all three defendants in the same suit.

20 Phang too was served with a notice of termination of employment on 24 August 2018. His laptop, mobile phone and thumb-drives were seized from him on that day as these were said to belong to Corporation[25].

***Phang's incorporation of Prius Pte Ltd and Primuz Pte Ltd***

21 Henry alleged that it was also after 6 July 2018 that he discovered – through searches done by the company secretary – that Phang had previously incorporated two other companies in Singapore[26]. The first was a company called Prius Pte Ltd ("Prius") which Phang had incorporated on 18 July 2009. Although Prius had subsequently been struck off the Accounting and Corporate Regulatory Authority ("ACRA") register in March 2017, Henry said he had found four delivery orders issued by Prius to four entities – the National University of Singapore, Ngee Ann Polytechnic, Impres Trading and Yong Her Sin Medical Store[27]; and he contended that "[p]roducts sold or sought to be sold by Prius could and should have been sold by [Corporation]". Moreover,

[24] [70] of Henry's AEIC.

[25] [68] of Henry's AEIC.

[26] [57] of Henry's AEIC.

[27] pp 858-861 of Henry's AEIC.



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according to Henry, Phang had employed one of Corporation's employees – Chia Su-Lin Lynnette ("Lynnette") – in Prius, and this amounted to "us[ing]" her services "to manage his business at Prius"[28].

22 Secondly, Phang had also incorporated another company called Primuz Pte Ltd ("Primuz") on 9 February 2017. Henry did not produce any documentary records of sales by Primuz, but his contention was that since the company search on Primuz revealed its principal objects to be "trading of healthcare equipment"[29], it was "in a position to compete with [Corporation] is [*sic*] sales of healthcare equipment"[30]. Moreover, Phang had not disclosed to Henry or to Corporation his interests in Primuz and in Prius.

23 I next outline Corporation's various claims. With respect, these were set out in a rather confusing manner in its amended statement of claim; and the contents of Henry's AEIC did not always appear to comport with what was pleaded. The summary of Corporation's claims below is gleaned from its pleadings; and I have also referred to the broad areas or issues on which Henry's evidence appeared to add to or differ from the pleadings.

***Corporation's claim against Phang for breach of fiduciary duties***

24 As against Phang, it was asserted[31] that he owed – in his capacity "as a director and agent of [Corporation]" multiple fiduciary duties, including, *inter alia* –

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[28] [59] and [62]-[63] of Henry's AEIC.

[29] pp 863-864 of Henry's AEIC.

[30] [65] of Henry's AEIC.

[31] [6] of Corporation's Statement of Claim (Amendment No. 2).



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(a) a duty to "act *bona fide* and in good faith in the interest of [Corporation] in the discharge of all duties, powers, responsibilities, obligations and functions assigned to or vested in or attached to [him] as a director of [Corporation]";

(b) a duty to "serve [Corporation] faithfully and dutifully and not to advance or promote [his] own or other external interests to the prejudice of or contrary to or in conflict with the corporate interests of [Corporation];

(c) a duty "not to place or allow [himself] to be placed in a situation or position whereby any of [his] duties and obligations to [Corporation] conflicted or may conflict with [his] own personal interests"; and

(d) a duty not to make secret profits whilst engaged as a director of Corporation.

25 In addition to such fiduciary duties, it was pleaded that Phang owed Corporation "obligations under the Companies Act Cap 50, under common law and equity, including the duty to exercise reasonable care, to act honestly and use reasonable diligence in the discharge of the office as a director of [Corporation]"[32].

26 In gist, Corporation claimed that Phang had breached these duties by setting up Healthcare, Prius and Primuz; by using Hooi Loo's services as a director of Healthcare; by causing Healthcare to compete with Corporation's

[32] [8] of Corporation's Statement of Claim (Amendment No. 2).



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business; and by making "secret profits" from Healthcare's business[33]. Henry's AEIC added the allegation that Phang had been "self-dealing" by arranging for Healthcare to sell Coeur products to Corporation at prices which were marked up by 15%[34].

27 Corporation contended that "[i]n the premises", any "secret profits and/or profits made by [Phang] as a result of his breach of fiduciary duties" were "held on a constructive trust for [Corporation]"[35]. An "account" of such profits was sought. The amended statement of claim did not explain what these "secret profits" might be or how they might have been made. However, in Henry's AEIC, it was alleged that the "directors' fees and dividends" received by Phang and/or Hooi Loo from Healthcare over the period from 2004 to 2016 constituted "secret profits" because they had received these payments "surreptitiously" and "unconscionabl[y]" while acting in breach of their "duties of loyalty and fidelity to [Corporation]"[36]. Henry claimed that as Healthcare's audited accounts over this period showed that they had together received an aggregate amount of RM1,240,000 in directors' fees and dividends, this was the amount which should be "disgorged" from them.

28 Apart from claiming all "secret profits and/or profits made by [Phang] as a result of his breach of fiduciary duties", Corporation also claimed the "claw-back" of all *bonuses* paid to him over the period from 2005 to July 2018, on the grounds that it had paid him these bonuses "as a result of a mistake", in

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[33] [25A] of Corporation's Statement of Claim (Amendment No. 2).

[34] [104] of Henry's AEIC.

[35] [26] of Corporation's Statement of Claim (Amendment No. 2).

[36] [165]-[169] of Henry's AEIC.



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circumstances where it "did not know [he] was engaged as a director of [Healthcare], acting for the benefit and interests of [Healthcare]"[37]. The bonuses to be clawed back were quantified at $675,000 at para 26 and Schedule 3 of the amended Statement of Claim, but in his AEIC, Henry said that the total amount of bonuses to be clawed back came to $555,000[38].

29 In addition, although the recovery of salary payments from Phang was not specifically pleaded in the amended statement of claim, Henry claimed in his AEIC that Corporation was also entitled to damages from Phang "in the form of clawback of part of *salaries* [paid] out to [him], over the period when [he] was a director of [Healthcare]" [emphasis added][39]. The salary payments by Corporation to Phang over the period from 2005 to July 2018 totalled $1,723,500[40]. Henry claimed that Corporation was entitled to claw back 80.31% of this amount, on the basis that an examination of the WhatsApp messages on Phang's mobile phone had shown that 80.31% of his messages were with Healthcare employees while 19.69% of his messages were with Corporation employees[41].

30 According to Henry, the basis for seeking claw-back of the remuneration paid to Phang was as follows[42]:

> Remuneration to [Phang] … was paid out as a result of a mistake, on the part of [Corporation]. If [Corporation] had known, [Phang] … breached [his] obligations to [Corporation]

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[37] [26] of Corporation's Statement of Claim (Amendment No. 2).

[38] [180] of Henry's AEIC.

[39] [178] of Henry's AEIC.

[40] [175] of Henry's AEIC.

[41] [174] of Henry's AEIC.

[42] [190]-[191] of Henry's AEIC.



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> (in 2004 …), by acting as [director] in [Healthcare] and competing with [Corporation's] interests, [Corporation] would have terminated the employment of [Phang] … at the material time.
>
> But for [Phang's] … non-disclosure of interests in [Healthcare], [Corporation[ would not have paid to [him] … remuneration in the sum of S$2,529,785.00 [*ie*, S$1,723,500 + $555,000] … [Corporation] had suffered a detriment to the extent of at least the sums of S$2,529,785.00 … caused by [Phang's] … breach of duties owed to [Corporation]. [Phang] … benefitted to such extent.
>
> [emphasis in original omitted]

31 On top of the monetary claims, Corporation further sought an injunction to restrain Phang from "soliciting orders from or otherwise dealing with any customer or agent of [Corporation] for the supply of goods and services of the type sold by [Corporation]", as well as an order "that the corporate veil be pierced to hold [Phang] personally liable for the activities of [Healthcare]"[43]. Henry's AEIC did not elaborate on the basis of the prayer for the injunction against Phang. As to the prayer in relation to piercing of the corporate veil, Henry's AEIC simply stated that Phang was "the controlling mind of the business of [Healthcare]" because of his directorship, his dominant shareholding and "the manner in which [Hooi Loo] reported to [him]"; and that it was as a result of his "breach of fiduciary duties" that Corporation had "suffered the losses which arose from the business activities of [Healthcare] in Malaysia"[44]. Somewhat puzzlingly, the same portion of Henry's AEIC also made reference to Phang's majority shareholding and directorship of *Prius*, as well as the losses allegedly caused to Corporation by the "business activities …

[43] Prayers (6) and (7) at p 24 of Corporation's Statement of Claim (Amendment No. 2).

[44] [193]-[194] of Henry's AEIC.



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of *Primuz Pte Ltd* in Singapore" [emphasis added], without elaborating on how these allegations related to the prayer for piercing of the corporate veil[45].

***Corporation's claim against Healthcare for "knowing assistance"***

32 It was further pleaded by Corporation that Healthcare had "acted in *dishonest and/or knowing assistance*" [emphasis added] in relation to Phang's alleged breaches of fiduciary duties[46]. Elsewhere in the amended statement of claim, it was also pleaded that Healthcare was "liable to account to [Corporation] as a constructive trustee for such profits as were made by [Healthcare] and/or suffered by [Corporation], on the grounds of knowing assistance *and receipt*" [emphasis added][47].

33 In gist, the following particulars were pleaded of the alleged "knowing assistance"[48]:

(a) that Healthcare had "used the services" of both Phang and Hooi Loo;

(b) that Healthcare had operated its business "such as to compete with [Corporation's] business" and "made unlawful profits from diversion of business away from [Corporation]";

(c) that Healthcare had passed itself off "as associated with [Corporation]"; and

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[45] [192] and [194] of Henry's AEIC.

[46] [27] of Corporation's Statement of Claim (Amendment No. 2).

[47] [28] of Corporation's Statement of Claim (Amendment No. 2).

[48] [27(1)]-[27(9)] of Corporation's Statement of Claim (Amendment No. 2).



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(d) that Healthcare had used the office premises of Corporation's Malaysian branch office without the latter's consent.

34 Henry's AEIC cited a somewhat different basis for the claim of "knowing assistance". Henry stated that Healthcare was Phang's "corporate vehicle in his breach of fiduciary duties"; that Phang was Healthcare's "controlling mind"; and that Phang had been "assisted in [his] breach" of fiduciary duties by Healthcare "where such assistance was rendered in dishonest circumstances"[49]. Nothing else was said in Henry's AEIC about the basis for the claim of "knowing assistance".

***Corporation's claim against Hooi Loo for breach of employment contract***

35 *Vis-à-vis* Hooi Loo, Corporation asserted that in addition to the duties expressly spelt out in her contract of employment, she was also subject to the following "implied" contractual terms[50]:

(a) a duty to "act in the interests of [Corporation]";

(b) a duty of "loyalty and fidelity to [Corporation]";

(c) a duty "so long as [her] contract of employment subsisted, not to disclose at any time to any unauthorized individual, any information concerning the interest or business of [Corporation] or any of its subsidiary or associated companies or any of their clients nor make or

[49] [149] of Henry's AEIC.

[50] [12(1)] of Corporation's Statement of Claim (Amendment No. 2).



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possess without prior permission, copies of documents, papers or other media on which such information is recorded";

(d) a duty "not to reveal at any time (whether during the term of employment or after the termination of employment for whatever reason) other than for the use of [Corporation's] own advantage, or reveal to any person, or company any of the trade secrets, business methods of information [*sic*] which [she] knew or ought reasonably to have known to be confidential concerning the business or affairs of [Corporation] as far as they would have come to [her] knowledge during [her] employment with the company"; and

(e) a duty "as an employee of the company to obey all applicable laws and practice high ethical standards in [her] dealings with regards to [Corporation's] affairs".

36 In gist, Hooi Loo was alleged to have breached her employment contract by joining Healthcare as a director whilst employed by Corporation, by causing Healthcare to compete with Corporation's business, and by making "secret profits" from Healthcare's business. She was also alleged to have "caused or allowed" Healthcare to pass itself off as being "associated with [Corporation]"[51].

37 Similar to its claims against Phang, Corporation also sought against Hooi Loo loosely-framed orders for an "[a]ccount as to damages or equitable compensation for misuse of confidential information, breach of duty and trust, and conspiracy to defraud … and/or an account of secret profits and payments

[51] [19(1)] of Corporation's Statement of Claim (Amendment No. 2).



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of the sums due and/or damages"[52]. The amended statement of claim did not explain what "secret profits" might have been made by Hooi Loo. However, as noted earlier, it was alleged in Henry's AEIC that the "directors' fees and dividends" received by Phang and Hooi Loo from Healthcare between 2004 and 2016 constituted "secret profits"; that the aggregate amount of directors' fees and dividends paid to them in this period came to RM1,240,000; and that this was the amount they must disgorge[53].

38 Similar to its claims against Phang, Corporation also sought to claw back from Hooi Loo bonuses totalling $38,100 which it had paid her in the period from 2007 to 2015. The claw-back of these bonuses was said to be premised on their having been paid "as a result of a mistake, in circumstances where [Corporation] did not know [Hooi Loo] was engaged as a director of [Healthcare], acting for the benefit and interests of [Healthcare] in breach of [her] duties to [Corporation]"[54].

39 In addition, although the recovery of salary payments from Hooi Loo was not specifically pleaded in the amended statement of claim, Henry claimed in his AEIC that Corporation was also entitled to damages from her in the form of claw-back of part of the salaries it had paid her between 2007 and 2017 and between January 2018 and 24 August 2018. The salary payments to Hooi Loo in the period from 2007 to 2017 totalled $379,900, while her salary for the period from January 2018 to 24 August 2018 totalled $26,250[55]. According to

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[52] Prayer 7(2) at p 25 of Corporation's Statement of Claim (Amendment No. 2).

[53] [165]-[169] of Henry's AEIC.

[54] [14], [19(2)] and Schedule 2 of Corporation's Statement of Claim (Amendment No. 2).

[55] [181]-[185] of Henry's AEIC.



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Henry, Corporation was entitled to claw back 84.86%[56] of these amounts. The percentage figure of 84.86%, according to him, was derived as follows[57]: Healthcare's total revenue over the period from 2011 to 2017 amounted to $4,529,185.13 (converted from Malaysian ringgit) whereas Corporation's total revenue over the same period amounted to $807,901.92. The aggregate of these two sums came to $5,337,087.05. Since Healthcare's revenue amounted to 84.86% of this aggregate amount (4,529,185.13 / 5,337,087.05), this must mean that Hooi Loo "spent 84.86% of her time promoting [Healthcare's] business against 15.14% on [Corporation's] business".

40 On top of the monetary reliefs claimed, Corporation also sought against Hooi Loo an injunction to restrain her from "soliciting orders from or otherwise dealing with any customer or agent of [Corporation] for the supply of goods and services of the type sold by [Corporation]" and from disclosing or using "any confidential information acquired by her, during the course of or after her respective period of employment by [Corporation]"[58]. In Henry's AEIC, nothing was said about the basis on which such injunction was sought.

***Corporation's claims for alleged diversion and/or attempted diversion of business and/or business opportunities***

41 In the trial before me, Corporation put forward a number of claims for the alleged diversion and/or attempted diversion of business and/or business

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[56] The figure is erroneously cited as 85.86% in several paragraphs of Henry's AEIC. The correct percentage figure, based on Henry's own computations, should be 84.86%: see [155]-[159] and [183] of Henry's AEIC. The figures of 807,901.97 and 5,337,087.10 in the table at [158] of Henry's AEIC are also incorrect and ought to be 807,901.92 and 5,337,087.05 respectively.

[57] [157]-[159] of Henry's AEIC.

[58] Prayer 7(5) at p 25 of Corporation's Statement of Claim (Amendment No. 2).



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opportunities by the defendants. It should be noted that in Corporation's amended statement of claim, only Healthcare was expressly pleaded as having "diverted business and/or business opportunities away from [Corporation]"[59], but in Henry's AEIC[60], he appeared to include all three defendants in the allegations about the diversion and/or attempted diversion of business and/or business opportunities.

42 The evidence relied on by Corporation for these claims is set out at paras 79–116 of Henry's AEIC. Per Henry's AEIC, Corporation claimed that the defendants had diverted and/or attempted to divert business and/or business opportunities from the following companies or entities:

(a) Halyard Health ("Halyard") (see paras 79–94 of Henry's AEIC and the exhibits referred to in these paragraphs);

(b) Novatech Resources Pte Ltd ("Novatech") (see paras 95–101 of Henry's AEIC and the exhibits referred to in these paragraphs);

(c) Bioteque Corporation (see paras 102–103 of Henry's AEIC and the exhibits referred to in these paragraphs);

(d) Coeur (see paras 104–105 of Henry's AEIC and the exhibit referred to in these paragraphs);

(e) Boon syringes (see paras 106–107 of Henry's AEIC and the exhibits referred to in these paragraphs);

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[59] [27(6)] of Corporation's Statement of Claim (Amendment No. 2).

[60] [79]-[116] of Henry's AEIC.



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(f) Straumann Singapore (see paras 108–109 of Henry's AEIC and the exhibits referred to in these paragraphs);

(g) Alliqua (see paras 110–111 of Henry's AEIC and the exhibit referred to in these paragraphs);

(h) GloTech (see paras 112–113 of Henry's AEIC and the exhibits referred to in these paragraphs); and

(i) Neos Surgery (see paras 114–116 of Henry's AEIC and the exhibit referred to in these paragraphs).

43 In gist, Corporation relied on e-mails and other documents retrieved from the electronic devices recovered from Phang for the above claims. I will not reproduce herein the documents referred to in Henry's AEIC. However, by way of an illustration of the manner in which Corporation's case was framed and presented, reference may be made to the evidence put forward by Henry to support the allegations about the diversion of business from Halyard. Particular reliance was placed on a set of PowerPoint presentation slides found in Phang's thumb-drive, which Henry claimed was a "presentation to Halyard"[61]. The presentation included statements about Healthcare being part of a "group" of companies including Corporation and Medisol, about total "group" revenue (in 2014) being S$8m (US$6m), and about the "group" having a total of 26 employees. Henry charged that these statements were "misleading, misrepresentations and a passing off"; and that Halyard's representative Jace Tan ("Jace") had become "confused between [Corporation] and [Healthcare]"

[61] [81] of Henry's AEIC.



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as evinced from her e-mail exchange with Phang[62]. Henry further charged that Phang and Hooi Loo had "used [Corporation's] name, reputation and goodwill, to divert and obtain for [Healthcare], the distributorship of Halyard in Malaysia" in or around June/July 2017, and that this had left Corporation having to "start from scratch, after losing everything which was supposed to have been built up for [Corporation's] Malaysian office"[63]. According to Henry, because Corporation had "lost the opportunity to market and distribute Halyard products in Malaysia"[64] –

> … [t]he loss in revenue translated to the gain in revenue to [Healthcare] from Halyard sales, which amounted to RM218,509.67 as appears from [Healthcare's] Branding Sales Report January 2018 to July 2018 … or RM374,588 per annum (S$122,815.73 at an exchange of S$1 to RM 3.05 as of 15.11.2019).
>
> At such rate, the loss over the next six (6) years at S$122,815.73 per annum, for the loss of revenue from Halyard products, caused by the Defendants amounts to S$736,894.43.
>
> [emphasis in original omitted]

44 It should be noted that having apparently quantified Corporation's loss of Halyard business in terms of Healthcare's projected total revenue from Halyard sales "over the next six (6) years", Henry proceeded in his AEIC to frame Corporation's damages for the loss of Halyard business in terms of the fall in the sales revenue of the Malaysian branch office. According to Henry, after Healthcare obtained the Halyard distributorship in July 2017[65] –

> … sales of Halyard products through the Malaysian office plummeted … [R]evenue from the Malaysian office dropped

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[62] [83] of Henry's AEIC.

[63] [85], [90] and [94] of Henry's AEIC.

[64] [92]-[93] of Henry's AEIC.

[65] [160]-[161] of Henry's AEIC.



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> from S$76,698.28 in 2016 to S$17,680.28 in 2017, a drop of S$59,018.00 per annum.
>
> … [Corporation] seeks damages for the diversion of business of the Malaysian Halyard distributorship from [Corporation] to [Healthcare], at S$59,018.00 per annum for a period of six (6) years, which amounts to S$354,108 (S$59,018.00 x 6 years). But for [Phang's] wilful default and breach of his duties as [Corporation's] director, the Halyard distributorship for Malaysia would have remained with [Corporation].
>
> [emphasis in original omitted]

45 Henry did not specify either in his AEIC or in his testimony whether, in respect of Corporation's claim for damages resulting from the diversion of Halyard business, the claim for an amount equivalent to Healthcare's projected total revenue from Halyard sales (over six years) was meant to be an alternative to the claim for an amount equivalent to the Malaysian branch office's projected cumulative drop in revenue (over six years). Nor did Corporation's amended statement of claim make clear whether the two were meant to be claims in the alternative.

46 On top of these claims, Henry's AEIC included further assertions that Corporation was entitled to "general damages" from Healthcare amounting to RM2,362,718 – this amount being apparently Healthcare's "profits over the period 2011 to 2016 … as appears in [Healthcare's] Branding Sales Report"[66]. Save for stating that this amount reflected "the profit which should have accrued to [Corporation] over six (6) years from 2016"[67], Henry did not elaborate on what losses these "general damages" were supposed to recompense. Nor was such elucidation forthcoming in his testimony at trial. It should also be noted that in Henry's AEIC, this claim for "general damages" was presented as a

[66] [162] of Henry's AEIC.

[67] [163] of Henry's AEIC.



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separate head of claim from the claim for "damages for loss of Halyard business"[68]. However, there was no explanation – either in Henry's AEIC or in his testimony – as to whether and how the claim for "damages for loss of Halyard business" had been accounted for in Corporation's quantification of the claim for "general damages".

47 I should also add that although Henry in his AEIC charged that Phang had diverted to Healthcare business and/or business opportunities from a number of companies apart from Halyard, it was only in respect of the loss of Halyard business that Corporation advanced a claim for damages separate from its claim for general damages. This was despite the fact that Henry cited sales revenue figures for products from several of these other companies: for example, he claimed that Healthcare had "managed to achieve sales of RM17,077.55" for WaterJel R1R2 products from Novatech (citing as his source Healthcare's Branding Sale Report for the period from January 2018 to July 2018)[69].

48 I should clarify that it did not appear Healthcare "managed to achieve sales" of products from all of the other companies listed by Henry, as there were several companies for which no evidence of sale or distribution of their products was put forward (for example, Straumann Singapore and Neos Surgery)[70].

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[68] [160]-[161] of Henry's AEIC.

[69] [98] of Henry's AEIC.

[70] [108]-[109] and [114]-[116] of Henry's AEIC.



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***Corporation's claim for conspiracy to defraud***

49 In respect of its claim against all three defendants for what it called "conspiracy to defraud", Corporation had particularised this claim in its amended statement of claim as Phang having "unlawfully conspired with [Hooi Loo] and [Healthcare]" by, *inter alia*, setting up Healthcare and causing it to compete with Corporation's business, using Hooi Loo's services as a director of Healthcare without Corporation's consent and without paying Corporation "expenses in the form of salaries, bonuses and remuneration" for the use of her services, using Corporation's office premises in Malaysia without authorisation, and "attempting to pass-off, deceive and/or lead members of the public to believe [Healthcare] is that of [Corporation] [*sic*] and/or otherwise connected to or associated with [Corporation]"[71]. However, in a table attached to its amended statement of claim (which was not actually referenced in the amended statement of claim), Corporation set out a somewhat different set of particulars which it labelled "[i]nstances of conspiracy"[72]. These appeared to consist largely of allegations of diversion of "business and/or distribution opportunities" in both Malaysia and Singapore, as well as allegations about the passing off of Healthcare "as [Corporation's] Malaysian branch to suppliers and/or customers".

50 In his AEIC, in respect of the claim for conspiracy to defraud, Henry simply referred to those paragraphs in his AEIC which dealt with the alleged diversion and/or attempted diversion of business and/or business opportunities by the defendants[73].

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[71] [29]-[30] of Corporation's Statement of Claim (Amendment No. 2).

[72] Table 7 attached to Corporation's Statement of Claim (Amendment No. 2).

[73] [147] of Henry's AEIC.



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***Corporation's claim for passing off***

51 In respect of its claim for passing off, Corporation pleaded in its amended statement of claim that Healthcare had passed itself off "as associated with [Corporation]"[74]. It also pleaded that Hooi Loo had "caused or allowed" Healthcare to pass itself off "as associated with [Corporation]"[75]. As for Phang, however, the particulars pleaded of his breaches of duties did not mention any involvement on his part in the alleged passing off[76].

52 Corporation's amended statement of claim did not plead how the elements of passing off (broadly – goodwill, misrepresentation and damage[77]) were made out in this case. In his AEIC, Henry claimed that Healthcare had sought to pass itself off "as associated with" Corporation in the following manner. Firstly, according to Henry, a Google search using the search term "Bluestone Healthcare Sdn Bhd" threw up a link which actually led to Corporation's website[78]. Secondly, the e-mail addresses of Hooi Loo and one Karen Tan ("Karen", a Healthcare employee) had the e-mail domain "*@bluestone.com.my*", whereas Corporation employees' e-mail addresses had the e-mail domain "*@bluestone-corp.com*"[79]. Thirdly, Henry said he had uncovered an e-mail sent by Karen to a Corporation staff (Jasmine), in which Karen's e-mail signature had appeared to represent her to be a Corporation staff

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[74] [27(7)] of Corporation's Statement of Claim (Amendment No. 2).

[75] [19(1)(g)] of Corporation's Statement of Claim (Amendment No. 2).

[76] [25A] of Corporation's Statement of Claim (Amendment No. 2).

[77] See, for example, *Novelty Pte Ltd v Amanresorts Ltd and another* [2009] 3 SLR(R) 216 at Tab 32 of the 3rd Defendant's Bundle of Authorities.

[78] [126] of Henry's AEIC.

[79] [128]-[129] of Henry's AEIC.



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(albeit with a Malaysian address)[80]. Fourthly, invoices issued by Healthcare carried the same Malaysian address, telephone and facsimile numbers as Corporation's Malaysian branch office[81].

53 According to Henry, the above conduct had created "confusion" by giving "customers and suppliers" the impression that Healthcare was "connected or associated with" Corporation and that Healthcare "sells the same products as [Corporation]"[82]. Henry cited an e-mail by UKM Hospital and an e-mail by Jace (a Halyard staff) which he said showed such confusion. He also cited the evidence of one Lee Jia Shin, who had joined Corporation in March 2019, and who claimed that her encounters with hospitals in Malaysia on "many occasions" since her employment showed that hospital representatives were confused as between Corporation and Healthcare[83]. This confusion, according to Henry, was why Corporation sought "an injunction against the [d]efendants' use of the 'Bluestone' name"[84].

***The alleged use by Healthcare of the office premises of the Malaysian branch office***

54 In addition to the claims outlined above, Henry's AEIC also made various allegations about Healthcare having "passed on" its operational expenses to Corporation by making use of the office premises of Corporation's Malaysian branch office[85]. The Malaysian branch office had its office address

[80] [133]-[134] of Henry's AEIC.

[81] [135] of Henry's AEIC.

[82] See, *eg*, [127] and [137] of Henry's AEIC.

[83] [7]-[8] of Lee Jia Shin's AEIC.

[84] [142] of Henry's AEIC.

[85] [123] of Henry's AEIC.



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at Suite 12 of Lot C-1/3, Jalam Selaman 1, Dataran Palma, off Jalan Ampang, 68000 Ampang, Selangor Darul Ehsan – a building which parties referred to during the trial as "Weini Business Centre". In his AEIC, Henry postulated that it was "likely" Healthcare had operated from this office address "from either 2004 or 2007, until on or around 2010/2011", because Healthcare's financial statements "made no reference to rentals paid until year 2010"[86]. Henry also alleged in his AEIC that Healthcare had managed in 2011 to take over the office then occupied by Corporation at a lower rate of rental than that previously paid by Corporation. Corporation, in contrast, was said to be paying a higher rate of rental by 2016[87].

55 Henry did not explain either in his AEIC or in his testimony how the loss or damage caused to Corporation by Healthcare's use of its Malaysian office premises should be quantified for the purposes of assessment of damages. Whilst his AEIC did set out a claim for "general damages" from Healthcare, as noted earlier, these were quantified as being an amount equivalent to Healthcare's "profits over the period 2011 to 2016".

56 I will next summarise Phang's and Hooi Loo's respective defences and the evidence they adduced.

**Summary of Phang's defence and the supporting evidence**

***The setting up of the Malaysian branch office***

57 Phang testified that Corporation's Malaysian branch office came about primarily because after Corporation had been appointed by Ballard Medical

[86] [118] and [120] of Henry's AEIC.

[87] [121]-[122] of Henry's AEIC.



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Products ("Ballard") to distribute some of its medical consumables in Singapore, the latter had expressed interest in having Corporation distribute its products in Malaysia. Ballard was subsequently taken over by the company known as Kimberly-Clark Health Care ("Kimberly-Clark") which later became known as Halyard. According to Phang, he had informed Henry of Kimberly-Clark's interest in appointing Corporation as the distributor for some of its products in Malaysia, and he had discussed with Henry the idea of having Corporation incorporate a Sdn Bhd in Malaysia. He had also made it clear to Henry that if they were to incorporate a Sdn Bhd, he (Phang) would have to be the resident director since he was a Malaysian citizen then – and in accordance with the greater liability he would bear, he would wish to be the majority shareholder in this Sdn Bhd. However, Henry – who had from the outset been the majority shareholder in Corporation – was not comfortable with having Phang as the majority shareholder in such a Sdn Bhd[88].

58 In the end, Phang said he and Henry decided that Corporation would set up a branch office in Malaysia. This decision also took into account the fact that at that point, Corporation was "still a young company" which needed to keep its costs down; and they believed that setting up a branch office would be cheaper, since it would not be subject to requirements such as the filing of audited accounts[89]. They were aware that a branch office "functioned primarily as a marketing and liaison office" and could not sell directly to customers in Malaysia, but they thought it would suffice to have this in place as sales could still be channeled through Corporation's office in Singapore[90].

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[88] [18] of Phang's AEIC.

[89] [19]-[20] of Phang's AEIC.

[90] [22]-[23] of Phang's AEIC.



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59 The Malaysian branch office was set up in March 2000. Sometime in early 2003, Corporation was appointed by Kimberly-Clark as the distributor for its test kits and respiratory products in Malaysia. In May 2003, Hooi Loo was hired to run the branch office.[91] The following year, Kimberly-Clark feeding tubes were added to the range of products in Malaysia[92]. Basically, the Malaysian branch office operated as a marketing and liaison office. Hooi Loo would market the products to potential Malaysian customers, but if a Malaysian customer wished to purchase any products, orders could only be taken by the two Malaysian agents, Apex Marketing Sdn Bhd and Nota Tenaga Sdn Bhd, who would then place the orders with Corporation[93].

***The Agreement***

60 After some time, according to Phang, Kimberly-Clark began to chase Corporation about its sales figures and to question when Corporation was going to expand its operations in Malaysia. Phang realised that their Malaysian branch office setup was not being taken seriously by Kimberly-Clark[94]. Sometime in 2004, he proposed again to Henry that they should incorporate a Sdn Bhd in Malaysia. Again he told Henry that if such a Sdn Bhd were set up, he (Phang) would have to be the resident director and he would correspondingly wish to be the majority shareholder[95].

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[91] [31]-[32] of Phang's AEIC.

[92] [37] of Phang's AEIC.

[93] [33]-[35] of Phang's AEIC.

[94] [37]-[39] of Phang's AEIC.

[95] [39] of Phang's AEIC.



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61 Henry was not agreeable to this proposal. Phang asserted that it was around this time that he and Henry came to the "understanding and agreement" which he (Phang) referred to as "the Agreement". In his amended defence and counterclaim, the Agreement was summarised as follows[96]:

> … Henry did not agree with [Phang's] suggestion [that Corporation incorporate a separate company in Malaysia] as he felt that [Corporation] should not expand the business in Malaysia as it had limited resources. In the circumstances, Henry felt that a branch office would be sufficient.
>
> However, Henry told [Phang] that he could go ahead and incorporate a company in Malaysia on his own if he wished to do so and if he wanted to explore the Malaysian market. [Phang] then proceeded to incorporate [Healthcare] in 2004, using his own funds. However, [Healthcare] was inactive from 2004 to 2006.
>
> Based on the aforesaid, it was the express (or alternatively, implied) understanding and agreement between Henry and [Phang] that as [Corporation] would not enter the Malaysian market beyond its Branch Office, both Henry and [Phang] could explore business opportunities in Malaysia on their own ("the Agreement"). This Agreement was affirmed on a number of occasions …
>
> [emphasis in original omitted]

62 In his AEIC and in his testimony in court, Phang elaborated on the Agreement. It will be remembered that Henry had asserted that when they set up Corporation, he and Phang had agreed on a set of "ground rules" for the management of the business[97]. Phang too testified that the two of them had the general understanding or agreement that[98] –

> [I]f we want to set up a business in the medical field, we ought to inform each other and see whether … we are interested to combine our forces and … me and Henry to explore that

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[96] [12(f)], [12(g)] and [12(h)] of Phang's Defence and Counterclaim (Amendment No. 3).

[97] See [5] above.

[98] See transcript of 6 March 2020 at p 125 lines 14-22.



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> particular business. And if the other party is not agreeable or not keen on that particular business, we can go ahead to set up our own business. …

63 According to Phang, this general understanding between them held true for business opportunities in the Malaysian market as well, where it was agreed that each of them "could explore the Malaysian market on [their] own"[99]. This was the Agreement in a nutshell, and it came about after he had approached Henry again in 2004 about incorporating a Sdn Bhd in Malaysia. On that occasion, he had reiterated to Henry that he (Phang) would be its resident director, and as such, he would want to be the majority shareholder in such a Sdn Bhd. Henry did not want Phang to have majority shareholding[100]. Instead, he told Phang that given that Corporation was still a young and small company, it "did not have the capabilities or resources to be able to focus on two separate markets" and should instead focus on the Singapore market[101]. At that point in time, Bluestone's sales in Singapore were averaging some $2.2m per year, of which at least 56% was attributable to medical consumables – whereas the Malaysian branch office was doing an average of $100,000 to $200,000 in sales per year. When Phang voiced aloud to Henry his worries about their losing the rights to distribute the Kimberly-Clark products in Malaysia, Henry stated that Malaysia did not represent a large part of Corporation's business and that he did not think it worthwhile for them to pump in more money to develop the Malaysian market, especially since test kits – one of the products they distributed in Malaysia – were a "declining market" anyway[102].

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[99] [104] of Phang's AEIC.

[100] [40] of Phang's AEIC.

[101] [40] of Phang's AEIC.

[102] [41]-[43] of Phang's AEIC.



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64 As Henry was not agreeable to Corporation investing in setting up a Sdn Bhd and/or to Phang being the majority shareholder in such a setup, it was decided that they would keep the Malaysian branch office "primarily only to handle the marketing and support with [Corporation's] Malaysian customers for Respiratory Products, Test Kits and feeding tubes". Henry told Phang that if he wanted to explore the Malaysian market, then he should go ahead and incorporate a Malaysian company to do so, especially since he was a Malaysian. Phang thought that in view of his Malaysian citizenship and his experience with sales in Malaysia, it would be a good idea for him to do so, in case a business opportunity should present itself[103]. He thus proceeded to incorporate Healthcare on 16 February 2004. He chose the name "Bluestone Healthcare Sdn Bhd" because he did not spend much time thinking of a new name. Moreover, at the back of his mind, he thought that if Henry changed his mind in the future, they could just "absorb Healthcare into [Corporation] as one of its subsidiaries or Henry could purchase the shares in Healthcare"[104].

65 Phang added that although Healthcare was incorporated in February 2004, it had stayed dormant for a period of time post-incorporation[105]. Sometime in 2005, Henry had asked him whether he had in fact incorporated a company in Malaysia, and he had told Henry about Healthcare while commenting that the company was dormant and that he should put in more effort to explore business opportunities for it[106].

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[103] [43]-[45] of Phang's AEIC.

[104] [47] of Phang's AEIC.

[105] Exhibit PCC-12 of Phang's AEIC.

[106] [51] of Phang's AEIC.



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***The termination of Corporation's right to distribute respiratory products in Malaysia***

66 Between 2003 and 2005, the Malaysian sales figures for the Kimberly-Clark respiratory products, test kits and feeding tubes stayed in the range of $100,000 to $200,000 per year. In late 2005, Kimberly-Clark's then business development manager – one Clara Lee ("Clara") – announced that Kimberly-Clark had decided to terminate Corporation's distributorship rights to the respiratory products because they wanted a distributor with "a larger operation and commitment in Malaysia". Phang felt that this decision to terminate their distributorship for respiratory products was premature, as Corporation had only started distributing these products in Malaysia in 2003[107]. He wanted to appeal the decision.

67 It was around this time that Phang reminded Henry about his Malaysian company, Healthcare, and suggested that it could be used as "a subsidiary of [Corporation]" in order to "convince" Kimberly-Clark of Corporation's commitment to Malaysia[108]. However, Henry did not want to invest in Healthcare and reiterated that Corporation's focus was on the Singapore market[109]. Their appeal to Clara's superior was unsuccessful. Subsequently, given Henry's reiteration of Corporation's Singapore-centric focus and his refusal to invest either in Healthcare or in the Malaysian market, Phang decided that he would put in some effort to grow Healthcare's business in Malaysia.

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[107] [48]-[50] of Phang's AEIC.

[108] [52] of Phang's AEIC.

[109] [52] of Phang's AEIC.



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***The start of Healthcare's business in Malaysia and Hooi Loo's involvement***

68 Around the same period in late 2005, Corporation also lost its distributorship rights for the Polymem wound dressing product in Singapore. Phang had found another brand called Medifoam which appeared to have a similar product. He decided that before Corporation launched this product in the Singapore market, he would test it out in Malaysia first. This was because the Singapore market was "far more demanding than Malaysia, particularly in terms of quality and results"[110].

69 According to Phang, he decided to use Healthcare to sell the Medifoam product in Malaysia so as to test where Healthcare's business might lead. As he had already been working with Hooi Loo and trusted her, he asked her if she wanted to be involved in her free time in Healthcare's exploration of the Malaysian market with the Medifoam product[111]. He told Hooi Loo that Healthcare was his own company; that Henry was not part of Healthcare; that he was testing the waters with the company at that stage; and that the business of the Malaysian branch office remained her priority[112]. Hooi Loo expressed interest in being involved, and he then left it to her to determine how she would manage her time. When the response to Medifoam in Malaysia appeared positive, Phang introduced the product to Corporation's repertoire of medical consumables; and Corporation started distributing Medifoam in Singapore in 2007[113].

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[110] [56]-[57] of Phang's AEIC.

[111] [58] and [62] of Phang's AEIC.

[112] [59] and [62] of Phang's AEIC.

[113] [64] of Phang's AEIC.



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70 When Phang incorporated Healthcare in February 2004, Malaysian law required two Malaysian directors in the company. At that point, Healthcare's two directors were Phang himself and one Loh Wai Mun. Loh Wai Mun subsequently tendered her resignation in early April 2007, and Phang invited Hooi Loo to come on board as the other director of Healthcare. Hooi Loo joined the Healthcare board on 2 April 2007[114]. She was given one share in Healthcare when she joined the board (with Phang holding the other 99 shares). Later, when Healthcare's paid-up share capital was increased from RM100 to RM2,500, Hooi Loo received in 2015 another 24 shares (with Phang holding the other 2,475 shares)[115].

***The further development of Healthcare's business in Malaysia***

71 After the introduction of Medifoam wound dressings, Phang added more items to the range of products distributed by Healthcare in Malaysia. These included not only medical consumables such as Dentium dental implants (in 2007) and Coeur CT scan tubings (in 2010), but also non-medical products such as Chefonic dishwashing chemicals (in 2013) and Nevo cleaning chemicals for restaurants and factories (in 2010)[116].

72 As Healthcare increased the range of products it distributed to customers in Malaysia, it also employed additional staff; and by 2010, it had an average of "about 3 [staff], including 1 part-time admin and 2 sales personnel"[117]. Phang's evidence was that there existed a certain degree of loose informality in the work

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[114] [66] of Phang's AEIC and exhibit LHL-12 of Hooi Loo's AEIC.

[115] [22]-[23] and also exhibits LHL-12 and LHL-13 of Hooi Loo's AEIC.

[116] [65] and [69] of Phang's AEIC.

[117] [67] of Phang's AEIC.



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duties of Karen, Healthcare's part-time administrative staff, as she would help out with the administrative work of Corporation's Malaysian branch office as and when help was needed[118].

73 In addition, Phang's evidence was that if a product distributed by Healthcare in Malaysia did well, he would seek to add it to the range of products distributed by Corporation in Singapore. Thus, besides Medifoam, he also introduced Dentium dental implants and Coeur CT scan tubings into the range of medical consumables distributed by Corporation in Singapore[119].

74 Given that Corporation and Healthcare had the above products in common, albeit in different markets, there was a fair amount of trade between them in these products as and when either company needed additional stocks[120]. When required, Healthcare would sell its stocks to Corporation "at a very slight mark-up to account for administrative costs (and vice versa)"; and these transactions "were carried out openly"[121]. At one point in May 2018, Corporation had also purchased Sage products from Healthcare when it [*ie*, Corporation] was short of stocks to fulfil its sales orders in Singapore[122]. The documentation generated for these trades – such as the tax invoices issued by Healthcare to Corporation and *vice versa* – all spelt out the name "Bluestone Healthcare Sdn Bhd"[123]. Additionally, due to these inter-company trades, the name "Bluestone Healthcare Sdn Bhd" appeared quite regularly in

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[118] [68] and exhibit PCC-14 of Phang's AEIC.

[119] [80]-[81] of Phang's AEIC.

[120] [84] of Phang's AEIC.

[121] [86] of Phang's AEIC.

[122] [88]-[89] of Phang's AEIC.

[123] Exhibit PCC-16 of Phang's AEIC.



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Corporation's accounts and other records; and alongside Healthcare's name, Hooi Loo and a Healthcare employee named "Dian" would be listed as its contact persons[124].

***Corporation's knowledge of Healthcare and its business***

75 This openness, according to Phang, reflected the fact that Henry – and Corporation – were well aware of the existence of Healthcare, the business it did and Phang's interest in it[125]. Apart from his having told Henry about his setting up Healthcare to venture into the Malaysian market, and apart from the transparency apparent in the inter-company trades, Phang was frank with all Corporation personnel about having set up Healthcare in Malaysia as his own company. For example, Jasmine – Corporation's part-time bookkeeping staff from 1999 till January 2018 – gave evidence that in early 2006, when she had sought to clarify with Phang some payments made by Corporation on behalf of Healthcare, Phang had told her that "*he set up Bluestone Healthcare in Malaysia*" [emphasis added][126]. When Corporation's auditors asked about the relationship between Corporation and Healthcare ("Whether it was a subsidiary? Whether Bluestone Corporation owned shares in Bluestone Healthcare? Whether it was a related party?"), Jasmine again approached Phang for answers. Phang's response was unequivocal[127]:

> Phang told me he set up Bluestone Healthcare in Malaysia. If that was a 'related party', to treat Bluestone Healthcare as a related party. I informed the auditors of Phang's reply.

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[124] Exhibit PCC-17 of Phang's AEIC.

[125] [83] of Phang's AEIC.

[126] [5] of Jasmine Phua's AEIC.

[127] [8] of Jasmine Phua's AEIC.



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76 As another example, Corporation sales staff Lynnette testified that in 2006 or 2007, when Phang was planning for Corporation to start selling Dentium dental implants in Singapore, he had told her that he had already achieved "some sales results" for Dentium in Malaysia, through "his Malaysian team". It was made clear to Lynnette that "this Malaysian team was employed under another business that Phang had set up in Malaysia, separate from [Corporation]"[128] and that Hooi Loo too was involved in this Malaysian business. She subsequently also became aware that Phang's Malaysian company was called Healthcare.

77 Phang, Hooi Loo and other witnesses also testified that Phang had spoken openly about Healthcare's sales performance in Malaysia at various events or gatherings when Henry and other Corporation personnel were present. One example was the meeting held on 5 November 2009 as part of Corporation's tenth anniversary celebrations. During the meeting, Phang and Hooi Loo had given a presentation to all Corporation personnel (including Henry), during which they had spoken, *inter alia*, about Healthcare's success in selling Dentium products in Malaysia. Phang could not remember if he had specifically mentioned Healthcare's name, but he was sure that even if he had not, it would have been obvious to everyone there – including Henry – that he and Hooi Loo had their own business in Malaysia: it was a known fact, after all, that Corporation's Malaysian branch office did not sell and had never sold Dentium products. Indeed, according to Phang, it was Henry who had suggested that he give a presentation on Healthcare's success in selling Dentium products

[128] [10]-[11] of Lynnette's AEIC.



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in Malaysia, so as "to motivate [Corporation's] staff to achieve the same level of success as Healthcare"[129].

78 It was in the same spirit of sharing with and encouraging Corporation staff that Phang and Hooi Loo had continued to speak about Healthcare's sales experience and sales performance during the regular sales meetings conducted for all Corporation sales staff, administrative personnel and engineers[130]. Henry attended some of these meetings. The information Phang and Hooi Loo shared about Healthcare's sales was clearly separate from the information they shared about the Malaysian branch office: it was clear that the Malaysian branch office dealt with Kimberly-Clark test kits and feeding tubes; whereas talk about Healthcare's sales would be about Dentium and Coeur[131].

79 Phang's position, therefore, was that consistent with the existence of the Agreement between him and Henry, he had from the outset been open about his venturing into the Malaysian market with the incorporation of Healthcare.

***The setting up of Prius and Primuz***

80 As for Prius, Phang's evidence was that he had set up the company in 2009 to test the market in travel-sized hand sanitisers. These travel-sized hand sanitisers were not medical products, and Corporation did not sell hand sanitisers. Lynnette did not take up employment with Prius: she was a 40% shareholder in Prius, and they had regarded their attempt to test the market in

[129] [92]-[96] of Phang's AEIC.

[130] [97] of Phang's AEIC.

[131] [99] of Phang's AEIC and [21]-[23] of Lynnette's AEIC.



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these travel-sized hand sanitisers as a "side project"[132]. It was an unsuccessful project as they only managed to sell fewer than five such hand sanitisers over the first few months of Prius' setting up. Prius ceased operations in 2012 and was struck off in 2017[133].

81 As for Primuz, Phang said that he set up the company in 2017 to test the market in Water-Jel burn creams. He had a friend – one Lim Ming Hok ("Ming Hok") – who was already the distributor of Water-Jel burn creams and who wanted him to try selling these creams[134]. Phang had already tried selling the creams in Malaysia through Healthcare and found the sales results very dismal ("we only managed to sell to one or two customers")[135]. At that point, Corporation did not sell Water-Jel burn creams or any product similar to these burn creams. Phang wanted to use Primuz to see how the product would do in Singapore. This turned out to be a short-lived experiment, as the creams also did badly in Singapore, with gross sales revenue of just $1,800 between 2017 and 2018[136].

***The breakdown of the relationship between Henry and Phang: events between 2016 and 2018***

82 During the same period, the relationship between Henry and Phang had started to fall apart. Like Henry, Phang too mentioned the fracas over the issue of bonus payments in 2016, but stated that from his point of view, he had not

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[132] [25]-[27] and exhibit CSLL-3 of Lynnette's AEIC.

[133] [112] of Phang's AEIC.

[134] [113] of Phang's AEIC.

[135] [114] of Phang's AEIC.

[136] [114]-[115] of Phang's AEIC.



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thought there to be anything amiss with preparing a cheque for his usual annual bonus of $50,000 because his team had achieved sales in excess of $1.7m for that year[137]. He was taken aback when Henry angrily refused to counter-sign the cheque for his bonus without offering any explanation, and also when – later that same day – Henry instructed Corporation's bookkeeper, Yok Fong, to remove all of Corporation's cheque books from his (Phang's) office. Up till then, Phang had been responsible for Corporation's cheque books, and he was not told why Henry had taken the extremely insulting step of ordering their removal from his possession. He perceived that their working relationship was becoming more and more strained but did not at the time really understand why this was so.

83 Because of the increasing tension in their working relationship, Phang did not speak with Henry when in 2017, Jace from Kimberly-Clark – by then rebranded as "Halyard" – informed him that their company was not happy with the arrangements made by Corporation in Malaysia for the distribution of Halyard's products. As the Malaysian branch office could not sell directly to customers, orders were taken by its Malaysian agents; and Halyard found these arrangements unsatisfactory[138]. Jace told Phang that Halyard would be agreeable to letting the Malaysian branch office continue to distribute its test kits, as they had no issue with the Malaysian agent responsible for this product – but that they wanted Healthcare to take over the distribution in Malaysia of the feeding tubes[139]. As Halyard was adamant about changing distributors for its feeding tubes, Phang agreed to Jace's request. In his view, "[i]n this way, at

[137] [116] of Phang's AEIC.

[138] [71] of Phang's AEIC.

[139] [72] of Phang's AEIC.



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least the Branch Office retained the Test Kits business and Healthcare could take over the feeding tubes business which would have ended up elsewhere anyway"[140].

84 During the trial, Phang testified that he did not talk to Henry about the above change because by then, he would generally be given the brush-off whenever he tried to talk to Henry; and in anger, he had decided to ignore Henry too[141]. However, although he did not speak to Henry about this change in the Malaysian distributorship of Halyard feeding tubes, he did not hide it from Corporation's employees[142].

85 It was around this time that Corporation's subsidiary, Medisol, was sold to RadLink[143]. The sale proceeds of some $10.78m were received by Corporation in 2018. Despite being a 35% shareholder of Corporation, Phang did not receive – and has to date not received – any part of these sale proceeds. On 24 August 2018, his directorship and employment were abruptly terminated by Corporation. On the same day, Corporation's solicitors also came to the office where they served him with the papers for this suit and seized his laptop and mobile phone[144].

86 According to Phang, he was blindsided by this turn of events[145]. He was also pained by the ignominious manner in which he had been forced out of

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[140] [73] of Phang's AEIC.

[141] See transcript of 6 March 2020 at p 72 lines 3-16.

[142] [74] of Phang's AEIC.

[143] [122] of Phang's AEIC.

[144] [129] of Phang's AEIC.

[145] [129] of Phang's AEIC.



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Corporation and the false claims laid against him by Henry. Henry had, after all, been aware of his incorporating Healthcare so as to venture into the Malaysian market. Henry himself had set up Absolmed in 2013 to sell Sonosite machines in Malaysia; Phang's evidence was that he was not in fact informed about Absolmed and only found out about it in 2015, but he did not enquire further as he viewed Henry's setting up of Absolmed as being consonant with their common understanding that they could each explore the Malaysian market on their own.[146] Henry had also been aware of all that he (Phang) had done for Corporation. Even after Healthcare started trading in Malaysia in 2007, Corporation's annual revenue from medical consumables had grown between 2007 and 2012, from $1,385,417 to $2,233,073. This figure had dropped after 2013 when Corporation lost the Dentium account in Singapore (an account which Healthcare had also lost in Malaysia). However, Corporation's revenue from medical consumables had continued to average around $1,724,486.25 between 2013 and 2016[147].

87 Phang believed that it was the successful sale of Medisol – and the prospect of having to share the proceeds – which gave rise to Henry's decision to bring false claims against him[148]. He felt vindicated in his belief when – at an annual general meeting of Corporation on 29 August 2019 – Henry declined to pay out the proceeds from the sale of Medisol. Instead, Henry suggested that there were plans to invest at least $6m of the cash held by Corporation for "investments" but declined to give details of what these investments were[149].

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[146] [106]-[107] of Phang's AEIC.

[147] [133] and exhibit PCC-26 of Phang's AEIC.

[148] [123] of Phang's AEIC.

[149] [124]-[125] of Phang's AEIC.



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***Defences relied on by Phang***

88 In summary, therefore, Phang asserted that having regard to the Agreement between him and Henry (the only two shareholders of Corporation at the material time), he had not breached any fiduciary duties *vis-à-vis* Corporation in setting up Healthcare and running its business in Malaysia. Even assuming there had been any breaches on his part, Phang also pleaded reliance on the defence of acquiescence[150]; further and in the alternative, on the defence of time bar, on the basis that Corporation's causes of action had accrued since 2004 or alternatively no later than 2006, and that its claims were thus time-barred pursuant to s 6(1)(*a*) and/or s 24A of the Limitation Act (Cap 163, 1996 Rev Ed)[151].

89 As to Prius and Primuz, Phang asserted that they did not compete with Corporation in terms of the business carried out, and that he had not breached any fiduciary duties to Corporation in setting up these two companies[152].

90 Further or in the alternative, Phang pleaded that even if he had committed any breaches of his fiduciary duties, he was entitled under s 391 of the Companies Act (Cap 50, 2006 Rev Ed) to seek relief from any liability, on the basis that he had acted honestly and reasonably and ought fairly to be excused for any default or breach[153].

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[150] [29(a)] of Phang's Defence and Counterclaim (Amendment No. 3).

[151] [31]-[32] of Phang's Defence and Counterclaim (Amendment No. 3).

[152] [28] of Phang's Defence and Counterclaim (Amendment No. 3).

[153] [30] of Phang's Defence and Counterclaim (Amendment No. 3).



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91 Finally, Phang also challenged Corporation's claims to various types or heads of damages and for claw-back of salary payments and bonuses[154].

***Phang's counterclaim***

92 In so far as the termination of his directorship and employment was concerned, Phang stated that this had been carried out in a manner "calculated to cause [him] maximum embarrassment and create an environment of fear of any association with [him] in the office"[155]. More importantly, the termination had been effected without any notice being given. In his amended defence and counterclaim, Phang pleaded that it was an implied term of his employment with Corporation that his employment should be determinable only by reasonable notice[156]. He contended that given his responsibilities as a director and his years of experience, a reasonable notice period would have been 12 months[157]. This formed the basis of his counterclaim against Corporation for the sum of $192,240 (being his salary and employer's Central Provident Fund ("CPF") contribution for 12 months from 24 August 2018)[158].

**Summary of Healthcare's defence and the supporting evidence**

93 Phang's evidence provided much of the basis for Healthcare's defence to Corporation's various claims. In its amended defence, Healthcare pleaded that Phang had not acted in breach of his fiduciary duties to Corporation, and that it could not therefore be liable for any "dishonest and/or knowing

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[154] [29] of Phang's Defence and Counterclaim (Amendment No. 3).

[155] [130] of Phang's AEIC.

[156] [38] of Phang's Defence and Counterclaim (Amendment No. 3).

[157] [131] of Phang's AEIC.

[158] [135] of Phang's AEIC.



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assistance". In particular, it was pleaded that the existence of Healthcare, its business, and its use of Phang's and Hooi Loo's services had all been known to Corporation; further, that Corporation had not raised any objections[159]. Healthcare also denied that its business competed with Corporation's or that it had diverted to itself business or business opportunities which should have been Corporation's[160]. As to the claim that it had passed itself off as "being associated with [Corporation]", this too was denied by Healthcare[161].

94 Further and in the alternative, like Phang, Healthcare also pleaded estoppel by acquiescence[162] and/or time bar pursuant to s 6(1)(*a*) and/or s 24A of the Limitation Act[163].

95 Finally, Healthcare also challenged Corporation's claims to various types or heads of damages[164].

**Summary of Hooi Loo's defence and the supporting evidence**

96 Like Phang, Hooi Loo asserted that the claims brought by Corporation were trumped-up.

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[159] [17] of Healthcare's Defence (Amendment No. 3).

[160] [17] of Healthcare's Defence (Amendment No. 3).

[161] [11]-[12] and [17(e)] of Healthcare's Defence (Amendment No. 3).

[162] [13] of Healthcare's Defence (Amendment No. 3).

[163] [20]-[21] of Healthcare's Defence (Amendment No. 3).

[164] [17] of Healthcare's Defence (Amendment No. 3).



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***How Hooi Loo came to be involved in Healthcare***

97 Hooi Loo joined Corporation as a product specialist on 7 May 2003, on a basic salary of $2,200 per month (with some allowance payments for transport and mobile phone). A Malaysian citizen, she was based in Corporation's Malaysian branch office. She reported directly to Phang[165]. As for Henry, although she did not report to him on a daily basis, she understood that he too was "involved in the strategic business decisions of [Corporation] and the [Malaysian] branch office"[166]. She herself was "a mere sales employee" of Corporation's, had no involvement in its business decisions, and denied owing it any fiduciary duties.

98 Hooi Loo was aware that the Malaysian branch office "had a restricted scope due to the nature of its corporate personality"[167]: under Malaysian law, medical products could not be sold to end-users in Malaysia unless the entity selling them was a Sdn Bhd, and had obtained the requisite licences and approvals from the relevant Malaysian authorities[168]. As such, although Hooi Loo was responsible for marketing products to customers in Malaysia, orders had to be taken by the two independent Malaysian "sub-distributors" that Corporation worked with (Nota Tenaga Sdn Bhd and Apex Pharmacy Marketing Sdn Bhd), who would then place these orders with Corporation[169]. Due to these limitations, Kimberly-Clark was the only supplier which the Malaysian branch office had secured; and Hooi Loo's job with the branch office

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[165] [14] of Hooi Loo's AEIC.

[166] [15] of Hooi Loo's AEIC.

[167] [8] of Hooi Loo's AEIC.

[168] [21] of Hooi Loo's AEIC.

[169] [10] of Hooi Loo's AEIC.



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from the outset was to market Kimberly-Clark product lines. These were: test kits; respiratory products; and feeding tubes[170]. On top of her salary, when Hooi Loo achieved the sales targets set by Corporation, she was paid a commission. Throughout her employment with Corporation, she had usually succeeded in achieving these sales targets[171].

99 Sometime in 2007, Phang told Hooi Loo about Healthcare and asked her to start selling products on behalf of Healthcare. She was not given a separate employment contract with Healthcare. She claimed that she had the impression the work to be done in respect of Healthcare was under the auspices of Corporation[172], but it was clear that soon after asking her to sell products on behalf of Healthcare, Phang also asked her to come on board as a director of Healthcare[173]. In April 2007, she was appointed as a director of Healthcare. According to Hooi Loo, this was because Healthcare's other director besides Phang (one Loh Wai Mun) had resigned, and the company needed to satisfy Malaysian regulatory requirements that the company have two Malaysian directors[174]. Hooi Loo's position was that she took on the directorship after being reassured by Phang that she would merely be a nominee director, and that the allotment of one Healthcare share to her had also been in compliance with Malaysian regulatory requirements. Her shareholding was subsequently increased to 25 shares in 2015 when Healthcare increased its paid-up capital

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[170] [28] of Hooi Loo's AEIC.

[171] [11]-[13] of Hooi Loo's AEIC.

[172] [15(c)] of Hooi Loo's Defence (Amendment No. 2).

[173] [19] and [22] of Hooi Loo's AEIC.

[174] [22] of Hooi Loo's AEIC.



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from RM100 to RM2,500[175]. Her appointment as director and her shareholding notwithstanding, Hooi Loo asserted that she was "never responsible for the financial management or business management" of Healthcare[176].

***The scope of Healthcare's business***

100 In so far as the distribution of products by Healthcare was concerned, Hooi Loo's evidence was that these were largely different from the products distributed by Corporation in Singapore and handled in Malaysia by the Malaysian branch office[177]. Moreover, Phang had told her from the outset to "prioritize the marketing of [Corporation's] products"[178]. She did not think there was "any competition or conflict of interests between [Corporation] / [Corporation's] branch office and [Healthcare]"[179]. As noted earlier, because of regulatory strictures, the Malaysian branch office could not sell directly to Malaysian end-users and was responsible for marketing only three Kimberly-Clark product lines. In contrast, as a Sdn Bhd, Healthcare was able to sell directly to end-users and thus had a wider range of distributorships. These included medical products such as Medifoam wound dressings, Dentium dental implants and Coeur tubings, as well as non-medical products such as Syntech cleaning chemicals (for cleaning factories and restaurants) and UAL Zymo

[175] [23]-[24] of Hooi Loo's AEIC.

[176] [27] of Hooi Loo's AEIC.

[177] [28] of Hooi Loo's AEIC.

[178] [19] of Hooi Loo's AEIC.

[179] [30] of Hooi Loo's AEIC.



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Biogrow organic fertilisers. Healthcare even offered rental of dishwashing machines from Chefonic Kitchen Equipment[180]. Hooi Loo was certain that[181] –

> … there could not have been any confusion or competition [as between Corporation/Corporation's branch office and Healthcare] because apart from the distinct and different products that each party carried, [Corporation] was unable to sell directly in Malaysia and [Healthcare] was unable to sell directly in Singapore … In other words, each entity had its own distinct market.

***Corporation's knowledge of Healthcare and its business***

101 Although each entity had its own distinct market, when a product distributed by Healthcare did well in the Malaysian market, Phang would arrange for Corporation to distribute the same product in Singapore. This was done with Medifoam wound dressings, Dentium dental implants and Coeur tubings[182]. According to Hooi Loo, she and Phang were open about publicising to Corporation staff the favourable sales results which Healthcare had achieved with these products in Malaysia. Thus, for example, at the meeting on 5 November 2009, she and Phang had given a presentation which included information about Healthcare's success in selling Dentium products in Malaysia. The inclusion of the information on Healthcare's success with Dentium in Malaysia was intended to "educate the [Corporation] sales team on how to introduce and sell Dentium to the Singapore market"[183]. Various Corporation personnel – including Henry and members of his team – were present at the meeting.

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[180] [29] of Hooi Loo's AEIC.

[181] [33] of Hooi Loo's AEIC.

[182] [31]-[32] of Hooi Loo's AEIC.

[183] [40] of Hooi Loo's AEIC.



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102 Aside from the meeting on 5 November 2009, Corporation also held sales meetings on a bi-annual or annual basis, at which the sales staff would update each other on matters such as market developments and sales success stories. At these sales meetings, Hooi Loo would update the other Corporation sales staff on the sales being done through the Malaysian branch office of the Kimberly-Clark products – and she would also share information about the products being sold by Healthcare[184]. There was, in short, no attempt by her or by Phang to conceal the existence of Healthcare and the business it was carrying on in Malaysia.

103 Indeed, Hooi Loo's evidence was that it would not have been possible to conceal the existence of Healthcare and its business in Malaysia, in light of the regular and extensively documented trading activities between Healthcare and Corporation from 2009 to 2018. Hooi Loo corroborated Phang's evidence that the two companies had regularly purchased products from each other whenever they were running low on stocks. The documentation kept of these trades included e-mails, invoices and purchase orders, which made clear the existence of Healthcare as a separate entity in Malaysia and the fact that it sold products which were decidedly not the Kimberly-Clark products handled by the Malaysian branch office[185]. *Inter alia*, the invoices issued by Healthcare to Corporation clearly displayed the company's name, logo and address. The frequent inter-company transactions involved regular communications between Hooi Loo and the Healthcare staff (Karen and Diana Low ("Diana")) on the one hand and numerous Corporation staff (Daphne Tan, Walter Tan, Yok Fong, Lynnette) on the other. Furthermore, as a result of these frequent inter-company

[184] [35] of Hooi Loo's AEIC.

[185] [35]-[44] and exhibits LHL-20 to LHL-45 of Hooi Loo's AEIC.



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transactions, the Corporation and the Healthcare staff responsible for accounting matters – Yok Fong and Karen respectively – were required to tally the amounts owed by Corporation to Healthcare and *vice versa*. While Yok Fong usually dealt with Karen, she would also on occasion communicate directly with Hooi Loo on these matters[186]. To sum up, therefore, Hooi Loo stated that "[g]iven the extensive body of contemporaneous correspondence and intercompany transactions between [Corporation] and [Healthcare]", she was "surprised" that the former was "now feigning ignorance about the existence of [Healthcare] and [her] role in the same"[187].

***The events of 24 August 2018***

104 Hooi Loo was of the view that Corporation's main objective in bringing the present suit was really "to find something to pin on Phang"[188]. She formed this impression largely from the events of 24 August 2018; in particular, the manner in which Henry and his brother-in-law, David, conducted themselves on that day.

105 According to Hooi Loo, on 23 August 2018, she had received a telephone call from an unknown caller claiming to be one of Healthcare's clients and asking to meet her the following morning[189]. When she was at Healthcare's office the following morning, however, it was David who came to the office. She did not know David then, as she had never met him previously. He was accompanied by two other persons, one of whom claimed to be a lawyer, and

[186] [43(iv)] and exhibits LHL-40 to LHL-41 of Hooi Loo's AEIC.

[187] [45] of Hooi Loo's AEIC.

[188] [65] of Hooi Loo's AEIC.

[189] [47] of Hooi Loo's AEIC.



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he told her he was there to serve her a writ of summons before handing her the document. He told her that her employment had been terminated by Corporation because she had set up Healthcare "illegally" together with Phang. He also threatened to confiscate her mobile phone and computer, although in the end it was not done as she insisted that these items were her personal property. At the same time, David kept pressurising her to meet with Henry, emphasising that it was her "last chance". Feeling shocked and intimidated, she agreed to meet Henry that afternoon at Subang Airport.

106 When Hooi Loo arrived at the airport, she was confronted by Henry in an extremely aggressive manner. He accused her of having colluded with Phang to set up Healthcare "illegally" and demanded to know why Google searches on Healthcare led to Corporation's webpage while refusing to listen to her attempts to explain herself[190]. After leveling this barrage of accusations at her, however, Henry suddenly changed tack. He told Hooi Loo that he knew she was innocent, that Corporation "would withdraw its Writ of Summons against [her] if [she] talked to the Lawyer and testify [*sic*] against Phang", and that Corporation might be "able to offer more resources to support [her] in [her] career if [she] gave a statement to the Lawyer"[191]. Later that day, David sent Hooi Loo the contact details of "the Lawyer" and "advised" her to "go for a consultation".

107 Although Hooi Loo was still feeling intimidated, she did not agree to Henry's suggestion that she give "a statement to the Lawyer" and "testify against Phang". This was because she found the whole encounter with Henry to be "at odds with everything [she] knew about the relationship and dealings

[190] [54]-[57] of Hooi Loo's AEIC.

[191] [58] of Hooi Loo's AEIC.



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between [Corporation] and [Healthcare]", and she was also concerned that Henry and David were not acting in her best interests[192]. Indeed, even after 24 August 2018, David continued to contact her, asking whether she had consulted a lawyer and trying to get her to meet with Henry again[193]. When she asked David for a copy of the order of court giving leave for the writ against her to be served out of jurisdiction (having received advice by then), David prevaricated, claiming that he had simply "extend[ed] a copy" of the writ to her on 24 August 2018 and that the "actual [w]rit" would be served together with the requisite order of court "in due course". " She concluded that both he and Henry were "trying to manipulate [her] to their advantage"[194]: "If [Corporation] had a legitimate claim against me, there would be no need for such theatrics."

***Defences relied on by Hooi Loo***

108 In gist, apart from denying any management role in Healthcare, Hooi Loo denied that she had breached the terms of her employment contract with Corporation. She asserted that Healthcare did not compete with Corporation: it did not and could not sell to customers in Singapore; whilst in Malaysia, it did not deal with the products marketed by the Malaysian branch office[195].

109 Further or in the alternative, Hooi Loo also relied on defences relating to acquiescence and time bar[196].

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[192] [58] and [60] of Hooi Loo's AEIC.

[193] [61] and [63] of Hooi Loo's AEIC.

[194] [63] of Hooi Loo's AEIC.

[195] [15] of Hooi Loo's Defence (Amendment No. 2).

[196] [2B]-[2C] of Hooi Loo's Defence (Amendment No. 2).



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**The issues for determination**

110 The trial before me was not bifurcated. As such, Corporation had to discharge the legal burden of proof on both liability and damage in respect of its claims against each of the three defendants, whilst Phang bore the legal burden of proof in respect of his counterclaim. As noted earlier, Corporation's pleadings were (with respect) confused – and confusing. Broadly speaking, however, the issues for determination may be grouped as follows:

(a) Corporation's claims against Phang

(i) Did Corporation prove that Phang breached his fiduciary duties to Corporation in setting up and operating Healthcare?

(ii) Did Corporation prove that Phang breached his fiduciary duties to Corporation in setting up and operating Prius?

(iii) Did Corporation prove that Phang breached his fiduciary duties to Corporation in setting up and operating Primuz?

(iv) If he did breach his fiduciary duties, did Corporation discharge its burden of proof in respect of the remedies claimed against him?

(b) Corporation's claims against Healthcare

(i) Did Corporation prove the commission of the tort of passing off by Healthcare?

(ii) Did Corporation prove either "knowing assistance" or "dishonest receipt" by Healthcare in relation to Phang's alleged breaches of fiduciary duties?



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(iii) If Healthcare did commit the above breaches, did Corporation discharge its burden of proof in respect of the remedies claimed against it?

(c) Corporation's claims against Hooi Loo

(i) Did Corporation prove that Hooi Loo breached the duties she owed Corporation pursuant to her contract of employment?

(ii) If she did breach these duties, did Corporation discharge its burden of proof in respect of the remedies claimed against her?

(d) Corporation's claims against all three defendants for conspiracy to defraud

(i) Did Corporation prove the alleged conspiracy by all three defendants?

(ii) If there was such a conspiracy, did Corporation discharge its burden of proof in respect of the remedies claimed?

(e) The defences of time bar and estoppel by acquiescence

(i) Assuming Corporation could prove the alleged breaches by the three defendants, were any of its claims subject to time bar or estoppel by acquiescence?

(f) Phang's counterclaim against Corporation

(i) Did Phang prove his counterclaim that his employment with Corporation was terminable only by reasonable notice?

(ii) If yes, what was the length of notice required?



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111 I address each of these issues in turn. I should state at the outset that in so far as the applicable legal principles were involved, these were not really in dispute: by and large, parties cited many of the same cases. Where they differed – and sharply so – was, firstly, on what facts could be said to be proved on the evidence available, and secondly, on how the law should apply to the proven facts.

112 I should also state that in assessing what facts could be said to be proved on the evidence available, I bore in mind the reminder by the Court of Appeal ("CA") in *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 at [16] (cited by the CA in its subsequent judgment in *Chin Siew Seng v Quah Hun Kok Francis and another appeal* [2010] SGCA 44 ("*Chin Siew Seng*") at [24]) that a court should be slow to place too much reliance on the perceived credibility of witnesses where there are undisputed facts and/or objective evidence from which the court can draw the appropriate inferences. *Inter alia*, and in particular, this meant that wherever possible, I sought to evaluate the credibility of each party's narrative against the documentary evidence and other objective evidence such as the undisputed evidence of the parties' own conduct.

113 I address first Corporation's claim that Phang breached various fiduciary duties he owed the company in setting up and operating Healthcare.

## Whether Phang breached his fiduciary duties to Corporation in setting up and operating Healthcare

### *The applicable legal principles*

114 Phang did not dispute that he owed fiduciary duties to Corporation in his capacity as director. Nor did he dispute what generally these fiduciary duties



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were. Whilst Corporation pleaded a large number of these duties in its amended statement of claim, the duties that are relevant in this case may be stated as follows:

(a) the duty to act *bona fide* in the best interests of Corporation;

(b) the duty not to place himself in a position of conflict;

(c) the duty not to make a profit out of his position without Corporation's consent; and

(d) the duty not to enter into any self-dealing transaction.

115 In *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957, the High Court explained the scope of these directors' duties at [52]–[56] of its judgment:

> 52 A director has the duty to act *bona fide* – which means to act honestly – in the best interests of the company (see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 8.10). A court would be slow to interfere with commercial decisions of directors which have been honestly made even if they turned out to be financially detrimental, but this does not mean the court would stop short of interfering as long as the directors claim to be genuinely acting to promote the company's interests (see *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 ("*Scintronix*") at [37]–[38]).
>
> 53 The no-conflict rule obliges a director, as a fiduciary, to avoid any situation where his personal interest conflicts with or may conflict with that of the company whose interest he is bound to protect, such that there is a risk he may prefer his interest over that of the company's. The rule is strict: where a director is found to have placed himself in a position of conflict of interest, he will not be permitted to assert that his action was *bona fide* or thought to be in the interests of the company (*Walter Woon on Company Law* at para 8.44, citing *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 834). A director can be in breach of the rule even though his or her own conduct has caused no loss to the company (*Company*



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> *Directors: Duties, Liabilities, and Remedies* (Simon Mortimore ed) (Oxford University Press, 2009) at para 14.11, citing *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("*Regal (Hastings)*") at 134 and 153).
>
> 54 The no-profit rule obliges a director not to retain any profit which he has made through the use of the company's property, information or opportunities to which he has access by virtue of being a director, without the fully informed consent of the company. The rule is again a strict one and liability to account arises simply because profits are made (see *Regal (Hastings*) at 144).
>
> 55 The rule against self-dealing prohibits a director from entering, on behalf of the company, into an arrangement or transaction with himself or with a company or firm in which he is interested (see *Tan Hup Thye v Refco (Singapore) Pte Ltd* [2010] 3 SLR 1069 at [29]). …
>
> 56 … [T]here is indeed overlap between the no-conflict rule, no-profit rule and rule against self-dealing. A director who enters into a self-dealing transaction would inevitably be in a position of conflict and, if a profit is made, would be in breach of the duty not to make a profit out of his position. For that reason, the no-profit rule and rule against self-dealing have been described as particular instances of the broader duty of a director not to place himself in a position of conflict (see *Walter Woon on Company Law* at para 8.45). In turn, there is overlap between the no-conflict rule and a director's duty to act in the best interests of the company, "for when a director makes his interests paramount, invariably he will not be acting in the best interests of his company" (*Walter Woon on Company Law* at para 8.39).

***Phang's conduct in setting up and operating Healthcare***

116 In respect of Corporation's claim against Phang for breach of his fiduciary duties, the key complaints – as pleaded – were that he had set up Healthcare and caused it to operate a business that competed with Corporation's business, and that he had used Hooi Loo's services as a director of Healthcare while she was employed by Corporation. He was alleged to have put himself in a position of conflict by doing so, and also to have made secret profits from Healthcare's business.



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117 I did not find Corporation's allegations to be made out. My reasons were as follows.

***On the setting up of Healthcare and the operation of its business***

118 In gist, Henry's evidence was that he and Phang had never discussed the latter venturing into the Malaysian market and incorporating his own Sdn Bhd to tap that market. Henry was adamant that he would "never ever" have agreed to Phang setting up a business of his own in Malaysia: such an agreement simply did not make sense. Phang, on the other hand, asserted that both men had discussed the possibility of Corporation setting up its own Sdn Bhd in Malaysia, but that Henry had not been keen, and had told Phang to go ahead on his own if he wished. I accepted Phang's version of events and rejected Henry's, for the following reasons.

***The "ground rules"***

119 By way of background, it must be noted first of all that both men actually agreed on one thing: at the start of their collaboration as fellow shareholders and directors of Corporation, they had agreed to a set of "ground rules" for dealing with business opportunities that might come their way. As I observed earlier, Henry's version of these "grounds rules" was as follows[197]:

> … [I]f there were business opportunities in the medical and healthcare industry, made available to either one of us, it would be disclosed and offered to each other. *If not accepted, we would be free to pursue such interests independently.* We were free to pursue our independent interests in non-related businesses. [emphasis added]

[197] [21] of Henry's AEIC.



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120 Phang's testimony on this score was broadly similar: he too testified that both of them had the general understanding or agreement that –

> … [T]he agreement, to my understanding, is let's say if you want to develop in the medical field … we must inform each other. But other than that, we are free to do whatever business that … we chooses [*sic*]. "We" as in me and Henry Tay[198].
>
> …
>
> [I]f we want to set up a business in the medical field, we ought to inform each other and see whether … we are interested to combine our forces and … me and Henry to explore that particular business. And if the other party is not agreeable or not keen on that particular business, we can go ahead to set up our own business[199]. …

121 I found it relevant that there was this basic set of "ground rules" in operation between the two men from the start, because to my mind, it lent credibility to Phang's account of why and how he had approached Henry about the idea of setting up a Sdn Bhd to tap the Malaysian market more effectively. Phang's evidence, in cross-examination and in re-examination, was that the Agreement he had with Henry for him to explore the Malaysian market by incorporating his own Sdn Bhd was in substance an example of their "ground rules" in operation in the Malaysian context[200]. Importantly, in Henry's own account of these "ground rules", there was the explicit acceptance that their interests in Corporation notwithstanding, he and Phang would each be at liberty to pursue "independently" any business opportunity "in the medical and healthcare industry" should the other person be unwilling to take up the opportunity jointly through Corporation. This was what Henry claimed he did with the setting up of Absolmed: as seen from the summary earlier of Henry's

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[198] See transcript of 6 March 2020 at p 124 lines 5-9.

[199] See transcript of 6 March 2020 at p 125 lines 14-22.

[200] See, *eg*, transcript of 10 March 2020 at p 42 line 20 to p 43 line 6.



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evidence[201], Henry claimed that Phang had been unresponsive when asked about the possibility of their setting up a Sdn Bhd in Malaysia to sell Sonosite machines, and that was why Henry had gone ahead to set up Absolmed without Phang. As also seen from the summary earlier of Phang's evidence[202], Phang denied that Henry had approached him about setting up a Sdn Bhd to sell Sonosite machines to the Malaysian market. I did not need to determine the truth of Henry's story in this respect. What mattered was that Henry's own story of how he came to set up Absolmed acknowledged the freedom which he and Phang each had to set up their own medical or healthcare-related business in Malaysia if the other had no interest in their pursuing that business opportunity together.

122 Furthermore, Henry's own story as to how he came to set up Absolmed gave the lie to his protestations that it would have been "crazy"[203] for him to agree to Phang setting up his own Sdn Bhd to tap on opportunities in the Malaysian medical/healthcare market. With Absolmed, Henry was proposing to distribute in Malaysia machines that Corporation itself already distributed in Singapore. In fact, according to Henry, the Sonosite machines distributed by Corporation in Singapore had enjoyed "consistently good sales performance" – a fact which Phang could hardly have been ignorant of, given Henry's insistence that Phang was primarily responsible for overseeing the preparation of Corporation's accounts[204]. The supplier Sonosite Inc had encouraged Corporation to take over the Malaysian distributorship of the machines; and

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[201] See [6] and [11] above.

[202] See [86] above.

[203] See transcript of 27 February 2020 at p 166 lines 22-24.

[204] [197] of Henry's AEIC.



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doing so would have "enhance[d] the distributorship position of [Corporation] in terms of discounts"[205]. Yet, according to Henry, not only was Phang uninterested in having Corporation take up the opportunity in Malaysia, he was prepared to consent to Henry exploiting this opportunity on his own[206].

123 To put it colloquially, based on Henry's own narrative, what was sauce for the goose had to be sauce for the gander. If according to him it was not commercially unthinkable that Phang should have consented to his exploiting the Sonosite opportunity in Malaysia through his own corporate vehicle, why should it have been unthinkable for him to agree to Phang doing the same *vis-à-vis* other opportunities in the Malaysian market?

***Reasons for Henry's reluctance to venture jointly with Phang into the Malaysian market***

124 I would add that Phang's account of the reasons for Henry's reluctance to venture jointly with him into the Malaysian market appeared to me to be entirely plausible. According to Phang, leaving aside the concern about conserving finite resources at an early stage of Corporation's growth, Henry had simply been unwilling to countenance being part of a venture in which Phang would have the controlling stake. Indisputably, had both of them agreed to set up a Sdn Bhd together, Phang would have had the upper hand. As Henry himself admitted – Phang was a Malaysian citizen who spoke fluent Malay[207]: he would have been the logical choice for resident director in any Sdn Bhd they

[205] [37] of Henry's AEIC.

[206] [38] of Henry's AEIC.

[207] [13] of Henry's AEIC.



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agreed to incorporate[208]. Phang himself had also made it clear to Henry from the outset that if they were to incorporate a Sdn Bhd to explore the Malaysian market, he (Phang) would – as its resident director – want to be the majority shareholder. That such a prospect would not have sat well with Henry was quite believable: within Corporation, not only did he hold a 65% controlling stake from Day 1, in 2005 he had apparently also gained control of its board by adding his parents as directors[209]. (I pause to note as an aside that whilst Henry described his parents as "non-executive" directors[210], there was no evidence that they were precluded from voting on board resolutions.)

125 Moreover, Phang's evidence (which went unchallenged on this score) was that at the time he broached the idea of setting up a Sdn Bhd with Henry in 2004, the sales through their Malaysian branch office had averaged only about $100,000 to $200,000 yearly, compared to Corporation's yearly sales of around $2.2m in the same period[211]. It was not inconceivable that given the modest sales performance in Malaysia, Henry should have been unenthusiastic about the prospect of venturing jointly into the Malaysian market with Phang as the controlling shareholder.

***Phang's openness about Healthcare post-2004***

126 Tellingly, the parties' conduct subsequent to 2004 pointed unequivocally to the existence of an understanding or arrangement between these two shareholders of Corporation to allow Phang to explore the Malaysian

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[208] [18] of Phang's AEIC.

[209] p 85 of Henry's AEIC.

[210] [10] of Henry's AEIC.

[211] [42] of Phang's AEIC.



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market by setting up his own company. Firstly, it could not be disputed that Phang was completely open about the existence of Healthcare, the nature of its business, and the fact that it was his own company. For example, according to Phang and Hooi Loo, they had both openly talked about Healthcare's sales performance on numerous occasions when Henry and assorted Corporation personnel were present. Although Phang could not recall if he had specifically mentioned Healthcare's name during the presentation given at Corporation's tenth anniversary celebration, he was certain that the references to the successful sales of Dentium products would have alerted those present that he was talking about a separate entity from Corporation (which had then just started to distribute Dentium products) and its Malaysian branch office (which did not distribute Dentium products). According to Phang and Hooi Loo, they would also have spoken freely about Healthcare's sales performance and experience during the sales meetings held for Corporation staff.

127 In this connection, I noted that Corporation made much of the fact that during the sale of Medisol to RadLink in 2017, Henry had disclosed his interest in Absolmed whereas Phang had not disclosed his interest in Healthcare. The insinuation which Corporation appeared to be making was that Phang had deceitfully concealed his interest in Healthcare even when faced with disclosure requirements during the Medisol sale process. I did not think this was an accurate representation of the parties' conduct. Phang in cross-examination was unable to recall why he had not disclosed his interest in Healthcare in the Medisol disclosure letter. Regrettably, only part of the disclosure letter was exhibited by Henry in his AEIC[212]: although the disclosure of Absolmed was contained in a portion of the letter which referred to a specific paragraph in

[212] pp 281-303 of Henry's AEIC.



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Schedule 3 of the Medisol sale and purchase agreement, Schedule 3 was omitted from both Henry's AEIC and the agreed bundle of documents. Nevertheless, even that portion of the letter exhibited by Henry indicated that what RadLink required by way of the said letter was disclosure of the Corporation and Bridgevision directors' interests in *companies which had contractual arrangements or dealings with Medisol*. This could be seen from the statements made by Henry and Phua in the disclosure made of their interests in Absolmed as well as in Corporation and another company named Web-economy Technology Pte Ltd. In the disclosure made in relation to Absolmed, it was expressly stated that Medisol (referred to as "the Company") "has an existing arrangement with Absolmed to provide teleradiology reporting services to Absolmed at a service fee of approximately S$500 per month"[213]. In the disclosure made in relation to Corporation, it was stated that Medisol had "contractual arrangements with [Corporation] from time to time" in respect of the supply by Corporation of medical imaging equipment to Medisol, and the supply by Medisol of medical imaging software and software support services to Corporation. In the disclosure made in relation to Web-economy Technology Pte Ltd, which was a company in which Phua (the sole shareholder of Bridgevision) held 5% shares, it was stated that Medisol had "an existing contractual arrangement with Web-economy for the provision by Web-economy of software development and software maintenance services to [Medisol]"[214]. Conversely, in relation to Healthcare, there was no evidence that it had any contractual arrangements with Medisol: certainly, Henry did not make any such allegation during the trial. As such, there was nothing sinister

[213] p 286 of Henry's AEIC.

[214] p 287 of Henry's AEIC.



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about Phang not disclosing his interest in Healthcare in the Medisol disclosure letter.

128 In closing submissions, Corporation's counsel also sought to attribute sinister undertones to a WhatsApp message sent by Phang to Hooi Loo on 26 August 2016[215], in which he had said: "Don't forget the objective. Bluestone Healthcare is here to provide you and me a comfortable retirement."

129 With respect, I did not see anything sinister in this WhatsApp message. Whilst it might be true that the message showed Phang's "motive" in setting up Healthcare was to seek financial rewards from its business[216] (and Phang himself did not deny this in cross-examination), this "motive" had to be seen in the context of the Agreement between Henry and Phang. There was nothing disconcerting about Phang hoping to do well "money-wise" by developing his own Malaysian business: this desire for financial reward was presumably also what had motivated Henry to set up Absolmed to sell Sonosite machines in Malaysia after seeing how well the machines had done in Singapore.

130 In any event, even if one were to be skeptical about the objectivity of Phang's evidence as to his own conduct, there was ample evidence given by other witnesses, including Corporation's witnesses, which attested to Phang's openness about Healthcare, his ownership of it, and its business operations.

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[215] Volume 4 of the Agreed Bundle of Documents, p 1637.

[216] [168] of Corporation's closing submissions.



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***Lynnette's evidence***

131 As noted earlier, Lynnette – for example – gave evidence that Phang had told her in 2006 or 2007 about achieving "some sales results" for Dentium products in Malaysia through "his Malaysian team", which he had made clear was employed under another business he had set up in Malaysia "separate from [Corporation]". Lynnette was also aware that Phang's Malaysian company was called Healthcare and that Hooi Loo too was involved in the operations of this Malaysian company[217].

***Walter's evidence***

132 As another example, Corporation's customer service coordinator Walter Tan Thiam Soon ("Walter") testified that after he joined Corporation in 2011, he came to know "that Mr Phang had a company in Malaysia, which is Bluestone Healthcare"[218], and he would interact with Hooi Loo and Healthcare staff Diana in relation to inter-company transactions such as the purchase by Corporation of products from Healthcare[219] and the loan by Corporation of products to Healthcare[220]. Walter testified that there were "many such transactions" between Corporation and Healthcare[221], in the course of which documents clearly showing Healthcare's name and address (such as invoices) would be generated or received by Corporation[222]. Walter further testified that Phang had spoken openly to him about setting up Healthcare as a separate entity

[217] [10]-[11] of Lynnette's AEIC.

[218] See transcript of 28 February 2020 at p 103 lines 23-24.

[219] See transcript of 28 February 2020 at p 132 line 9 to p 135 line 24.

[220] See transcript of 28 February 2020 at p 106 lines 13-18.

[221] See transcript of 28 February 2020 at p 135 lines 11-16.

[222] See transcript of 28 February 2020 at p 132 line 9 to p 135 line 24.



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from Corporation's Malaysian branch office and about owning Healthcare together with Hooi Loo[223].

133 I should add that in so far as Walter's evidence was concerned, Corporation argued that his testimony in court should be rejected in favour of an affidavit it had procured from him in March 2019 when it sought to resist Hooi Loo's application to strike out certain paragraphs of its statement of claim[224]. In a three-page affidavit filed on 14 March 2019, Walter had stated that he knew Hooi Loo to be the sales manager of "Bluestone Malaysia", which he thought was "[Corporation's] company in Malaysia", set up by Phang and Henry; that he had come across the name "Bluestone Healthcare Sdn Bhd" in Corporation's "computer systems"; and that he had thought "the name, 'Bluestone Healthcare Sdn Bhd' was Bluestone Singapore's Malaysian company"[225]. However, in his testimony during the trial, Walter clarified that he had actually been aware that Healthcare was a separate entity from Corporation's branch office[226]. He explained that he had affirmed the affidavit as drafted because he had been "quite under pressure" at the time[227], having been called up "last-minute" by his "boss and director", David, to "go to the [lawyer's] office to sign the affidavit"[228]. According to Walter, he actually found the term "Bluestone Malaysia" to be "rather confusing" because both Healthcare and Corporation's Malaysian branch office were based in

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[223] See transcript of 28 February 2020 at p 136 line 6 to p 137 line 4.

[224] [92]-[94] of Corporation's reply to Phang's and Healthcare's closing submissions.

[225] See [4] and [6] of Walter's affidavit of 14 March 2019.

[226] See transcript of 28 February 2020 at p 110 lines 13-21.

[227] See transcript of 28 February 2020 at p 111 line 10 to p 112 line 1.

[228] See transcript of 28 February 2020 at p 114 line 4 to p 115 line 17.



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Malaysia[229]. He could not recall if he had signed the affidavit before a commissioner for oaths, although he did not dispute that he had been given the affidavit to read before signing it[230]. He asserted, however, that both Henry and David had been present in the lawyer's office when he was asked to read and sign the affidavit; and he had felt concerned that if he did not sign, he "might get sacked or something like that"[231].

134 On balance, having seen and heard Walter's testimony during the trial and having reviewed the affidavit of 14 March 2019, I believed that Walter was telling the truth at trial. As Corporation's customer service coordinator, he was well placed to know about the setup of its Malaysian branch office. The documentary records shown to him during his cross-examination by Phang's counsel also showed that he had extensive interaction with Healthcare staff over the inter-company trades. I did not think it likely that he would have been so confused as to think that Healthcare was the same entity as the Malaysian branch office, and/or that Healthcare staff such as Diana and Karen were really Corporation employees. Furthermore, as at the date of the trial, Walter was still employed by Corporation: he had nothing to gain – and potentially much to lose – by disavowing or qualifying his previous affidavit and by corroborating Phang's narrative.

***Yok Fong's evidence***

135 Corporation's bookkeeper Yok Fong confirmed Walter's testimony that Healthcare's details had been maintained on a computer system used by

[229] See transcript of 28 February 2020 at p 105 line 14 to p 110 line 22.

[230] See transcript of 28 February 2020 at p 116 lines 14-24.

[231] See transcript of 28 February 2020 at p 115 line 11 to p 117 line 12.



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Corporation (known as the "MYOB system"). She also confirmed that she herself had been aware that Healthcare was a Sdn Bhd and that it was not the same entity as Corporation's Malaysian branch office[232]. Yok Fong testified that a few months after she joined Corporation, in either 2011 or 2012, Phang had handed her the Corporation payroll table to maintain, and she would input or update this payroll table according to the instructions of both Henry and Phang[233]. She was also responsible for preparing the pay cheques of the Corporation staff. As a result, she was aware that Hooi Loo was paid by Corporation, whereas Karen and Diana – whom she dealt with in relation to the tallying of accounts between Corporation and Healthcare[234] – were clearly not on Corporation's payroll[235].

***Jasmine's evidence***

136 As for Jasmine, the part-time bookkeeper for Corporation, her evidence – as recounted earlier[236] – was that she had found out about Healthcare in 2006, and that upon her querying Phang about it, he had told her that Healthcare was a company he had set up. Indeed, when she approached him again to convey the auditors' queries, Phang had reiterated that Healthcare was a company he had set up in Malaysia, and that "[i]f that was a 'related party', to treat Bluestone Healthcare as a related party"[237]. Jasmine confirmed that thereafter, Healthcare was expressly included as a related party in Corporation's accounts[238].

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[232] See transcript of 4 March 2020 at p 47 lines 15-25.

[233] See transcript of 4 March 2020 at p 38 line 23 to p 39 line 21.

[234] See transcript of 4 March 2020 at p 43 line 16 to p 45 line 23.

[235] See transcript of 4 March 2020 at p 43 lines 16-21.

[236] See [75] above.

[237] [8] of Jasmine's AEIC.



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137 Jasmine also confirmed that over the years from 2008 till 2017, she would send Henry the monthly financial statements for Corporation[239]. Indeed, on Henry's own evidence, this was done by Jasmine *at his request*, to allow him to check on the company's financial health every month; and he would chase her for these documents if he did not get them[240]. From the documents produced before the court, Healthcare's name would be expressly stated and set out under "Trade receivables" separately from the lengthy list of other trade receivables. In at least some of these financial statements, Hooi Loo's name would also be included as one of Healthcare's contact persons[241].

138 I pause here to note that whilst Lynnette and Walter might be said to have been on friendly terms with Phang, it was plain to me that Yok Fong and Jasmine were loyal to Henry, or at the very least, had no loyalty to Phang and were not predisposed simply to accept at face value whatever he told them. Jasmine, for example, made it a point to question Phang about Healthcare in 2006 when she noticed a payment made on behalf of the company; and even after getting an answer from Phang, she had "clarified with the auditors" and gone back to Phang with more questions[242]. She had also approached Henry about Healthcare and had on one occasion, prodded Henry "to ask Phang about Bluestone Healthcare"[243]. I will address this incident later when I deal with the issue of Henry's professed ignorance about Healthcare.

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[238] See transcript of 5 March 2020 at p 13 lines 9-17.

[239] See transcript of 5 March 2020 at p 14 line 13 to p 16 line 2.

[240] See transcript of 25 February 2020 at p 68 lines 7-16.

[241] See, *eg*, exhibit D1.

[242] [5]-[8] of Jasmine's AEIC.

[243] [15]-[16] of Jasmine's AEIC.



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***Why Phang's openness about Healthcare was important***

139 To recap, therefore, the evidence of these diverse witnesses corroborated Phang's assertion that he was consistently open about Healthcare, the nature of its business, and the fact that it was his own company. This was evidentially significant because Henry's version of events was that he and Phang had never discussed – much less agreed on – the latter incorporating his own Sdn Bhd to explore the Malaysian market. In line with this version of events, Henry claimed that Phang kept him in the dark about the incorporation of Healthcare and/or Phang's and Hooi Loo's involvement in Healthcare until Henry made the shocking discovery for himself "on or after 2.2.2018"[244].

140 Henry's story about Phang's alleged subterfuge could not be believed, however, when tested against the evidence from assorted Corporation personnel to whom Phang had openly spoken about setting up Healthcare and who had dealt with Healthcare in inter-company trades. If there had been no Agreement as Henry asserted in his defence, it would have been obvious to Phang that the act of incorporating his own Sdn Bhd to explore the Malaysian medical and healthcare market would be seen by Corporation as a hostile act – in fact, an act of competition; and if that were the case, Phang could not have afforded to let anyone in Corporation know about his incorporation of Healthcare or the type of business it was doing. Put another way, if Phang had really been trying to use Healthcare to divert business away from the Malaysian branch office on the sly, then it made no sense for him to risk anyone in Corporation finding out. Even if he had not said anything to Henry himself, he could hardly have sworn every Corporation staff to secrecy. It was easily foreseeable, after all, that the

[244] [47] of Henry's AEIC.



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use of the word "Bluestone" in Healthcare's name and the nature of the products it dealt in would at some point have elicited curiosity about Healthcare from some of the Corporation staff. Indeed, as seen in Jasmine's case for example, not only did she question Phang about Healthcare more than once, she also approached Henry about Healthcare, and on one occasion, even "asked Henry to ask Phang about Bluestone Healthcare" in her presence.

141 This brings me to the issue of Henry's own conduct. Despite Henry's protestations of ignorance about Healthcare, I found that his conduct showed he was in fact well aware of Phang having set up Healthcare and equally well aware of the business Healthcare operated.

***Henry's conduct subsequent to 2004***

142 Although Henry denied that he and Phang had in 2004 discussed and agreed to the latter setting up his own company to explore the Malaysian market, he conceded in cross-examination that by 2006, he was already aware of the existence of "a company called Bluestone Healthcare Sdn Bhd in Malaysia"[245]. He also conceded that given its name, Healthcare was very likely to be involved in the medical or healthcare business[246]. Although in his AEIC he said nothing about the incident in 2006 when Jasmine had "asked [him] to ask Phang about Bluestone Healthcare in her presence, he agreed at trial with her account of this incident, including her assertion that Phang had retorted "you don't need to know" when asked. He conceded as well that this response by Phang indicated that the latter "must be involved" in Healthcare[247].

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[245] See transcript of 25 February 2020 at p 97 line 20 to p 98 line 1.

[246] See transcript of 25 February 2020 at p 98 lines 2-6.

[247] See transcript of 25 February 2020 at p 98 lines 7-16.



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143 Henry's concessions about his state of knowledge as at 2006 formed another significant piece of evidence which pointed unequivocally to an understanding or arrangement between him and Phang to allow the latter to explore the Malaysian market by incorporating his own company. If there had been no such understanding (or as Phang called it, "the Agreement"), it was unbelievable that Henry would have reacted to information about the existence of a Malaysian company called "*Bluestone* Healthcare Sdn Bhd" with such bland equanimity – especially when he recognised that it was in the same medical/healthcare business as Corporation and its Malaysian branch office. I would add that although Phang did not recall having said "you don't need to know" when Henry brought Healthcare up in Jasmine's presence, if he had in fact made such an apparently offhand answer, then Henry's undisputed passivity and inaction following such answer provided further proof of the existence of the Agreement. Why else would he have been so blasé about his fellow shareholder and director's apparent involvement in this Malaysian company with a similar name and an apparently similar business – if not for the Agreement?

144 I found it telling, moreover, that in his amended reply and defence to Phang's defence and counterclaim, Henry had pleaded all along that he was "unaware of [Healthcare's] incorporation and/or its existence and trade until on or around 2.2.2018"[248]. There was no mention of his having been told of Healthcare by Jasmine in 2006 and/or of his having asked Phang about Healthcare in her presence at that juncture. This omission seemed to me quite misleading, especially given the information he would have gleaned from the

[248] [2] of Corporation's Reply and Defence to Counterclaim of 1st Defendant (Amendment No. 3).



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exchanges with Jasmine and with Phang (which he himself conceded in cross-examination). In his AEIC, Henry appeared to realise that he could not avoid acknowledging the exchange with Phang in 2006, since it had taken place at Jasmine's prodding and in her presence. However, he made only a cursory reference to the incident in his AEIC ("Jasmine Phua mentioned the name Bluestone Healthcare at an early stage"[249]). He also sought in his AEIC to suggest that[250] although he had become aware of "the existence of an entity known as Bluestone Healthcare" at this "early stage", it was only "around June 2017" that he came to know about its "trade activities with [Corporation]" – and only on or after 2 February 2018 that he came to know of "[Healthcare's] incorporation, [Phang's] and [Hooi Loo's] involvement". This attempt to suggest a fragmented and belated state of awareness on his part about Healthcare was refuted by the admissions he himself made in cross-examination (see above at [142]).

145 In his AEIC, Henry had also alleged that he only noticed the name "Bluestone Healthcare" appearing in Corporation's "trade receivables list" sometime around 2017, and that Yok Fong too had mentioned the name "Bluestone Healthcare" to him in "mid/late-2017" in connection with some erroneous payments from customers in Malaysia[251]. Even then, he claimed it took him until January 2018 to get help from the new auditors to carry out searches on "Bluestone Healthcare in Malaysia"[252]. Clearly, the impression he

[249] [47] of Henry's AEIC.

[250] [47] of Henry's AEIC.

[251] [47]-[48] of Henry's AEIC.

[252] [50] of Henry's AEIC.



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sought to give in his AEIC was that he had never seen Healthcare mentioned in Corporation's financial and accounting records up until 2017.

146 I found the above narrative equally unbelievable. As one of the directors of Corporation, Henry was responsible for signing off on its yearly audited accounts; and despite his attempt in his AEIC to profess a general lack of familiarity with these accounts, he admitted in cross-examination that he knew he had fairly onerous responsibilities as a director *vis-à-vis* the preparation of these accounts[253]. I found it unbelievable that in reviewing and signing off on these audited accounts, he would have failed to notice the inclusion of "Bluestone Healthcare Sdn Bhd" as a related party. In cross-examination, Henry's attempts to deny awareness of the mention of Healthcare in the accounts became so desperate as to amount to obvious lies. He claimed for example that when reading the accounts, he would only look at a few items such as the company's cash balance and he would not notice other items such as the related party transactions[254]. When it was pointed out to him that in some of the accounts, the related party transactions appeared immediately above the item "cash at bank", he said he "cannot remember at all" whether he would have noticed the information on related party transactions[255].

147 Despite his avowed lack of involvement in Corporation's financial matters, Henry also could not deny that over the years, from at least 2008 till 2017, he had – at his own request – received monthly financial statements from

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[253] See transcript of 25 February 2020 at p 40 lines 9-20. It should be noted that in these proceedings, Corporation only disclosed audited accounts for the years 2012 to 2018. No explanation was offered by Corporation as to why its audited accounts for the earlier years were not disclosed.

[254] See transcript of 25 February 2020 at p 52 line 15 to p 56 line 12.

[255] See transcript of 25 February 2020 at p 54 lines 2-15.



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Jasmine. *Inter alia*, these monthly financial statements were meant to enable Henry to monitor Corporation's trade receivables and to follow up on their payment where necessary. Moreover, despite Henry's claims about having had nothing to do with consumables in Corporation, it was apparent from the monthly financial statements sent to him that his interest in matters such as trade receivables extended to the consumables division. Lynnette – who was a consumables sales staff – also gave evidence that in 2013/2014, Henry had spoken to her fortnightly "about late or outstanding payments from customers", and it was clear to her Henry was "familiar with, or at least aware of, the sales, accounts and customers of the medical consumables division of [Corporation]"[256]. An examination of the monthly financial statements also showed that Healthcare was specifically listed under trade receivables: usually, Healthcare's name would appear on a separate page either on its own or together with the name of Corporation's Malaysian agent (Apex Marketing Sdn Bhd)[257]. In the circumstances, I found it incredible that despite having received and read these monthly financial statements over the course of at least a decade, Henry should have managed not to notice Healthcare's name in that entire period.

148 In my view, the evidence of his own witnesses and documentary records demonstrated that by 2006 at the very least, Henry was fully aware of Healthcare, its business, and Phang's role in it. The misleading statement in his amended reply and defence to Phang's defence and counterclaim that he was "unaware of [Healthcare's] incorporation and/or its existence and trade until on or around 2.2.2018", as well as the vague and evasive manner in which he alluded in his AEIC to his knowledge of Healthcare, indicated that he was

[256] [24] of Lynnette's AEIC.

[257] See, *eg*, exhibit D1.



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conscious of the damage that would result to his case from evidence of such knowledge.

149 Based on his own evidence, Henry took no steps either to investigate or to object to Healthcare's activities and Phang's involvement in those activities, until January 2018. As an aside, I should state that I disbelieved Henry's claim that he had habitually tried to avoid conflict with Phang because of Phang's "forceful" personality. Henry's own conduct – for example, in ordering the removal of Corporation's cheque books from Phang's possession after being angered by the latter's approval of bonus payments – demonstrated that he was well able to make his objections to Phang's behavior known.

***My findings***

150 Given my finding above on the state of his knowledge, Henry's prolonged inaction formed another important piece of evidence which supported Phang's assertion about the existence of the Agreement. In coming to this conclusion, I found it helpful to refer to the judgment in *Chin Siew Seng* ([112] *supra*). In that case, the appellant ("Chin") was a director and minority shareholder of the company Seaspan Agencies. The respondent ("Quah") was also a director as well as the majority shareholder. On 11 October 2005, Chin told Quah that he was resigning as a director of Seaspan Agencies and incorporating a new company to carry on the ship-brokering business which he had been in charge of managing in Seaspan Agencies. On 13 October 2005, Chin incorporated a new company, which he named Seaspan Singapore and in which he and one Joanne Ho ("Ho", his fellow director from Seaspan Agencies) were the directors. However, Chin and Ho remained as directors of Seaspan Agencies. They officially tendered their written resignations as directors of Seaspan Agencies on 9 February 2006. Seaspan Agencies subsequently sued



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Chin for (*inter alia*) breach of his duties as a director of Seaspan Agencies by allegedly diverting to Seaspan Singapore the ship-brokering commissions earned in respect of contracts entered into by Seaspan Agencies or Seaspan Singapore for the period when Chin was a director of Seaspan Agencies. At first instance, the trial judge rejected Chin's assertion that Seaspan Singapore was entitled to the commissions on the basis of an express agreement between him and Quah. On appeal, the CA reversed the trial judge's finding and held that "the documentary evidence and subsequent conduct of the parties (Quah's, in particular) … points unequivocally to some kind of arrangement or settlement between the then shareholders of Seaspan Agencies to sever the ship-brokering … businesses sometime in October 2005, freeing Chin to start his own business and permitting Ho to join Chin" (at [26]). *Inter alia*, the CA found it significant (at [27]) that "… during the entire four-month period Chin was carrying on business under Seaspan Singapore while still a director of Seaspan Agencies, Quah appears not to have protested about this despite being aware that Chin was conducting business under Seaspan Singapore and that there was no longer any ship-brokering business coming into Seaspan Agencies after 13 October 2005".

151 The CA also pointed out that the "undisputed subsequent conduct of the parties" – in particular, the distribution of the cash surplus of Seaspan Agencies – was "entirely consistent with the existence of an agreement that the businesses would be split in October 2005 and that Chin was free to pursue his own ship-brokering business" (at [28]). In the premises, the CA held that –

> … all the directors and shareholders of Seaspan Agencies knew and consented to Seaspan Singapore's receipt of ship-brokering commissions for the period between 11 October 2005 and 9 February 2006. Chin and Ho were not, in the prevailing circumstances, in breach of their duties to Seaspan Agencies with respect to the claim for the diversion of ship-brokering commissions and business opportunities during that period.



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152 In *Tuitiongenius Pte Ltd v Toh Yew Keat and another* [2020] SGCA 103 ("*Tuitiongenius*"), the appellant company was a joint venture between the first respondent ("Mr Toh") and one Keng Yew Huat ("Mr Keng"). After setting up the appellant company together with Mr Keng, Mr Toh first set up a sole proprietorship called Economics at Tuitiongenius ("ETG"), which he subsequently replaced by incorporating a company called Economics at Tuitiongenius Pte Ltd ("ETGPL"). Both the appellant and ETGPL were in the business of providing private tuition services. The appellant sued Mr Toh, alleging that Mr Toh had breached (*inter alia*) his fiduciary duties as its director in conducting a competing private tuition business through ETG and later ETGPL ("the ETG Entities"). The trial judge rejected the appellant's claims and found that there was no breach of any fiduciary duties by Mr Toh because the parties had a subsequent oral agreement ("the Oral Agreement") that Mr Toh could continue to run his own private tuition business through the ETG Entities – and to retain the revenue thus generated (at [15]). On appeal, the CA upheld the trial judge's findings. As the CA noted in its judgment (at [60]), the appellant's case rested on the proposition that Mr Keng had been unaware of the use of the ETG Entities by Mr Toh to run his own private tuition business, but the trial judge had found that Mr Keng in fact knew about the ETG Entities: Mr Toh was transparent about setting them up, and the trial judge further accepted Mr Toh's evidence that Mr Keng had encouraged him to set up these entities (at [27]). The CA affirmed these findings, stating (at [60]):

> … Given the agreement between Mr Keng and Mr Toh, who were the promoters of the appellant, as to the basis on which the appellant's and Mr Toh's respective businesses would co-exist under the Oral Agreements, there cannot be any question of Mr Toh acting in breach of his fiduciary duties in running his private tuition business through the ETG Entities. In doing this, he was acting in line with what had been agreed.



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153 I found these two cases to be helpful as they illustrated the operation of the principle that a fiduciary such as a director "cannot act for his own benefit without the *informed consent* of his principal" [emphasis in original] (at [60] of *Tuitiongenius*). In *Chin Siew Seng*, the directors and shareholders of Seaspan Agencies were found to have known and consented to Seaspan Singapore's receipt of all ship-brokering commissions during the four-month period from October 2005 to February 2006. In *Tuitiongenius*, Mr Keng and Mr Toh – who were the directors and equal shareholders of the appellant – were found to have made an oral agreement for the latter to continue running his own private tuition business through the ETG Entities. As the CA noted in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Scintronix*", at [52] and [59]), either the "informal assent of all the directors of a company" or the "unanimous, or at the very least majority agreement of the shareholders" [emphasis in original omitted] would suffice to release a director from his obligations to the company.

154 Applying these general principles to the present case, I found that as at 2004, Henry and Phang had – as the shareholders and directors of Corporation – agreed to Phang setting up his own company to tap on the Malaysian market. In the result, Phang was *not* in breach of his duties to Corporation with respect to the claims for setting up a competing business and for diversion of business or business opportunities to Healthcare.

**Whether Phang breached his fiduciary duties to Corporation in having Healthcare take over the distributorship of Halyard feeding tubes in July 2017**

155 In respect of Corporation's claims against Phang for diversion of business or business opportunities to Healthcare, I should address separately the allegations concerning the transfer from Corporation to Healthcare of the



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distributorship rights for Halyard (formerly Kimberly-Clark) feeding tubes, since Henry's AEIC dealt with these allegations in some detail.

156 In my view, the Agreement between Henry and Phang would cover the transfer of the distributorship for Halyard feeding tubes from Corporation to Healthcare. It must be remembered that the Agreement came about after Phang sought unsuccessfully to persuade Henry that they should join forces to set up a Sdn Bhd in Malaysia so as to exploit the Malaysian market more effectively[258]. After Kimberly-Clark (the predecessor to Halyard) decided to terminate Corporation's distributorship rights to its respiratory products in Malaysia in late 2005, Henry must have been aware that retaining the Malaysian branch office instead of setting up a Sdn Bhd carried the risk of Corporation losing distributorship rights to other product lines. Nevertheless, for his own reasons, he was unwilling to have Corporation set up a Sdn Bhd in which Phang would be the controlling shareholder. It was against this backdrop that the Agreement between the two men came about. As I have also noted, it was interesting that shortly after Phang's incorporation of Healthcare in 2004, Henry apparently consolidated his control over the Corporation board by getting his parents appointed to the board. In the premises, I found that the risk of the Malaysian branch office losing other distributorships – and the possibility of these distributorships going to Healthcare – were matters within the contemplation of both men at the time of the Agreement.

157 In this connection, it was pertinent to note that while Phang agreed that their deteriorating relationship in 2017 meant that he did not talk to Henry about Halyard's plans to transfer the distributorship, he (Phang) took no steps to

[258] See [60]-[63] above.



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conceal the transfer of the Halyard distributorship from Corporation's personnel. Even Walter, who was a customer service coordinator and not a sales staff, was aware that by 2017 Healthcare was distributing Halyard's feeding tubes[259]. Again, this lack of concealment on Phang's part was consistent with his case about the existence of the Agreement and his consequent belief that he had nothing to hide in relation to Healthcare's business activities.

158 However, even assuming for the sake of argument that Corporation could establish Phang had placed himself in a position of conflict of interests, Corporation's case could not stop there. This was a non-bifurcated trial, which meant that Corporation bore the burden of proving both Phang's liability for the alleged breaches of duties *and* the *quantum of the loss or damage* it claimed to have suffered as a result of such breaches. In respect of the latter, the following observations by the High Court in *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 ("*Smile Inc (HC)*", judgment upheld on appeal) were particularly apposite (at [7]–[8]):

> 7 It is trite law that ***the plaintiff bears the burden of proving each head of claim on the balance of probabilities. To meet this standard of proof, the plaintiff cannot merely assert that it has suffered a loss. Instead, each head of claim must necessarily be backed by evidence, whether documentary, oral or otherwise. Without any such evidence, the claim will not be established on the balance of probabilities, and the plaintiff's claim will fail***.
>
> 8 Where no evidence is furnished by the plaintiff to back its head of claim, there is strictly speaking *no* burden on the defendant to raise any objection. …
>
> [emphasis in original in italics; emphasis added in bold italics]

[259] See transcript of 28 February 2020 at p 139 lines 7-16.



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159 In the present case, Corporation's claim for monetary compensation flowing from Healthcare's acquisition of the distributorship for feeding tubes was extremely confused. Firstly, as I noted earlier[260], Henry in his AEIC appeared to vacillate between quantifying Corporation's loss of Halyard business in terms of Healthcare's projected total revenue from Halyard sales "over the next six (6) years" and in terms of the fall in the sales revenue of the Malaysian branch office.

160 Secondly, there was no coherent explanation provided by Henry or anybody else as to the proposed six-year period for computing Corporation's losses. In cross-examination, Henry conceded that the distributorship agreements with Halyard were typically for a two-year period and that it was likely Halyard would have terminated this distributorship agreement anyway if "sales [were] really bad"[261]. There was thus no basis at all for Corporation to claim that its losses should be computed over a six-year period.

161 Thirdly, in its closing submissions, Corporation made the startling argument that its losses should be measured by *Healthcare's post-tax profits from 2011 to 2016*[262]. This made no sense because Healthcare only started selling the Halyard feeding tubes *from July 2017*. Moreover, the figures for the post-tax profits were in respect of *Healthcare's sales between 2011 and 2016 of all its products – and not just Halyard feeding-tube products*. Even more oddly, even as Corporation put forward this claim for losses sustained as a result

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[260] See [44] above.

[261] See transcript of 25 February 2020 at p 184 line 17 to p 186 line 4.

[262] [243] of Corporation's closing submissions.



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of Healthcare's acquisition of the distributorship, it also continued to maintain a separate claim for disgorgement of secret profits.

162 Fourthly, even if one were to try to quantify Corporation's losses in terms of the fall in the sales revenue of the Malaysian branch office, the computations put forward by Henry were (with respect) plainly nonsensical. For one, as I have noted, there was no coherent explanation as to why the losses should be computed over a six-year period. More importantly, Henry relied on gross revenue figures which – as he admitted in cross-examination – did not take into account the cost of sales and other overhead expenses that would have had to be incurred to earn the revenue. Indeed, as he admitted in cross-examination, this method of computation was "[i]n hindsight … not a fair claim"[263].

163 For the above reasons, I concluded that even if I were to accept that Phang had breached the no-conflict rule by agreeing to have Healthcare take on the distributorship for Halyard feeding tubes, Corporation was unable to prove the measure of its resulting losses. It therefore failed in its claim for compensation in relation to the loss by the Malaysian branch office of the Halyard distributorship.

**Whether Phang breached his fiduciary duties to Corporation in making use of Hooi Loo's services in Healthcare**

164 The other breach of fiduciary duties pleaded against Phang related to his making use of Hooi Loo's services in Healthcare[264]. It will be remembered that

[263] See transcript of 25 February 2020 at p 186 line 11 to p 187 line 2.

[264] [25A] of Corporation's Statement of Claim (Amendment No. 2).



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Hooi Loo remained a Corporation employee until 24 August 2018. Corporation contended that in asking her to join Healthcare whilst she remained a Corporation employee, Phang was in breach of his duty to act in Corporation's best interests.

165 As a preliminary point, I noted that in his AEIC, Phang stated that when he asked Hooi Loo if she was interested in being involved in Healthcare, he had "made it clear to [her] that she should prioritise the business of [Corporation's] Branch Office, and that her work for Healthcare … should only be done during her downtime"[265]. Hooi Loo herself asserted that her performance as a Corporation employee did not suffer as a result of her involvement in Healthcare[266].

166 Whether Hooi Loo's involvement in Healthcare was at the expense of her duties to Corporation would be a matter relevant to the question of whether Corporation could prove any loss or damage to itself. It would not, however, be relevant to the question of Phang's *liability* for breach of his fiduciary duties in asking Hooi Loo to join Healthcare. In *Griffin Travel Pte Ltd v Nagender Rao Chilkuri and others* [2014] SGHC 205 ("*Griffin Travel*"), for example, the plaintiff company sued (*inter alia*) its former managing director ("Nagender") for breach of his fiduciary duties which included instructing the Plaintiff's staff (one Piyush) to perform certain accounting and administrative tasks for his own company ("QRS"). The High Court held that Nagender did breach his fiduciary duties in instructing Piyush to perform tasks for QRS (at [333]):

> … A director of a company is not entitled to treat the company's employees as if they were his own, and make use of them for

[265] [62] of Phang's AEIC.

[266] [13] and [30] of Hooi Loo's AEIC.



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> his private benefit. While Nagender's breach in this regard did not cause the Plaintiff any loss, as Piyush himself has admitted that his activities were not done at the expense of his duties to the Plaintiff, this does not mean that it was proper for Nagender to have done so.

167 It should be added that in *Griffin Travel*, in so far as Nagender's use of Piyush's services was concerned, the High Court ultimately declined to make any order for damages to be assessed (or for any other remedy), as the plaintiff failed to demonstrate that the breach in question had caused it any loss (at [418(a)].

***The applicable legal principles***

168 In any event, in respect of the question of his liability for breach of fiduciary duties in getting Hooi Loo involved in Healthcare, what Phang actually pleaded was that it had been done with Corporation's consent and/or knowledge[267]. I have earlier alluded to the CA's judgment in *Scintronix* ([153] *supra*), where it noted that as a matter of general principle in company law, either the "informal assent of all the directors of a company" or the "unanimous, or at the very least majority agreement of the shareholders" [emphasis in original omitted] would suffice to release a director from his obligations to the company. In *Innovative Corp Pte Ltd v Ow Chun Ming and another* [2020] 3 SLR 943, the High Court cited the principles articulated by the CA in *Scintronix* when it held (at [101]) that –

> An informal assent of all the shareholders may be sufficient to effectively ratify a director's breach of his fiduciary duties. The proprietary interests of shareholders entitle them as a general body to be regarded as the company when questions of the duties of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no

[267] [29(f)] of Phang's Defence and Counterclaim (Amendment No. 3).



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> challenge to the validity of what the directors have done: *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others and other appeals* [2013] 1 SLR 374 at [45] citing Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 at 730.

169 Corporation has not pleaded, nor has it sought to show, that anything in its articles of association required the release of directors' liability to be effected through any specific means or any formal process. Phang and Henry were the only shareholders of Corporation from its incorporation until sometime in 2018 when Henry gave his parents 10% of his shares (leaving himself still holding 55% of the shares in the company[268]). As such, the informal assent of Phang and Henry would be sufficient to ratify or authorise the former's actions in asking Hooi Loo to join Healthcare as a director. It was not disputed that Phang did not seek Henry's express approval for Hooi Loo to get involved in Healthcare. However, both Phang and Hooi Loo asserted that given the transparent manner in which they both operated in relation to Healthcare and given the many (and multi-faceted) interactions between Healthcare and Corporation, Henry would have been well aware of Hooi Loo's involvement in the former entity.

***Henry's knowledge – and consent***

170 Having considered the evidence available, I accepted this assertion. Firstly, as I have observed earlier, Phang and Hooi Loo never attempted to conceal the existence of Healthcare and their involvement in it from Corporation and its various personnel. Hooi Loo testified, for example, that she would travel from Malaysia to Singapore to attend the Corporation sales meetings which

[268] [4] of Henry's AEIC. The copy of Corporation's ACRA business profile exhibited at p 86 of Henry's AEIC shows that as at 18 May 2018, Henry still held 65% of the shares in Corporation, with Phang holding the other 35%.



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were held bi-annually or annually; and that at these sales meetings, apart from updating on the sales of Kimberly-Clark products by the Malaysian branch office, she would also speak about the products sold by Healthcare. Whilst Corporation produced another sales staff (Lee Sze Ling) who claimed that she could not recollect seeing Hooi Loo at these sales meetings[269], Hooi Loo's evidence was corroborated by Lynnette. Lynnette (who had joined Corporation in 2004[270]) gave evidence that at these Corporation sales meetings, which all Corporation sales staff were required to attend, Phang and Hooi Loo would – apart from updating on the sales of Kimberly-Clark products by the Malaysian branch office – openly talk about the sales of Dentium and Coeur products by Healthcare[271]. These updates on Healthcare's sales of Dentium and Coeur products would have started sometime in 2007 for Dentium products and sometime in 2010 for Coeur products (based on Phang's evidence as to when Healthcare commenced distributing Dentium and Coeur products[272]). According to Lynnette, "[a]s Henry was the one who called for these sales meetings, he would invariably attend these meetings"[273].

171 Weighing the evidence, therefore, I found it more probable than not that Henry would have attended these Corporation sales meetings, that he would have been privy to statements or comments made by Hooi Loo about Healthcare's sales, and that he would therefore have been aware that she was involved in the Malaysian company that Phang had set up.

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[269] [13] of Lee Sze Ling's AEIC.

[270] [3] of Lynnette's AEIC.

[271] [21]-[23] of Lynnette's AEIC.

[272] [64]-[65] and [69(b)] of Phang's AEIC.

[273] [22] of Lynnette's AEIC.



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172 In this connection, I noted that in cross-examination, *Henry did not actually deny being aware that Hooi Loo was involved in the sale of Dentium and Coeur products in Malaysia – but he claimed that he had "[a]ll along" believed her to be doing so on behalf of Corporation*[274]. Having reviewed the evidence, I did not find Henry's protestations of ignorance at all credible. I found that he would have been aware – at least from early 2006 – that Corporation's Malaysian branch office only dealt in Kimberly-Clark products. It was not disputed that he was personally involved – together with Phang – in appealing to Kimberly-Clark against its decision to terminate Corporation's distributorship rights to its respiratory products in Malaysia. Indeed, according to Phang, Henry was the one who had suggested making the appeal to Clara's boss Mr Goh; and it was not disputed that Henry was present together with Phang at the meeting in Kuala Lumpur in February 2006 with Mr Goh[275]. In cross-examination, Henry also admitted that he was aware he had not signed any distributorship agreements for the distribution by Corporation of Dentium and Coeur products *in Malaysia*[276]. In the circumstances, I did not believe that Henry would have thought references by Phang and/or Hooi Loo to the sales of Dentium and Coeur products in Malaysia were references to sales *by Corporation's Malaysian branch office*.

173 For the same reasons, in respect of Phang's presentation at Corporation's tenth anniversary celebration in 2009, even assuming Phang did not expressly mention the name "Healthcare" in his presentation, I did not believe that Henry

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[274] See transcript of 25 February 2020 at p 74 line 14 to p 75 line 8.

[275] [53] of Phang's AEIC and [16] of Hooi Loo's AEIC.

[276] See transcript of 25 February 2020 at p 75 lines 9-12.



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would have thought Dentium products were being sold by the Malaysian branch office[277].

174 In addition, in the financial statements which Jasmine forwarded to Henry between 2008 and 2017, not only was Healthcare's name listed under trade receivables, Hooi Loo's name also appeared in its contact details in some of these financial statements[278]. Again, I did not find it believable that Henry could have failed to notice this, considering that these financial statements were being sent to him on a monthly basis over a good number of years.

175 For the reasons stated above, I was satisfied that Henry would have known of Hooi Loo's involvement in Healthcare at the very latest from 2009 (the year of the presentation at Corporaiton's tenth anniversary celebrations). In this connection, there appeared to be the suggestion at some points that Henry would never have knowingly consented to Hooi Loo being involved in Healthcare – Phang's company – when Corporation was paying her salary. In my view, such a suggestion disregarded the fact that up until the point when their relationship started seriously to deteriorate around 2016 or so, Henry and Phang appeared to have adopted a fairly relaxed attitude of *laissez-faire* towards each other. Thus, for example, Henry was able to get his parents appointed to the Corporation board in 2005, without any objections from Phang[279]; and despite there being no evidence of his parents having played any role in running Corporation's business operations (Henry himself called them "non-executive"

[277] See transcript of 25 February 2020 at p 112 lines 9-19.

[278] See, *eg*, exhibit D1.

[279] [10] and p 85 of Henry's AEIC.



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directors[280]), Phang had evidently been agreeable to their receiving bonus payments[281]. Indeed, it was interesting that the appointment of Henry's parents as Corporation directors – and the control this gave Henry over the board – came about not long after he and Phang had in 2004 agreed to Phang exploring the Malaysian market with his own Sdn Bhd. As another example, whilst Henry and Phang disagreed over whether Henry had expressly sought Phang's consent prior to setting up Absolmed, it was clear that both on Henry's telling and on Phang's, Henry's actions in setting up his own corporate vehicle in Malaysia to launch the Sonosite machines met with no resistance from Phang.

176 In other words, there appeared to have been a degree of informal give-and-take between the two men, at least up until 2016. I did not find it inconceivable or anomalous, therefore, that Henry could have assented to Hooi Loo's involvement in Healthcare after becoming aware of it in 2009 at the very latest. Given that Henry and Phang were the only shareholders of Corporation at the material time, it followed from Henry's assent that Phang's conduct in asking Hooi Loo to join Healthcare was validly ratified or authorised by all the shareholders of Corporation.

### Whether Phang breached his fiduciary duties to Corporation in making use of its Malaysian office premises

177 In its amended statement of claim, although it was pleaded that Healthcare had used the office premises of Corporation's Malaysian branch office without the latter's consent[282], Corporation oddly did not plead this

[280] [10] of Henry's AEIC.

[281] See transcript of 26 February 2020 at p 118 line 8 to p 122 line 7.

[282] [27(8)] of Corporation's Statement of Claim (Amendment No. 2).



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alleged use of its Malaysian office premises under the particulars of Phang's alleged breaches of fiduciary duties[283]. However, as counsel cross-examined Phang at some length about the alleged use of the premises of the Malaysian branch office[284], I address this matter as well.

178 It was suggested in cross-examination that Phang had breached his duty to act in Corporation's best interests, first by having Healthcare occupy the said office premises rent-free, and later by arranging for Corporation to pay a higher rent so as to enable Healthcare to negotiate a lower rent for its own unit. Unfortunately, there appeared to be considerable confusion on Corporation's part as to the facts it was seeking to establish.

179 In his AEIC, Phang had stated that while Healthcare shared "the same office address" as Corporation, there were "2 rooms at the address and the room used by the Branch Office was paid for by [Corporation] while the room used by Healthcare was paid for by Healthcare"[285]. He did not specify the timeframe in question in his AEIC. However, the earliest tenancy agreement which Healthcare produced at trial in respect of its own office unit was an agreement dated 18 December 2011 for a tenancy starting on 1 January 2012. This tenancy related to suite 12 in Weini Business Centre where Corporation also rented a unit. Based on the documentation produced at trial, Phang agreed that Healthcare must only have started renting its own room in Weini Business Centre from 1 January 2012[286].

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[283] [25A] of Corporation's Statement of Claim (Amendment No. 2).

[284] See, *eg*, transcript of 9 March 2020 at p 119 line 13 to p 141 line 23.

[285] [60] of Phang's AEIC.

[286] See transcript of 9 March 2020 at p 126 line 14 to p 128 line 6.



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180 At the same time, however, it should be remembered that Healthcare was dormant between 2004 and 2006. This was not denied by Corporation. In addition, there was documentary evidence available which showed that from 1 April 2010, Healthcare had rented storage premises at another building known as 11/2 Terrace Factory, paying first RM600 a month up until March 2013 and then RM1,100 a month after March 2013[287]. This documentary evidence was not highlighted by Corporation's counsel during its cross-examination of Phang. I found this documentary evidence interesting, because Phang's evidence – which was not refuted – was that between 2007 and end-2009, Healthcare was only dealing with Medifoam wound care dressings, Dentium dental implants and Confident Care patient cleansing wipes[288]. There was no evidence adduced to establish that Phang and Hooi Loo stored stocks of these products within the premises of Corporation's Malaysian office. The rental of the storage unit at 11/2 Terrace Factory on 1 April 2010 appeared to have come about after Healthcare took on a series of distributorships involving products such as chemicals and tubings, starting with Coeur CT scan tubings in January 2010 and continuing with the addition of Syntech chemicals in March 2010[289]. As for Hooi Loo's presence in Corporation's Malaysian office between 2007 and 2011, she would have needed to be in the office in any event to carry out the work she did as Corporation's Malaysian product specialist. Karen did not join Healthcare until 5 June 2012[290]. No evidence was adduced as to what other staff (if any) Healthcare employed prior to Karen joining the company and/or when

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[287] See transcript of 9 March 2020 at p 142 line 16 to p 145 line 16; also Tab 10 of the 3rd Defendant's Supplementary Bundle of Documents.

[288] [64]-[69] of Phang's AEIC.

[289] [69] of Phang's AEIC.

[290] See transcript of 11 March 2020 at p 59 line 25 to p 60 line 2.



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the other staff (if any) joined Healthcare. I should add that Corporation did not dispute it had access to all the information on Phang's laptop and mobile phone, which it seized from him on 24 August 2018: as such, I would have expected Corporation to produce clear evidence of Healthcare's rent-free use of its Malaysian office premises – for example, as storage premises – if it had such evidence. It did not produce such evidence.

181 In any event, even assuming for the sake of argument that Corporation could prove rent-free use by Healthcare of the Malaysian office unit between 2007 and 2011, its case against Phang could not stop there. Corporation bore the burden of proving both Phang's liability for the alleged breaches of duties *and* the *quantum of the loss or damage* it claimed to have suffered as a result of such breaches (per the High Court in *Smile Inc (HC)* ([158] *supra* at [7]–[8])).

182 Regrettably, Corporation did not plead in its amended statement of claim the quantum of loss or damage that it purportedly suffered as a result of the rent-free use of its Malaysian office unit between 2007 and 2011. Even more regrettably, there was nothing in Henry's AEIC to explain how such loss or damage should be quantified. Nor was there any testimony adduced from Corporation's witnesses on how such loss or damage should be quantified. In his AEIC, Henry made the brief statement that "the expenses incurred by [Healthcare] and [Hooi Loo], in the operations of [Healthcare's] office premises in Kuala Lumpur *from 2004 to 2010/2011* were passed on to [Corporation] to bear, in circumstances, where [Corporation] had no interests in [Healthcare]"[291]. On the basis of this one-liner, it would not have been appropriate to quantify the purported loss or damage as being the entire sum of rental paid by Corporation

[291] [123] of Henry's AEIC.



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for the said unit between 2007 and 2011, because the Malaysian branch office *did* occupy and use the said unit throughout that period. Nor would it have been appropriate to attempt some sort of apportionment of the rental paid by Corporation during the said period: not only was there a total absence of any evidence which might have supported such an exercise, this was not even something suggested by Henry or any of Corporation's other witnesses. In short, there was no evidence led by Corporation to prove the quantum of loss or damage resulting to it from Healthcare's rent-free use of its Malaysian office unit. Even assuming liability to be established on Phang's part, Corporation failed to prove the loss or damage purportedly resulting to it (see, in this connection, *Griffin Travel* ([166] *supra*) at [418(a)]).

183 Next, it was suggested that Phang arranged for the Malaysian branch office to move to a larger room in the same building on 18 June 2009 even though by then, the branch office had lost the distributorship rights to Kimberly-Clark's respiratory products: and it was further suggested that he did so in order to enable Healthcare to use this larger room as its "own stock room"[292]. It was also suggested that Phang deliberately allowed Corporation to continue incurring higher rent for a larger room so that he could use the fact that Corporation was renting a larger room to negotiate a lower rent for Healthcare's own unit[293].

184 I found these suggestions to be entirely without merit. Documentary evidence produced at trial established that from 1 April 2010, Healthcare had rented storage premises at another building known as 11/2 Terrace Factory,

[292] See transcript of 9 March 2020 at p 131 line 16 to p 133 line 10.

[293] See transcript of 9 March 2020 at p 139 line 7 to p 141 line 23.



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paying first RM600 a month up until March 2013 and then RM1,100 a month after March 2013[294]. If Phang had really hatched a scheme for Corporation to rent a larger unit so as to use that larger unit as Healthcare's "stock room", it made no sense for Healthcare to pay for a separate set of storage premises.

185 As for the suggestion that Phang had allowed Corporation to continue incurring higher rent for a larger room so as to use that fact to negotiate a lower rent for Healthcare's unit, this appeared to be pure speculation. No evidence at all was adduced to demonstrate that the rental paid by Corporation played any part in rental negotiations for Healthcare's own unit. Furthermore, from at least 1 January 2012 onwards, Healthcare had started paying RM500 for its own room at the Weini Business Centre, *on top of* the RM600 (later RM1,100) it was paying for storage premises at 11/2 Terrace Factory. It made no sense that Phang should have been willing to incur these expenses if the intention all along was to freeload on Corporation and to minimise Healthcare's rental outlay.

186 For the reasons explained above, I rejected the suggestion that Phang breached his fiduciary duties by engineering Corporation's move to a larger office for his own purposes.

**Whether Phang breached his fiduciary duties to Corporation in setting up and operating Prius**

187 As to the setting up of Prius by Phang, in the first place I did not agree that his doing so constituted failure to act in Corporation's best interests or that it put him in a position of conflict of interests *vis-à-vis* his duties as a director of Corporation. Phang's evidence was that he set up Prius as a side project

[294] See transcript of 9 March 2020 at p 142 line 16 to p 145 line 16; also Tab 10 of the 3rd Defendant's Supplementary Bundle of Documents.



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together with Lynnette to test the market in travel-sized hand sanitisers. Indeed, to elaborate a little more: from the delivery orders exhibited in Henry's AEIC, these were scented travel-sized hand sanitisers, each with a recommended retail price of $2.90[295]. I accepted Phang's evidence that these could not by any stretch be regarded as "medical and healthcare" products of the sort distributed by Corporation. This was relevant because according to the "ground rules" agreed between Henry and Phang, they were to bring up to each other business opportunities arising from the medical and healthcare field – but where the business opportunity in question was *not* from this field, they were free to pursue the opportunity independently. Phang alluded to this understanding in his testimony[296]; and as I observed earlier, this was also the position clearly stated by Henry himself[297]:

> We both agreed, if there were business opportunities *in the medical and healthcare industry*, made available to either one of us, it would be disclosed and offered to each other. If not accepted, we would be free to pursue such interests independently. *We were free to pursue our independent interests in non-related businesses*. [emphasis added]

188 Given the above understanding or agreement between the two shareholders, it did not appear to me there was any breach of his fiduciary duties by Phang in setting up Prius to test the market in scented travel-sized hand sanitisers.

189 Further, and in any event, Corporation failed to adduce any evidence to prove the quantum of loss or damage it purportedly suffered as a result of this breach. The four delivery orders exhibited in Henry's AEIC merely showed

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[295] pp 858-861 of Henry's AEIC.

[296] See transcript of 6 March 2020 at p 124 lines 5-9.

[297] [21] of Henry's AEIC.



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that Prius had apparently delivered some hand sanitisers to four retail outlets, but they did not show whether Prius was paid for these hand sanitisers or what profit (if any) it made. Phang's evidence – which went unrebutted – was that Prius only managed to sell fewer than five of the hand sanitisers at the retail outlets[298]. In any event, the burden of proof being on Corporation, it was up to Corporation to advance a cogent case as to what the measure of its damages should be as a result of the breach, and to produce sufficient evidence to prove those damages. Regrettably, this was not done.

190 Although Lynnette's involvement in Prius was brought up in the amended statement of claim[299] and in Henry's AEIC[300], Corporation did not actually plead any breach of duties on Phang's part in relation to Lynnette's involvement. I should add that Henry's allegation in his AEIC that Lynnette had joined Prius as a "manager" and that Phang had "used [her] services" to "manage his business at Prius" appeared to be baseless anyway. Lynnette did not take up employment as a "manager" at Prius: she was a 40% shareholder in Prius, the other 60% shareholding being owned by Phang. This was plain from the ACRA business profile on Prius which Henry himself exhibited in his AEIC[301]: in relation to Lynnette, it was stated in the ACRA profile that her position in Prius was that of a shareholder. In cross-examination, Henry conceded[302] that he had read the description of her occupation in the ACRA

[298] [112] of Phang's AEIC.

[299] [24(2)] of Corporation's Statement of Claim (Amendment No. 2).

[300] [59]-[60] of Henry's AEIC.

[301] p 846 of Henry's AEIC.

[302] See transcript of 25 February 2020 at p 139 line 10 to p 141 line 7.



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document – "manager" (which was the position she occupied in Corporation[303]) – and mistaken it for a description of her position within Prius. This seemed to me to bespeak a certain cavalier attitude on Corporation's part towards the evidence presented on its behalf. I will come back to this point later on in this judgment.

**Whether Phang breached his fiduciary duties to Corporation in setting up and operating Primuz**

191 I address next the setting up of Primuz by Phang. In cross-examination, Phang was forthright in admitting that he had set up Primuz in February 2017 because he was angry with Henry at the time (their relationship having started its downward slide in 2016), and that he had been looking for products to sell through Primuz[304]. In his AEIC, Phang stated that Primuz had tried selling WaterJel R1R2 creams between 2017 and 2018, but had only managed gross sales of $1,800[305]. Phang stated that there was no conflict of interests *vis-à-vis* Corporation in his having Primuz sell these creams because they were "therapeutic or cosmetic related product[s]" and not medical or healthcare products[306].

192 In this respect, there was no evidence adduced to refute Phang's assertion that these creams were "therapeutic or cosmetic related product[s]" and not medical or healthcare products. There was no evidence adduced by Corporation to show that it sold such creams – or other similar creams. This

[303] [59] of Henry's AEIC.

[304] See transcript of 6 March 2020 at p 122 lines 7-9.

[305] [113]-[115] of Phang's AEIC.

[306] [84] of Phang's and Healthcare's reply closing submissions.



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was relevant because Henry's own evidence as to the "ground rules" agreed between him and Phang from the outset was that they were only required to disclose and to offer to each other "business opportunities in the medical and healthcare industry" but that they were otherwise free to pursue independently their own interests in businesses not related to the medical and healthcare industry. It being Corporation's case that Phang breached his fiduciary duties by setting up Primuz without disclosing it to the board, Corporation bore the burden of proving that Primuz's business fell outside of the "ground rules" agreed between Henry and Phang. I was not satisfied that this burden was discharged.

193 However, even assuming for the sake of argument that the WaterJel creams sold by Primuz constituted a "business opportunit[y] in the medical and healthcare industry" and that Phang was thus liable for breach of his fiduciary duty to Corporation, once again Corporation's case could not stop there. Corporation was required to bear the burden of proving both Phang's liability for the alleged breach of duty *and* the *quantum of the loss or damage* suffered as a result of such breach. Once again, Corporation did not plead in its amended statement of claim the quantum of loss or damage purportedly suffered, nor was any evidence put forward to prove such loss or damage.

194 Corporation's allegations about the Alliqua mist ultrasound healing therapy product, the GloTech platelet-rich plasma product, and the Nanoom AED product suffered from the same problem. In respect of the first two products, all that was established at trial was that Phang's wife, Susan Chia, had contacted the suppliers to express interest on Primuz's behalf in distributing these products. As for the Nanoom AED product, there was an exchange of messages between Phang and Ming Hok about transferring the distributorship rights from Corporation to Primuz. Importantly, though, Primuz never acquired



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the distributorship rights for the Alliqua and GloTech products; and the distributorship rights for the Nanoom AED product were never transferred to Primuz. As such, even assuming for the sake of argument Phang had breached his fiduciary duty to Corporation by setting up Primuz and using it to explore distribution opportunities, no loss or damage was suffered by Corporation as a result. In cross-examination, Henry was obliged to concede that he had no evidence of any loss suffered by Corporation in relation to these products[307].

195 Finally, I observed that in his AEIC, Henry made it a point to mention that Primuz had registered two CAIR LGL products with the Health Sciences Authority ("HSA") in Singapore[308]. Henry did not state the date of these registrations, nor did he exhibit the relevant documentation. The impression given was that these registrations were done by Primuz while Phang was still a director of Corporation, and that they too were acts by Phang which amounted to breaches of his fiduciary duties. That this was the impression *intended* was apparent from the fact that the reference to the registrations was followed immediately by statements about Primuz competing "in the same market as [Corporation]" – and about how it was "unfair and unacceptable" for Phang to set up Primuz and to divert "suppliers and business" to Primuz whilst still a director of Corporation. This was disingenuous and misleading, because the HSA documentation (eventually produced by Phang at trial) showed that the registration of the CAIR LGL products was done on 29 January 2019[309], whereas Phang's directorship and employment in Corporation had been terminated since 24 August 2018.

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[307] See transcript of 26 February 2020 at p 23 line 8 to p 25 line 11.

[308] [116] of Henry's AEIC.

[309] Exhibit D3.



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196 In this connection, I noted that in his AEIC, Henry's position was that he had "ascertained" Primuz's registration of the CAIR LGL products[310]. When he was shown the HSA registration documents in court, he admitted initially that these were what he was talking about when he spoke about having "ascertained" Primuz's registration[311]. However, when it was pointed out to him that the date of the registrations by Primuz would have been obvious from these documents, he suddenly began to backpedal, eventually claiming that he could not remember if he had in fact checked the HSA registrations[312]. This appeared to be yet another instance of a somewhat cavalier attitude on Corporation's part towards the evidence presented on its behalf, which I will address elsewhere in this judgment.

**Whether Phang breached his fiduciary duties by engaging in self-dealing**

197 In the closing submissions filed on behalf of Corporation, it was contended[313] that one of Phang's breaches of fiduciary duties was engaging in self-dealing by arranging for Healthcare to sell Coeur products to Corporation at a 15% mark-up in price.

198 This alleged act of self-dealing was not particularised in the amended statement of claim as one of Phang's breaches of fiduciary duties[314]. Oddly, in one of the tables attached to the amended statement of claim, this allegation of

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[310] [116] of Henry's AEIC.

[311] See transcript of 26 February 2020 at p 17 line 1 to p 18 line 6.

[312] See transcript of 26 February 2020 at p 18 line 7 to p 22 line 15.

[313] [90]-[93] of Corporation's closing submissions.

[314] [25A] of Corporation's Statement of Claim (Amendment No. 2).



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self-dealing was included as one of the "instances of conspiracy" by the three defendants to defraud Corporation[315]. Nevertheless, since counsel has dealt with this allegation in closing submissions on the basis that it constituted a breach of Phang's fiduciary duties, I will deal with it at this juncture.

199 In brief, the allegation that the 15% mark-up constituted self-dealing by Phang was premised on the assumption that this figure represented a profit earned by Healthcare. Based on the evidence available, I did not find this to be the case. In cross-examination, Hooi Loo testified[316] that this 15% did not represent a profit for Healthcare "… [b]ecause this one is to cover the charges for the freight and all these administrative charges, and … we also need to keep stock". Hooi Loo's testimony corroborated Phang's.

200 Hooi Loo's evidence on this issue was not refuted. Additionally, Walter – who was privy to the inter-company trade between Corporation and Healthcare – testified[317] that a mark-up of 10% to 15% was applied "both ways" in the course of this inter-company trade: just as Healthcare charged such a mark-up to cover freight and other administrative costs when selling products to Corporation, Corporation too would charge a similar mark-up when it sold products to Healthcare. Walter testified that conversely, in sales by Corporation to other customers, it would apply a much higher mark-up of 50% to 55%. Water's evidence in this respect was also not refuted. In fact, it should be pointed out that in cross-examination, Henry admitted – after much prevarication – that he had "probably" heard from Walter about Corporation

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[315] Table 7 attached to Corporation's Statement of Claim (Amendment No. 2).

[316] See transcript of 10 March 2020 at p 146 lines 8-19.

[317] See transcript of 28 February 2020 at p 138 line 3 to p 139 line 6.



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charging a mark-up on sales to Healthcare (although he insisted he could not remember whether the mark-up was 15% or not)[318].

201 In the result, I did not find that Corporation was able to prove the claim of self-dealing against Phang.

**Time bar**

202 Further and in the alternative, Phang asserted that Corporation's causes of action against him were time-barred under the Limitation Act. I should state firstly that the defence of time bar would not be relevant to the claim relating to Healthcare's acquisition of the distributorship for Halyard feeding tubes, nor to the claim relating to the setting up of Primuz. This was because Healthcare only acquired the Halyard distributorship in July 2017, whereas the writ in this action was filed on 8 August 2018. Primuz was incorporated on 9 February 2017[319]. Whilst the defence of time bar would not apply to these two claims, I have already explained why I found Corporation to have failed to prove these claims[320].

203 In invoking the defence of time bar, Phang's pleadings referred, *inter alia*, to s 24A of the Limitation Act. I did not think s 24A was applicable in the present case. Section 24A applies in cases of latent injuries and damage. This was not a case where Corporation was claiming some sort of latent injury or damage.

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[318] See transcript of 26 February 2020 at p 12 line 1 to p 13 line 16.

[319] p 863 of Henry's AEIC.

[320] See [155]-[163] and [191]-[196] above.



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204 Phang's pleadings also referred to s 6(1)(*a*). Section 6(1)(*a*) applies so as to impose a six-year limitation period on actions founded on a contract or on tort. This would be relevant, for example, to the claims brought by Corporation against Hooi Loo for breach of her employment contract terms.

205 The six-year time bar in s 6(1) also applies to Corporation's equitable claims against Phang for breach of fiduciary duties by virtue of s 6(7): see in this respect the CA's judgment in *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 ("*Dynasty Line*"). In that case, the CA held that the six-year time bar in s 6 applied to the appellant company's equitable claim for breach of fiduciary duties. The CA further noted that the six-year time bar would be lifted pursuant to s 22(1)(*a*) in the case of fraud or a fraudulent breach of trust (at [53]). In *Dynasty Line*, it held that the time bar was lifted pursuant to s 22(1)(*a*), because there had been fraudulent breaches of trust by the respondent directors who had fallen short of the ordinary standards of reasonable and honest people in dealing with the appellant company's property (at [55]–[57]).

206 Although Phang did not specifically mention s 6(7) in his amended defence (which cited s 6(1)), I did not think this precluded me from considering the applicability of s 6(7), because in its amended reply, Corporation pleaded reliance on s 22 and/or s 29 of the Limitation Act[321] and must therefore have been aware of the scope and effect of s 6(7). Section 22 is specifically referenced in s 6(7) which provides:

> **6.**—(7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an

[321] [17] of Corporation's Reply and Defence to Counterclaim of 1st Defendant (Amendment No. 3).



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injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

207 Section 22 provides:

> **22.**—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.
>
> (3) The right of action referred to in subsection (2) shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

208 Section 29 provides:

> **29.**—(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —
>
> (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (*b*) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (*c*) the action is for relief from the consequences of a mistake,



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> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.
>
> (2) Nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which —
>
> > (*a*) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
> >
> > (*b*) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

209 Unfortunately, Corporation's amended reply did not state which limbs of s 22 and/or s 29 were being relied on. In its closing submissions, all that was said was that ss 22 and 29 applied because it was only on 2 February 2018 that Henry had "[come] into knowledge of [Healthcare's] incorporation, [Phang's] and [Hooi Loo's] interests in [Healthcare's] business, breaches of duty, conspiracy to defraud committed by the [three defendants] and dishonest and/or knowing assistance on the part of [Healthcare]"[322].

210 On the facts of this case, I did not think s 22 of the Limitation Act was applicable. In *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 ("*Yong Kheng Leong*"), the CA held (at [51]) that in light of the exceptional nature of the rule that excludes the applicability of the time bar in certain actions, only Class 1 (and not Class 2) constructive trusts

[322] [250] of Corporation's closing submissions.



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would fall within the ambit of s 22. The CA explained the distinction between Class 1 and Class 2 constructive trustees as follows (at [46] and [47]):

> 46 … If a person holds property in the position of a trustee (and there is no doubt that a director is regarded as a trustee over the company's property …) and deals with that property in breach of that trust, he will be a Class 1 constructive trustee; whereas a wrongdoer who fraudulently acquires property over which he had never previously been impressed with any trust obligations, may, by virtue of his fraudulent conduct, be held liable in equity to account as if he were a constructive trustee. But the latter is not a case of someone who had ever in reality been a trustee of that property; and it is only by virtue of equity's reach that such a person is regarded as a Class 2 constructive trustee.
>
> 47 That this is the essence of the distinction can be seen by comparing two English cases. In *J J Harrison* … the claimant was a company, of which the defendant was a director. A property owned by the company was valued at £8m, but in a side letter the valuer said that it may have some development potential that had not been taken into account in the valuation. The side letter was not disclosed to the company, but the director was aware of it. A year later, he bought the property from the company without disclosing the side letter. He subsequently sold it for a profit. More than six years later, the company sued him for an account of the proceeds of sale of the land. His limitation defence failed on the ground that he was regarded as a Class 1 constructive trustee. Whereas, in *Gwembe Valley*, … the defendant shareholder-director of the claimant company owned a majority of the shares in and controlled another company. The defendant arranged for the other company to loan money to the claimant company without disclosing his interest in the other company to the board of the claimant company. It was held that, apart from fraud, the claim would have been time-barred because the defendant's liability to account for the secret profit was not within Class 1. … [T]he difference between *J J Harrison* and *Gwembe Valley* was that the property in *J J Harrison* was trust property that had been acquired by the director from the company at an undervalue; whereas, in *Gwembe Valley*, the defendant's liability arose from his failure to disclose the true rate of exchange he had paid, and not because there was any misappropriation of specific property that belonged to the company …

211 In *Yong Kheng Leong,* the company in question ("Panweld") brought an action for breach of fiduciary duties against its director ("Mr Yong"). Mr Yong



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was found to have wrongfully placed his wife on the company's payroll and authorised salary payments to her for 17 years even though she was never an employee. The CA held (at [48]) that Mr Yong had trustee-like responsibility for Panweld's assets; and that when he disposed of Panweld's assets unlawfully, whether to his wife or to himself through his wife, he was undoubtedly a Class 1 constructive trustee because he had dealt with that property in breach of the trust and confidence that had been placed in him as a director.

212 In the present case, Henry's AEIC did not explain why Phang's conduct made him a Class 1 constructive trustee for the purposes of Corporation's purported reliance on s 22 of the Limitation Act. Nor was there any attempt in Corporation's closing submissions to explain the position. Leaving aside the claim relating to Healthcare's acquisition of the Halyard distributorship and the claim relating to Primuz (for which the causes of action would have accrued at the earliest in 2017), I did not see how any of Corporation's claims against Phang for breach of fiduciary duties could be said to involve the misappropriation of specific assets belonging to it. I did not find any basis, therefore, for Corporation's purported reliance on s 22.

213 As for s 29, as stated earlier, Corporation did not specify in its pleadings which limb(s) of s 29 it was relying on. Nevertheless, since it pleaded, *inter alia*, that Phang was "dishonest and/or fraudulent" in breaching his duties as director and that he did not disclose to Henry the existence and operations of Healthcare, I took it to be referring to ss 29(1)(*a*) and 29(1)(*b*). In its closing submissions, Corporation did not explain the basis for its reliance on s 29: it simply repeated Henry's allegation that he only found out on 2 February 2018 about "[Healthcare's] incorporation, [Phang's] and [Hooi Loo's] interests in [Healthcare's] business, breaches of duty, conspiracy to defraud committed by



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the [three defendants] and dishonest and/or knowing assistance on the part of [Healthcare]"[323].

214 For the reasons set out earlier in this judgment[324], I did not accept that Henry only found out on 2 February 2018 about Healthcare's incorporation, its business, and Phang's and Hooi Loo's interests in it. To reiterate, I was satisfied that Henry was aware of Healthcare's existence, its business and Phang's involvement in it by 2006 at the very least; and that he was aware of Hooi Loo's involvement by 2009 at the very least. In the premises, I did not find any basis for Corporation's purported reliance on s 29.

215 In short, I found that Phang was able to establish – as an alternative defence – that the six-year time bar in s 6 of the Limitation Act applied to Corporation's equitable claims against him for breach of fiduciary duties. As I noted earlier, this time bar would not apply to the claim relating to Healthcare's acquisition of the Halyard distributorship and the claim relating to Primuz – but I have explained why I found that Corporation failed to prove these two claims.

**Acquiescence**

216 Section 32 of the Limitation Act provides that "[n]othing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise". In response to Corporation's claim that he had breached his fiduciary duties as its director by setting up Healthcare as a

[323] [250] of Corporation's closing submissions.

[324] See [142]-[148] and [168]-[176] above.



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competing business, Phang also pleaded in the alternative the defence of acquiescence[325].

217 In *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30, the High Court explained the scope of this defence and the requirements for it to operate (at [112]):

> The defence of acquiescence is described in the following manner in *Halsbury's Laws of England* vol 16 (4th Ed Reissue) at para 924, which was cited by the Court of Appeal in *Genelabs* (*supra*) at [76]:
>
> > The term acquiescence is … properly used where a person having a right and seeing another person about to commit, or in the course of committing an act infringing that right, stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he consents to its being committed; a person so standing-by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as [quiescence] under such circumstances that assent may reasonably [be] inferred from it and is no more than an instance of the law of estoppel by words or conduct …

218 The High Court also noted that while acquiescence was frequently pleaded together with the defence of laches, they were "separate and distinct defences with different consequences" (at [113]–[114] and [117]):

> 114 Thus, laches in its strict sense refers only to delay on the part of the plaintiff coupled with prejudice to the defendant … *[L]aches can only be used as a defence against a claim for equitable relief. Acquiescence on the other hand is premised not on delay, but on the fact that the plaintiff has, by standing by and doing nothing, made certain representations to the defendant in circumstances to found an estoppel, waiver, or abandonment of rights: see Orr v Ford (supra) at 337–338. Unlike laches, the defence of acquiescence is not limited to resisting claims for equitable relief.*

[325] [29(a)] of Phang's Defence and Counterclaim (Amendment No. 3).



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> …
>
> 117 It is an obvious requirement that to succeed on a defence of acquiescence, the acquiescing party must have been aware of the acts he now seeks to complain of because one cannot acquiesce to something he does not know: *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR(R) 369 at [40]; *Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd* [2000] 1 SLR(R) 355 at [27]. …
>
> [emphasis added]

219 In the present case, even if I were to disregard Phang's evidence as to the Agreement he and Henry had, it was clear *from Henry's own evidence* that he (Henry) possessed the following knowledge as at 2006. He knew there existed a Malaysian company called Bluestone Healthcare Sdn Bhd[326]. He knew Bluestone Healthcare Sdn Bhd was very likely involved in the medical or healthcare business[327]. He knew Phang "must be involved" in Bluestone Healthcare Sdn Bhd[328]. It was also clear that Henry acquired the above knowledge in his capacity as a director of Corporation: there could hardly be any question that Jasmine had approached him to bring up the matter of Healthcare – and the payment apparently made by Corporation on Healthcare's behalf – because he was a director of Corporation. Indeed, on Henry's own case, he and Phang were the only two "executive" directors[329] of Corporation as at 2006. In the circumstances, Henry's knowledge of Healthcare's existence, its business, and Phang's involvement in it, must be attributed to Corporation. Directors are agents of the company; and the law may impute to a principal

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[326] See transcript of 25 February 2020 at p 97 line 20 to p 98 line 1.

[327] See transcript of 25 February 2020 at p 98 lines 2-6.

[328] See transcript of 25 February 2020 at p 98 lines 7-16.

[329] As noted earlier, Henry's parents were appointed to the Corporation board in November 2005, but he described them as "non-executive" directors ([10] of his AEIC); and there has been no evidence of their playing any part in managing business operations.



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knowledge relating to the subject matter of the agency which the agent acquires while acting within the scope of his authority: see in this respect the judgment of the High Court in *The "Dolphina"* [2012] 1 SLR 992 at [216] and [217].

220 Despite having known since 2006 about the existence of Healthcare, its business, and Phang's involvement in it, Corporation took no steps over the next 12 years to raise any objections or to injunct Phang from continuing to operate Healthcare's business. Throughout this period, Phang would reasonably have inferred that Henry – and through him, Corporation – were aware of Healthcare: not only had Henry brought it up with him in 2006 in Jasmine's presence, the monthly financial statements which Jasmine sent Henry from at least 2008 until 2017 (which were copied to Phang) specifically listed Healthcare under trade receivables and stated Hooi Loo to be its contact person[330]. For years, Henry also signed off in his capacity as director on Corporation's audited accounts – which accounts clearly listed Healthcare as a related party. In the circumstances, I accepted that when Corporation took no steps to object or put an end to his operating Healthcare's business, Phang would have been induced to believe that Corporation consented to what he was doing; further, that it was on account of this acquiescence that he went on to invest in growing Healthcare's operations (for example, by increasing its paid-up share capital and hiring staff).

221 In short, in relation to Corporation's claim about Phang setting up Healthcare as a competing business, I was satisfied that Phang was able to make out an alternative defence of acquiescence.

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[330] Exhibit D1.



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**Section 391 of the Companies Act**

222 In the above instances where I was prepared to find that Phang's conduct amounted to breach of his fiduciary duties to Corporation, I did not find it necessary to consider the issue of possible relief under s 391 of the Companies Act. This was because in my view, even assuming I had found that Phang was not entitled to relief under s 391 for these instances of breach, Corporation would still fail in its claims against him, firstly, because it was unable to prove the loss or damage purportedly resulting from such breaches; and secondly, because in any event its claims were either time-barred or subject to estoppel by acquiescence.

**Whether Healthcare committed the tort of passing off *vis-à-vis* Corporation**

223 I address next Corporation's claims against Healthcare. I start with the claim of passing off. The elements of a claim of passing off are well known. These were summarised by the CA in *Novelty Pte Ltd v Amanresorts Ltd and another* [2009] 3 SLR(R) 216 ("*Amanresorts*") as follows: firstly, the presence of goodwill; secondly, misrepresentation; and thirdly, damage to goodwill (at [36]–[37]).

224 Regrettably, in its amended statement of claim, Corporation failed to plead these three elements of the claim of passing off and/or the material facts relied on in support of each element. All that was said in the amended statement of claim about its claim of passing off was that Healthcare had "passed off [Healthcare] as associated with [Corporation]"[331]. In Henry's AEIC, there was

[331] [27(7)] of Corporation's Statement of Claim (Amendment No. 2).



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also no attempt to deal with each element of the claim of passing off. Instead, Henry's AEIC focused on attempting to show that Healthcare had caused "confusion" and given "customers and suppliers the misimpression [Healthcare] are [*sic*] connected or associated with [Corporation], that [Healthcare] sells the same products as [Corporation]". Henry claimed that Healthcare created such "misimpression" by ensuring that a Google search on the search term "Bluestone Healthcare Sdn Bhd" would direct the person conducting the search to Corporation's website[332]. Henry cited an e-mail from UKM Hospital dated 11 April 2019 and an e-mail from Halyard representative Jace dated 24 February 2017 as evidence purportedly showing "confusion" on the part of "customers and suppliers". Although goodwill was mentioned in Henry's AEIC, this was only mentioned in vague general terms, and its existence was assumed, not explained, by Henry[333]:

> [Healthcare] leveraged on the goodwill of the 'Bluestone' name. [Corporation's] Malaysian office, was registered on 20.3.2000. Marketing of medical consumables from Halyard in Malaysia was associated with [Corporation's] Malaysian office. Halyard products sold in Malaysia were associated with [Corporation's] Malaysian office, until [Healthcare's] registration in Malaysia on 16.2.2004 using the 'Bluestone' name. [emphasis in original omitted]

225 With respect, the deficient manner in which Corporation pleaded its passing-off claim, the scant evidence provided in Henry's AEIC and the failure to address in any coherent manner each element of the passing-off claim would have been reason enough to reject this claim without more. However, as both defence counsel took the trouble to deal in some detail with the passing-off claim in their closing submissions, I address below the main issues raised.

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[332] [127] of Henry's AEIC.

[333] [139] of Henry's AEIC.



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226 In the first place, goodwill in a passing-off action is not concerned specifically with the get-up (meaning the mark, brand or logo) used by the trader, but rather, is concerned with the trader's business as a whole. Goodwill "describes the state of the trader's relationship with his or her customers": per the CA in *Tuitiongenius* ([152] *supra*) at [81]. Citing its own judgment in *Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading)* [2016] 4 SLR 86, the CA reiterated (at [83]) that "the tort of passing off protects the plaintiff's goodwill in his business and not specifically his right to the exclusive use of a mark, get-up, or logo, as the case may be. The mark, get-up or logo will feature prominently in the analysis because this will usually be the means by which the tort or misrepresentation is committed; but it is not the ends for which the tort exists" [emphasis in original omitted].

227 Bearing in mind the above analysis, Henry's pre-occupation with trying to show the "goodwill of the 'Bluestone' name" – and the alleged association of the said "name" with the business of the Malaysian branch office – was misconceived.

228 Even if I were prepared to hold that there was sufficient evidence of goodwill in the business of the Malaysian branch office in that there was evidence of the revenue it derived from its business (see [85]–[86] of *Tuitiongenius*), it was clear that Corporation could not overcome the evidential hurdle of proving an actionable misrepresentation and damage related to its goodwill.

229 Under the element of misrepresentation, Corporation first had to satisfy the threshold requirement of distinctiveness of its "Bluestone name" or "mark": namely, whether the Bluestone mark was distinctive of the business of its Malaysian branch office. In this respect, there was no evidence adduced by



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Corporation of such distinctiveness. In fact, all that Henry – and another Corporation witness, Lee Jia Shin – focused on emphasising in their AEICs was that there were some potential customers or suppliers who were "confused" about the difference between Corporation and Healthcare[334].

230 Even assuming for the sake of argument that Corporation could satisfy the threshold requirement of distinctiveness and establish a misrepresentation by Healthcare that had caused confusion between its business and Healthcare's, such misrepresentation would not *per se* be actionable under the law of passing off unless it had caused (or was likely to cause) damage to Corporation's goodwill (per the CA in *Amanresorts* ([223] *supra*) at [94]). As the CA noted in *Amanresorts* (at [97]–[98]):

> 97 There are two primary and very well-established means by which goodwill can be damaged, namely, by 'blurring' and by 'tarnishment'. Blurring occurs when the plaintiff's get-up, instead of being indicative of only the plaintiff's goods, services or business, also becomes indicative of the defendant's goods, services or business. While customers may still be drawn by the attractive force of the plaintiff's get-up, they may be drawn to the business, goods or services of the defendant instead of those of the plaintiff. In other words, the goodwill attached to the plaintiff's business, goods or services becomes spread out over business, goods or services which are not the plaintiff's. This phenomenon occurs only when the business, goods or services of the plaintiff and those of the defendant are in competition with or are at least substitutes for each other. The damage manifests itself in sales being diverted from the plaintiff to the defendant.
>
> 98 Tarnishment occurs when the business, goods or services of the defendant are of a worse quality than those of the plaintiff or have some other undesirable characteristic. Customers think that the plaintiff is now the source of such poor quality or undesirable business, goods or services. The goodwill previously attached to the plaintiff's business, goods or services loses its attractive quality and may even become a

[334] [137]-[141] of Henry's AEIC and [7]-[8] of Lee Jia Shin's AEIC.



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> liability, driving away custom rather than attracting it. Where it is alleged that goodwill has been damaged by tarnishment, there is no need for the plaintiff's business, goods or services and those of the defendant to be in competition with each other (*contra* the position where damage to goodwill by blurring is concerned). The plaintiff and the defendant can be engaged in entirely different fields of business so long as it is shown that the poor quality or undesirability of the defendant's business, goods or services rebounds on the plaintiff.

231 In the present case, regrettably, Corporation did not plead what damage it claimed to have suffered to its goodwill. Nor did Henry – or any other witness – give evidence identifying and quantifying any alleged damage to Corporation's goodwill. While there was an attempt in Henry's and Lee Jia Shin's AEICs to assert that some potential customers or suppliers were "confused" about the difference between Corporation and Healthcare, this fell far short of proving that the goodwill attached to the business of the Malaysian branch office had become "spread out" over Healthcare's business. There was also no evidence to establish in any event the quantity of sales allegedly diverted from the Malaysian branch office to Healthcare as a result of any alleged "blurring".

232 I should add that the manner in which Corporation dealt with Healthcare's alleged acts of "passing off" raised even more questions about the credibility of its claim. It will be recalled that one of the main things which Corporation objected to and which it relied on as evidence of the passing off was the alleged results from a Google search on "Bluestone Healthcare Sdn Bhd": according to Corporation, a party carrying out such a search would be directed to Corporation's website. One would have thought, therefore, that by the time of the trial, Corporation would have taken the necessary steps to provide information on its website to alert the public to the fact that it was unrelated to Healthcare and that it had its own branch office in Malaysia. This



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was all the more so considering that – according to David – Corporation had made revisions to its website around end-2018 or early 2019[335]. Yet, oddly, by the time of the trial before me, no steps had been taken by Corporation – not even to furnish the details of its Malaysian branch office on its website. To my mind, this apparent apathy cast more doubt on Corporation's claims about goodwill and about the damage supposedly caused to that goodwill by Healthcare's act of "passing off".

233 For the above reasons, I found that Corporation failed to prove its claim of passing off against Healthcare.

**Whether Healthcare should be held liable for dishonest and/or knowing assistance and/or receipt**

234 The other main claim brought against Healthcare by Corporation was that it had "acted in *dishonest and/or knowing assistance*" [emphasis added] in relation to Phang's alleged breaches of duties[336]. Unfortunately, in this connection, there was considerable confusion as to the precise nature of its claim, because it also pleaded in its amended statement of claim that Healthcare was "liable to account" as a "constructive trustee for such profits as were made by [Healthcare] and/or suffered by [Corporation], on the grounds of knowing assistance *and receipt*"[337] [emphasis added].

235 Dishonest assistance and knowing receipt are two separate torts with differently defined elements. In *George Raymond Zage III and another v Ho*

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[335] See transcript of 28 February 2020 at p 32 lines 23-25.

[336] [27] of Corporation's Statement of Claim (Amendment No. 2).

[337] [28] of Corporation's Statement of Claim (Amendment No. 2).



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*Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage*"), the CA held (at [22]) that for a defendant to be liable for dishonest assistance, he had to have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them. The CA stressed that in this context, dishonesty described and qualified action, not mere passive receipt; and that the threshold of knowledge for dishonest assistance and knowing receipt, though very similar, still remained conceptually distinct (at [43]). For liability in knowing receipt, the recipient's state of knowledge had to be such as to make it unconscionable for him to retain the benefit of the receipt.

236 In its amended statement of claim, Corporation appeared to conflate these two separate torts, and also failed in any event to plead how the elements of each tort were made out in the present case.

237 The elements of a claim in dishonest assistance are: the existence of a trust; a breach of that trust; assistance rendered by the third party towards the breach; and a finding that the assistance rendered by the third party was dishonest: *George Raymond Zage* at [20]. In the present case, the particulars which Corporation pleaded of Healthcare's dishonest assistance (referred to as "knowing assistance" in the statement of claim)[338] related to the alleged diversion of business and/or business opportunities; the alleged use of Corporation's resources (in the form of Phang's and Hooi Loo's services and the Malaysian office premises); and the alleged passing off of Healthcare as being "associated with" Corporation. I have already dealt with the allegation of passing off at [223]–[233]. As for the other allegations, in light of my findings

[338] [27(1)]-[27(9)] of Corporation's Statement of Claim (Amendment No. 2).



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on the claims of various breaches made against Phang, it followed that since Phang was not liable for those breaches, Healthcare could not be liable for knowingly assisting any such breaches.

238 As for a claim in knowing receipt, the elements which have to be established are: a disposal of the plaintiff's assets in breach of fiduciary duty; the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty: *George Raymond Zage* at [23]. As counsel for Phang and Healthcare pointed out in closing submissions, the allusion to "knowing receipt" in Corporation's statement of claim appeared to be based on a misapprehension of the law: the statement of claim said nothing about any assets of Corporation which were traceable to Healthcare as a result of alleged breaches by Phang. Nor was any evidence adduced of such assets.

239 For the above reasons, I found that Corporation failed to prove its claims of "knowing assistance and receipt" against Healthcare.

**Time bar and acquiescence**

240 Further and in the alternative, Healthcare also pleaded the defence of time bar in relation to the various claims made by Corporation against it[339]. The claims against Healthcare were all claims founded on tort, to which s 6(1)(*a*) of the Limitation Act would be applicable. For the reasons set out above at [202]–[215], I found this alternative defence of time bar to be made out.

[339] [20]-[21] of Healthcare's Defence (Amendment No. 3).



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241 In addition, in respect of the claim of passing off, Healthcare also pleaded in the alternative estoppel by acquiescence[340], on the basis that Corporation would have known since 2004 or at the latest by 2009 of Healthcare being incorporated and trading under the name "Bluestone Healthcare", and that it nevertheless conducted itself in such manner as to lead Healthcare to believe it consented to the latter trading under the name "Bluestone Healthcare". In light of the reasoning set out above at [216]–[221], I found this alternative defence to be made out.

**Whether Hooi Loo breached the terms of her employment contract**

242 I address next the breaches alleged against Hooi Loo. In gist, Hooi Loo was said to have breached her employment contract by causing or allowing Healthcare to pass itself off as being "associated with [Corporation]"[341]. She was also said to have breached her employment contract by joining Healthcare as a director whilst employed by Corporation, by causing Healthcare to compete with Corporation's business, and by making "secret profits" from Healthcare's business[342].

243 In light of the findings I made earlier on Corporation's claim against Healthcare for passing off[343], the claim that Hooi Loo had caused or allowed Healthcare to pass itself off as being "associated with" Corporation could not be sustained.

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[340] [13] of Healthcare's Defence (Amendment No. 3).

[341] [19(1)] of Corporation's Statement of Claim (Amendment No. 2).

[342] [19(1)] of Corporation's Statement of Claim (Amendment No. 2).

[343] See [223]-[233] above.



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244 I address next the allegations that Hooi Loo had breached her employment contract by joining Healthcare as a director whilst employed by Corporation, by causing Healthcare to compete with Corporation's business, and by making "secret profits" from Healthcare's business. At the outset, it should be made clear that Hooi Loo accepted that there was an implied term in her employment contract that she would serve her employer (Corporation) with good faith and fidelity, and that she would also use reasonable care and skill in the performance of her duties pursuant to the employment contract. That this implied duty of good faith and fidelity is owed by an employee to an employer is trite law: per the CA in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [193].

245 As counsel for Hooi Loo pointed out, however, there is a distinction between these duties of good faith and fiduciary duties. The CA made this point in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 ("*Smile Inc*" at [52], citing, *inter alia*, the following passages from the English High Court's decision in *Nottingham University v Fishel* [2000] IRLR 471):

> 90 [T]he essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision-making powers.
>
> 91 This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual



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> obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. …
>
> …
>
> 97 [I]n determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached …

246 In *Smile Inc*, the court found that the respondent employee was not in a position where he owed the appellant company fiduciary duties. He was merely an associate dental surgeon who had not been entrusted with the authority to make any management decisions for the appellant. Neither was he permitted to make corporate decisions binding the appellant: on the contrary, under the terms of his employment contract with the appellant, the respondent was obliged to work at any of the practices operated by the appellant at the instructions of its directors; and the respondent also undertook that he would be responsible and take instructions from the directors and carry out duties as might be assigned to him.

247 In the present case, while Corporation had pleaded breach of employment contract by Hooi Loo, it had also couched its claim in terms normally used to describe fiduciary duties: it referred to Hooi Loo placing herself in "a position of conflict of interests, vis-à-vis [Corporation]" and failing "to manage and deal with [Corporation's] property, assets and resources, in a



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trustee like manner"[344]. In so far as Corporation was seeking to attribute such fiduciary duties to Hooi Loo, I agreed with her counsel that there was simply no evidence to support its doing so. It could not be disputed that as an employee of Corporation, Hooi Loo was never entrusted with the authority to make any management decisions for Corporation; nor was she permitted to make corporate decisions binding Corporation. On the contrary, the express terms of her employment contract made it clear that her role in Corporation was a non-managerial one in which she had no authority to make any management or corporate decisions which would bind the company. Thus, for example, clause 1.2 of her employment contract stated that she would "be reporting to the Sales Manager with duties and responsibilities assigned by him or her". Clause 2.3 and clause 5.2 of the contract stated that her incentive plan and leave would be subject to the discretion or approval of the Sales Manager. Clause 8.1 stipulated that her employment would be "subject to prevailing policies and practices adopted by the company", that there would be "policy changes from time to time", and that she agreed to accept these changes[345].

248 Indeed, Henry himself agreed in cross-examination that Hooi Loo was not part of Corporation's management; not even middle management – and that she had no say at all in the executive decisions of Corporation[346]. Based on the evidence adduced, therefore, I found that whilst Hooi Loo was subject to an implied duty of good faith and fidelity, she did not owe Corporation any fiduciary duties.

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[344] [19(1)(b)] and [19(1)(f)] of Corporation's Statement of Claim (Amendment No. 2).

[345] Exhibit LHL-4 of Hooi Loo's AEIC.

[346] See transcript of 27 February 2020 at p 97 line 16 to p 98 line 21.



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249 Hooi Loo accepted that this implied duty of good faith and fidelity would prohibit an employee from competing against the employer in the course of employment[347]. The question was whether she should be held to have engaged in "actual competitive activity" (*Smile Inc* ([245] *supra*) at [70]). In my view, this question had to be determined within the context of my findings about the circumstances in which Healthcare was set up and in which it went about its business. To recap, I found that Henry and Phang had come to an agreement (*ie*, "the Agreement") that the latter would be free to set up his own Sdn Bhd to explore the Malaysian market. I found that given the Agreement between these two shareholders of Corporation, Phang could not be said to have breached his fiduciary duties to Corporation in incorporating Healthcare and in using it as his corporate vehicle for tapping on business opportunities in the Malaysian market. To put it another way, I did not think the incorporation of Healthcare and the operation of its business constituted competitive activity by Phang in breach of his duty to act in Corporation's best interests. Seen in this context, I did not think that Hooi Loo's subsequent involvement in Healthcare should fairly be described as "actual competitive activity".

**Time bar and acquiescence in relation to the claims against Hooi Loo**

250 However, even if I were wrong to come to this conclusion, Hooi Loo has pleaded in the alternative the defence of time bar[348] – or as another alternative, the defence of acquiescence[349] . In respect of time bar, as the claims against Hooi Loo were for breach of her employment contract, s 6(1)(*a*) of the

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[347] [99] of Hooi Loo's closing submissions.

[348] [2B] of Hooi Loo's Defence (Amendment No. 2).

[349] [2C] of Hooi Loo's Defence (Amendment No. 2).



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Limitation Act would be applicable. Given my earlier findings as to Henry's awareness of Hooi Loo's involvement in Healthcare and his conduct after becoming so aware(see [168]–[176] above), I was satisfied that even assuming Hooi Loo had engaged in "actual competitive activity" *vis-à-vis* Corporation, either Corporation's claims against her would be time-barred, or it would be held to have acquiesced to her conduct.

**Whether the claim of conspiracy to defraud could be made out against the three defendants**

251 I next address the claim against all three defendants of conspiracy to defraud. In its amended statement of claim, Corporation particularised this claim as Phang having "unlawfully conspired with [Hooi Loo] and [Healthcare]" by (*inter alia*) setting up Healthcare and causing it to compete with Corporation's business, using Hooi Loo's services as a director of Healthcare without Corporation's consent and without paying Corporation "expenses in the form of salaries, bonuses and remuneration" for the use of her services, using Corporation's office premises in Malaysia without authorisation, and "attempting to pass-off, deceive or [*sic*] and/or lead members of the public to believe [Healthcare] is that of [Corporation] [*sic*] and/or otherwise connected to or associated with [Corporation]"[350]. Rather oddly, having pleaded these particulars of the alleged conspiracy to defraud, Corporation proceeded to obfuscate matters by attaching to the amended statement of claim a table in which it set out a different set of particulars which it labelled "instances of conspiracy"[351]. These consisted largely of allegations of diversion of business and/or distribution opportunities in both Malaysia and Singapore, and of the

[350] [29]-[30] of Corporation's Statement of Claim (Amendment No. 2).

[351] Table 7 attached to Corporation's Statement of Claim (Amendment No. 2).



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"passing off" of Healthcare as "[Corporation's] Malaysian branch" to "suppliers and/or customers". Henry's AEIC appeared to treat both sets of allegations as being "instances of conspiracy".

252 As a preliminary point, Corporation's pleadings were somewhat confusing. The tort of conspiracy takes two forms: conspiracy to use unlawful means and conspiracy to injure: see *Clerk and Lindsell on Torts* (Sweet & Maxwell, 22nd Ed, 2018) at para 24-94. Corporation did not actually plead the elements of either form of the tort in its amended statement of claim.

253 Nevertheless, since Corporation did briefly set out the law on unlawful means conspiracy in its closing submissions[352], and since the defendants dealt with Corporation's claim on the basis that it was a claim of unlawful means conspiracy, I dealt with the claim on this basis as well.

254 In *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*"), the CA held (at [112]) that to succeed in a claim of unlawful means conspiracy, a claimant must show that –

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

[352] [162] – [163] of Corporation's closing submissions.



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(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

255 In *Seagate Technology Pte Ltd and another v Goh Han Kim* [1994] 3 SLR(R) 836, the CA cautioned (at [15]) that in a claim of unlawful means conspiracy, "a high degree of proof" is required to make out such a claim. On the basis of the evidence adduced, I found Corporation incapable of making out its claim of unlawful means conspiracy.

256 In the first place, there was no real attempt by Corporation to persuade me that the element of combination had been established on the evidence. The assumption appeared to be that since Phang and Hooi Loo were both involved in Healthcare, they must have shared "a common understanding of the material facts"; that is, that they were "sufficiently aware of the surrounding circumstances and share[d] the object" such that it could properly be said that "they were acting in concert at the time of the acts complained of" (at [113]–[114] of *EFT Holdings*). This ignored Phang's and Hooi Loo's evidence that the latter simply took instructions from the former, in respect of the acts alleged to evince conspiracy, and shared no "common understanding" with him nor with Healthcare[353]. There was no attempt by Corporation in the course of the trial or in closing submissions to come to grips with the evidence.

257 In any event, the "unlawful" acts which Corporation relied on related to the various alleged breaches of duties by Phang and also the alleged "passing off". Given my findings on these allegations[354], it followed there were no

[353] See, *eg*, [256] of Phang's and Healthcare's closing submissions.

[354] See [114]-[154], [164]-[186] and [223]-[233] above.



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"unlawful acts" which could be relied on to establish a tort of unlawful means conspiracy.

258 For the reasons set out above, I found that Corporation was unable to prove its conspiracy claim.

**Confidential information**

259 I also address at this point Corporation's allegations about "confidential information". In the original iteration of its statement of claim, Corporation had pleaded several categories of information which it claimed amounted to confidential information[355]. These paragraphs were subsequently deleted. Nevertheless, in its amended statement of claim, Corporation pleaded that "[i]n the course of [Phang's] employment with [Corporation], [Phang] had access to [Corporation's] confidential information"[356]. Corporation also pleaded that Hooi Loo was subject to both express and implied contractual obligations to refrain from disclosing to "any unauthorized individual" in the course of her employment "any information concerning the interest or business of [Corporation] or any of its subsidiary or associated companies or any of their clients"[357]. She was also said to be subject to an implied contractual obligation not to reveal to any person or company at any time (whether during or after her term of employment) any of the trade secrets, business methods of information [*sic*] which [she] knew or ought reasonably to have known to be confidential concerning the business or affairs of [Corporation]"[358].

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[355] [4] of the Statement of Claim filed on 12 December 2018.

[356] [5] of Corporation's Statement of Claim (Amendment No. 2).

[357] [12] and [12(1)] of Corporation's Statement of Claim (Amendment No. 2).

[358] [12(1)(d)] of Corporation's Statement of Claim (Amendment No. 2).



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260 In Henry's AEIC, he set out several categories of information which he claimed amounted to "confidential information". In summary, these consisted of the names and contact details of Corporation's suppliers and customers; the prices at which Corporation supplied goods and services to customers; the prices at which Corporation procured goods and services from its suppliers; and "summary of [Corporation's] monthly sales to customers including the payments [*sic*] terms for the customers and the profit margins of [Corporation] on its business with their customers"[359]. Henry also claimed that Phang had access to these four categories of alleged "confidential information"[360]. In addition, Henry claimed that Phang was one of only three Corporation employees who enjoyed access to the company's MYOB system – an online "accounting system, which keeps track of all transactional matters, including sales to customers, purchases from suppliers, sales reports etc". Henry added that the MYOB system "requires secure log-in credentials"[361] and that these measures were put in place 'to ensure that confidential information would not be used, other than for the benefit of [Corporation]"[362].

261 The brief snippets pleaded in the amended statement of claim and the above assertions in Henry's AEIC seemed to hint at some sort of allegation of breach of confidence on Phang's and/or Hooi Loo's part – but a hint was all it amounted to in the end. In its amended statement of claim, Corporation did not actually plead the elements of the tort of breach of confidence against either Phang or Hooi Loo. In relation to Phang, whilst it was pleaded that he had

[359] [27] of Henry's AEIC.

[360] [28] of Henry's AEIC.

[361] [30] of Henry's AEIC.

[362] [31] of Henry's AEIC.



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access to confidential information because of his position as a director of Corporation, it was not disputed that he did not have any written contract of employment with Corporation: there was nothing in writing that expressly provided for the existence and scope of his alleged confidentiality obligations to Corporation. The amended statement of claim said nothing about the basis on which a duty of confidence might be said to arise on Phang's part: in fact, the words "duty of confidence" were not used at all in connection with Phang. In relation to Hooi Loo, while it was pleaded that her employment contract expressly stipulated confidentiality obligations, it was not pleaded that she had any access to information regarded by Corporation as "confidential information". Per Henry's AEIC, she was not one of the Corporation employees who could access the MYOB system; and in cross-examination, he confirmed she had no such access[363]. Further, in relation to both Phang and Hooi Loo, the particulars pleaded of their various breaches did not include particulars of any breach of the duty of confidence.

262 Given the state of Corporation's pleadings, there was no basis for any finding of breach of confidence on either Phang's or Hooi Loo's part.

### Observations on Corporation's pleadings, claims for relief and handling of evidence

263 Before I turn to Phang's counterclaim, I find it necessary to put on record the following observations about Corporation's pleadings, its claims for relief, and the manner in which it purported to put forward evidence in support of its case.

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[363] See transcript of 26 February 2020 at p 170 lines 1-20.



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264 Firstly, as I noted earlier in these written grounds, the manner in which Corporation pleaded its case in the statement of claim was often confusing. I found it regrettable that Corporation apparently decided to take a "scattershot" approach by alleging as many breaches against the three defendants as it could think of, but often without bothering to plead the elements of each purported cause of action or the material facts relied on in support thereof. In some instances, it appeared to use the words "and/or" as some sort of umbrella term for covering any gaps in its pleadings, even when the use of these words made nonsense of its very case. I refer, for example, to the claims it brought against Healthcare for allegedly acting in "*dishonest and/or knowing assistance*" [emphasis added] in relation to Phang's alleged breaches of duties[364], which it then framed elsewhere in the statement of claim as "knowing assistance *and receipt*"[365] [emphasis added].

265 Secondly, some of the claims for relief pleaded by Corporation appeared to me to be wholly misconceived. On the one hand, it sought to claim from the defendants an account of secret profits, including any directors' fees paid by Healthcare to Phang and Hooi Loo. In other words, it sought relief based on the gain allegedly achieved by the defendants. On the other hand, it sought orders for the payment by the defendants of various sums said to represent losses caused to it by the operation of Healthcare's business and in particular the diversion of the Halyard distributorship. It also sought orders for damages in respect of Phang's and Hooi Loo's alleged breaches of duties. These orders would constitute a loss-based measure of relief. The law is clear that a plaintiff cannot claim both gain-based and loss-based relief arising from the same alleged

[364] [27] of Corporation's Statement of Claim (Amendment No. 2).

[365] [28] of Corporation's Statement of Claim (Amendment No. 2).



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wrong. Thus, in *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631, where the plaintiff ("QAM") had sought various relief against the defendants including injunctions, damages and account of profits, the High Court held (at [18]):

> … Damages are, of course, relief assessed based on the loss suffered by QAM. An account of profits is relief based on the gain achieved by one or more of the defendants. It is clear that QAM could not pursue *both* a loss-based measure of relief *and* a gain-based measure of relief arising from the same wrongful conduct. [emphasis in original]

266 It should also be noted that in praying for damages from both Phang and Hooi Loo, Corporation asserted that these damages should be assessed with reference to the salaries it had paid the two defendants over the years (from 2005 to 24 August 2018 in Phang's case, and from 2007 to 24 August 2018 in Hooi Loo's case).[366] In my view, such a claim was clearly wrong in principle. In *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Beyonics*"), which also involved a company ("Beyonics") suing its former director ("Goh") for breaches of his fiduciary duties. *Inter alia*, Beyonics sought to recover the post-resignation salary of $45,900 paid to Goh, on the basis that it was paid in ignorance of his various breaches of duty which he should have disclosed. At first instance, the trial judge allowed this claim and ordered that the salary payment be repaid to Beyonics. On appeal, the CA disagreed with the trial judge. Noting that she had relied on the case of *John While Springs (S) Pte Ltd v Goh Sai Chuah Justin* [2004] 3 SLR(R) 596 ("*John While Springs*"), the CA held that this reliance was in error (at [87]):

> … [W]e do not agree that *John While Springs* supported the Judge's findings on this issue. In *John While Springs*, Choo Han

[366] Schedule 2 and Schedule 3 of Corporation's Statement of Claim (Amendment No. 2).



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> Teck J allowed the plaintiffs to reclaim bonus payments paid to their ex-employee who had breached his fiduciary duty on the basis that '[n]o reasonable employer would have offered a bonus to a cheating employee, or one who was in breach of his fiduciary duty as was the case here'. However, the present case can be distinguished on the facts. Unlike a bonus that is 'generally a payment fashioned as a reward as well as an incentive' (*John While Springs* at [7]), salaries paid after resignation are generally contractually due to the employee. In such situations, payments of salary after resignation are not gestures of goodwill, but would be the employee's contractual entitlement. In *Schonk Antonius Martinus Mattheus v Enholco Pte Ltd* [2016] 2 SLR 881 ("*Schonk*"), this court held that an employer may not use an employee's breach of fiduciary duties to justify withholding payment of salary that that employee is entitled to. Instead, the employer would only be entitled to make a deduction from the employee's salary in respect of such losses as the employer can prove that it has suffered by reason of the employee's breach (*Schonk* at [15]). The employee in breach in *Schonk* was held to have been entitled as a matter of law to his salary for so long as he was working and, in the particular circumstances of that case, regarded himself as an employee. …

267 In light of the CA's reasoning in *Beyonics*, Corporation was not entitled to claw back from Phang and Hooi Loo their past salaries. In this connection, I did consider whether this was a case where Corporation believed itself to be entitled to claim repayment of an amount equivalent to the deduction it was "entitled to make" from their past salaries "in respect of such losses as [it could] prove that it ha[d] suffered by reason of [their] breach[es]". However, even assuming this was an acceptable justification, the manner in which Corporation purported to "prove" the losses suffered by reason of the breaches was without any principled basis. In Phang's case, it was argued that he should pay damages equivalent to 80.31% of his past salary payments because an analysis of his WhatsApp conversations with Healthcare employees showed that he spent 80.31% of his time on Healthcare's business. In Hooi Loo's case, on the other hand, it was argued that since Healthcare's gross revenue over the years accounted for only 84.86% of the combined gross revenue of the Malaysian



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branch office and Healthcare in the same period, this meant that she must have spent 84.86% of her time working on "earning revenue" for Healthcare, which in turn must oblige her to repay Corporation 84.86% of her past salaries. Neither approach appeared to me to be sensible or backed by any coherent logic.

268 In addition, Corporation's attempt to claim damages assessed in terms of Phang's and Hooi Loo's past salaries struck me as being disingenuous in light of the previous striking out of its original claim for claw-back of Phang's salary. In striking out the claim for claw-back of Phang's salary, the assistant registrar ("AR") had made it clear that an employee would be entitled to his salary unless statute provided otherwise or unless there had been a total failure of consideration (the latter not having been pleaded by Corporation). Corporation did not appeal the AR's order. In nonetheless seeking damages assessed in terms of past salary payments, Corporation appeared to me to be trying to obtain via a backdoor approach the very thing the AR had held it could not have.

269 In respect of Corporation's claim for claw-back of Phang's and Hooi Loo's past bonus payments, as I have found against it on its claims of breaches of duties, it was not entitled to get these claw-backs; and no more need be said here about this claim.

270 Thirdly, I found the manner in which Corporation presented its evidence frankly disquieting. To begin with, there were odd and unexplained gaps in the documentary records it put forward. For example, it disclosed its own audited financial statements for the years 2012 to 2018 – but not for the years preceding 2012. There did not seem to be any cogent reason why the financial statements for the years preceding 2012 could not be produced, especially since it had made



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a point of exhibiting Healthcare's audited accounts for the years 2004 to 2016[367].

271 More disturbingly, Corporation's chief witness Henry appeared prone to making sweeping and at times misleading statements in his AEIC which in cross-examination he had difficulty sustaining. I have alluded earlier to several instances of the seemingly cavalier attitude adopted by Corporation in presenting evidence in support of its case. I will only mention two instances here. One example was the misleading statement Henry made in his AEIC about Primuz's registration of two CAIR LGL products with the HSA in Singapore[368]. Another example of evidence being presented in a misleading manner related to a set of PowerPoint slides found in the thumb-drive seized from Phang on 24 August 2018[369]. The copy of the slides which was exhibited in Henry's AEIC appeared to be a complete slide presentation: the impression given was that this was a presentation which had been shown or conveyed to Halyard. However, in cross-examination, it transpired that the copy of the slides exhibited by Henry actually had several pages omitted from it – and the pages which were omitted included blank pages and a blank table. Had these missing blank pages and blank table been included in Henry's exhibit, it would have become obvious that these were draft slides which had yet to be completed (and which were ultimately never presented to Halyard). There was simply no reason for this selective presentation of evidence – unless it was to mislead the court and to make Phang look bad.

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[367] [151] and pp 304-536 of Henry's AEIC.

[368] See [195]-[196] above.

[369] [81]-[82] and pp 895-900 of Henry's AEIC.



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**Phang's counterclaim**

272 I come finally to Phang's counterclaim. According to Phang, it was an implied term of his employment with Corporation that his employment should be determinable only by reasonable notice. He contended that given his responsibilities as a director and his years of experience, a reasonable notice period would have been 12 months.

273 Corporation's response to this counterclaim, as pleaded in its amended reply, was that it was entitled to terminate Phang's employment summarily because of his "dishonest and/or fraudulent and/or negligent design in breach of his duties as a director and agent of [Corporation] and/or in breach of trust"[370]. In this connection, I have found that Corporation failed to prove on a balance of probabilities the various breaches alleged.

274 In *Richardson and another v Koefod* [1969] 1 WLR 1812 ("*Richardson*"), it was held by the English Court of Appeal (at 1816) that in the absence of express contractual stipulation, "the rule is that every contract of service is determinable by reasonable notice. The length of notice depends on the circumstances of the case." *Richardson* was followed by our CA in *Teh Guek Ngor Engelin née Tan and others v Chia Ee Lin Evelyn and another* [2005] 3 SLR(R) 22 ("*Teh Engelin*", at [20]). The CA in *Teh Engelin* held (at [21]) that –

> … What is relevant for the purpose of determining the reasonable length of the period of notice of termination … depends on the individual facts of the case, and the courts would generally incline towards the period agreed by the

[370] [20] of Corporation's Reply and Defence to Counterclaim of 1st Defendant (Amendment No. 3).



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> parties, or, in the absence of agreement, a reasonable but determinate period.

275 In *Teh Engelin*, the respondent ("Chia") had worked at the law firm for some seven years prior to the termination of her consultancy by the appellant and the other partners of the firm. It was pointed out by the CA that she was described as a "rainmaker" and that "the amount of profits the firm derived from the work [she] brought in … was substantial" (at [21]–[22]). The CA upheld the trial judge's decision that the period of reasonable notice applicable in this case would be the time required for Chia to complete and bill all the files on which she would have been entitled to a profit share.

276 In the present case, it was not disputed that there was no written contract of employment between Corporation and Phang. There was no evidence of any agreement between them as to the terms of any termination of employment or of any agreement as to the notice period required for termination. In the premises, I accepted Phang's contention that he was entitled to a reasonable period of notice.

277 As to what the length of this period of notice should be, I noted that Phang was a co-founder of Corporation, along with Henry; and that he had been working for Corporation for nearly two decades at the time his employment was terminated on 24 August 2018. I was of the view that the 12-month notice period he argued for was excessive, but I did agree that given the circumstances of this case (including his length of service with Corporation, his seniority, and his age), a notice period of a mere one to two months would not have been reasonable. On balance, I concluded that a reasonable notice period would be six months. I therefore allowed his counterclaim to the extent that he was to be paid the sum of $96,120 (being his salary and employer's CPF contribution for



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a reasonable notice period of six months), with interest to run thereon at 5.33% from the date of the writ.

**Costs**

278 Having dismissed Corporation's claims and having allowed Phang's counterclaim, I ordered that it pay each of the three defendants costs. As parties were unable to agree on quantum of costs, they sent in written skeletal submissions. After receiving their submissions, I fixed Phang's and Healthcare's costs at a total of $320,000 plus disbursements of $49,619.89. The disbursements allowed included the expenses incurred in relation to the Malaysian law expert ("Ms Ooi"): I found it reasonable to allow this item of disbursement because it was not until trial that it transpired Ms Ooi's testimony would not be required. As for Hooi Loo's costs, I fixed them at a total of $220,000 plus disbursements of $49,876.11. In fixing costs in these amounts, I took into account *inter alia* the number of days taken for the trial (11 days) and the large number of issues raised by Corporation which were unmeritorious but which still required defence counsel to expend time and effort to address.

Mavis Chionh Sze Chyi
Judicial Commissioner



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Martin Francis Decruz and Alexander Loh (Shenton Law Practice LLC) for the plaintiff;
Gan Theng Chong and Kelley Wong Kar Ee (Lee & Lee) for the first and second defendants;
Sharon Chong Chin Yee, Nandhu, Nadene Law Qin Ning and Renee Sim (RHTLaw Asia LLP) for the third defendant.

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