IN THE APELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 21

Civil Appeal No 121 of 2021

Between

(1) Yong Khong Yoong Mark
(2) Emily Hwang Mei Chen
(3) Medivice Investment Limited

… *Appellants*

And

(1) Ting Choon Meng
(2) Chua Ngak Hwee

… *Respondents*

In the matter of Suit No 1140 of 2018

Between

(1) Yong Khong Yoong Mark
(2) Emily Hwang Mei Chen
(3) Medivice Investment Limited

… *Plaintiffs*

And

(1) Ting Choon Meng
(2) Chua Ngak Hwee

… *Defendants*

EX TEMPORE JUDGMENT

[Contract — Misrepresentation — Fraudulent]
[Contract — Misrepresentation — Negligent]
[Contract — Misrepresentation — Inducement]
[Tort — Misrepresentation — Fraud and deceit]
[Tort — Misrepresentation — Inducement]
[Tort — Misrepresentation — Negligent misrepresentation]
[Tort — Conspiracy — Unlawful means conspiracy]

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18 May 2022

18 May 2022

Belinda Ang Saw Ean JAD (delivering the judgment of the court *ex tempore*):

Introduction

1 AD/CA 121/2021 ("AD/CA 121") is an appeal by the appellants, Yong Khong Yoong Mark ("Mr Yong"), Emily Hwang Mei Chen ("Ms Hwang") and Medivice Investment Limited ("Medivice"), against the High Court judge's (the "Judge") decision in *Yong Khong Yoong Mark and others v Ting Choon Meng and another* [2021] SGHC 246 ("the Judgment") to dismiss their claims against the respondents, Ting Choon Meng ("Dr Ting") and Chua Ngak Hwee ("Mr Chua"), in misrepresentation and unlawful means conspiracy.

2 The facts of this case have been comprehensively set out in the Judgment at [6] to [44]. We therefore only summarise the salient facts relevant to this appeal. The appellants claimed that they were induced by the respondents' misrepresentations to make several loans to HealthSTATS International Pte Ltd

("Healthstats International") from January to July 2016 amounting to $2.5m and to enter into a subscription agreement in August 2016 (the "Subscription Agreement") for the sum of $5m. The sum of $2.5m loaned to Healthstats International formed part of the consideration for the Subscription Agreement. The Subscription Agreement was entered into on 12 August 2016 between the second appellant, Ms Hwang, and Healthstats International.

3 Under the Subscription Agreement, Healthstats International issued approximately 3.2m new shares to Medivice, the third appellant (as the second appellant's nominee) for a total consideration of $5m. The appellants principally alleged that, between September 2015 and February 2016,[1] the respondents fraudulently or negligently made the following representations ("Representations"):

(a) that all of Healthstats International's products, in particular the BPro G2 and the CasPro devices, had obtained the necessary regulatory approvals from Singapore's Health Sciences Authority, the US' Food and Drug Administration (the "FDA") and the European Union's ("EU") Conformité Européenne (the "Regulatory Representation");

(b) that $18m of sales had been booked for 2016 and another $38.2m of sales had been booked for 2017 (the "Revenue Representation"); and

(c) that Healthstats International was to launch the BPro G3 in the second quarter of 2016 (the "Product Representation").

4 The Judge dismissed all of the appellants' claims against the respondents. The Judge found in one respect that the Regulatory Representation

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[1] Statement of claim (Amendment No 2) dated 28 January 2021 at para 16 read with para 16(v)(t).

was falsely made, namely the respondents represented that the BPro G2 had regulatory approval from the FDA when it did not. The Judge did not find that the Regulatory Representation in respect of the CasPro was falsely made because there was CFDA approval. The Judge also found that the Revenue Representation and Product Representation were statements of future intention and were not actionable representations. Finally, the Judge found that even if all the Representations were falsely made, the appellants had not shown that the Representations had played a real and substantial role in inducing them to make the loans or entering into the Subscription Agreement.

5 In AD/CA 121, the appellants appeal against the whole of the Judge's decision. In this appeal, the law in relation to the tort of misrepresentation is not disputed by the parties. After carefully considering the parties' submissions, we dismiss AD/CA 121 for the reasons set out below.

Our decision

6 The appellants' pleaded case is that the Representations made between September 2015 and February 2016 induced them to enter into the Subscription Agreement in August 2016. The burden lies on the appellants to show that the Representations were continuing at the time of entering into the Subscription Agreement. However, in our judgment, the evidence of the state of affairs at that time shows that the Representations were not in play.

7 It is crucial to set out the events following the making of the Representations to the entering of the Subscription Agreement. On 2 December 2015, Mr Yong executed a letter of intent on behalf of one of his investment vehicles, Uncharted Holdings Limited ("Uncharted"), evincing his intention to purchase shares in Healthstats International for about $27m. By this time, Healthstats International had entered into a joint venture with Winsan

(Shanghai) Medical Science and Technology Co Ltd ("Winsan") through HealthSTATS Technology (SIP) Co Ltd ("Healthstats China"). Under this arrangement, Healthstats International entered into a purchase agreement dated 13 August 2015 (the "First China Contract") and a purchase agreement dated 26 October 2015 (the "Second China Contract") with Healthstats China (collectively, the "China Contracts") under which Healthstats China was to purchase $5m worth of BPro G2 devices and accessories and $52.785m worth of BPro G2, BPro G3 and CasPro devices and accessories from Healthstats International respectively.

8 From 8 January 2016 to 8 April 2016, Uncharted commissioned an extensive due diligence process involving DLA Piper UK LLP ("DLA Piper"), KPMG Services Pte Ltd and Baker & McKenzie, Wong & Leow. Mr Yong also approached Mr John Sheng ("Mr Sheng"), a partner in a law firm based in Shanghai, to look into Winsan and Healthstats China, on his behalf. Following the results of the due diligence, Uncharted decided not to proceed with the $27m investment. In its initial Notice of Termination dated 25 April 2016, it merely stated that it was of the view that due diligence had not been completed to its satisfaction in its sole opinion. Following a discussion between Mr Yong and Dr Ting, Mr Yong agreed to issue another notice and this time he clarified in an e-mail dated 26 April 2016 (at 5.41pm) to Dr Ting that Uncharted's main concern was that Winsan seemed financially unsound and Winsan and Healthstats China had several issues. Mr Yong wrote that he was not comfortable with Healthstats China. He even recommended to Dr Ting to consider carrying out a full independent audit on Healthstats China. In his opinion, the orders of $5m for 2015 and the commitment for 2016 and 2017 under the China Contracts were not likely to be fulfilled.

9 Mr Yong had informed Dr Ting that Unchartered had commissioned the extensive due diligence process on Healthstats International, the patents and Healthstats China. This would have made clear Mr Yong's intention to verify the accuracy of the Representations. Save for concerns relating to Healthstats China and Winsan, Mr Yong clarified with Dr Ting that Uncharted was fine with the results of the due diligence on Healthstats International and the patents. In the words of Mr Yong, Uncharted "loved" Healthstats International's products and was still very interested in investing but not at the current valuation.

10 Further, Mr Yong had already brought in Mr Joshua Soh ("Mr Soh")[2] as Chief Executive Officer of Healthstats International with the primary role of changing the sales-based model to a service-based model since March 2016.[3] The service-based model for the BPro G2 is implemented by giving the device to clinical professionals for free with a fee charged per use (instead of selling the device) and is expected to increase profitability and allow potential penetration of other markets like the US. Dr Ting testified that Mr Yong had explained to him that the implementation of the service-based model in the US would be far more lucrative than the Second China Contract.[4] Even after Unchartered withdrew from making the $27m investment, Mr Soh continued to be Mr Yong's nominee in Healthstats International until April 2017.

11 Considering this crucial context, the crux of this appeal turns on why the appellants nevertheless decided to enter into the Subscription Agreement in August 2016 after Uncharted withdrew from the $27m investment. While the

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2 ROA Vol III (Z) at pp 183 (line 20) to 184 line 1).

3 ROA Vol III (A) at pp 23 to 24 (paras 60 to 63).

4 ROA Vol III (AF) at pp 17 (line 12) to 22 (line 21).

appellants now assert that it was the Representations that induced them to enter into the Subscription Agreement, Mr Yong's own evidence in his affidavit of evidence-in-chief ("AEIC") contradicts this and tells a different story. In our view, the documentary evidence including his AEIC coheres with the state of affairs outlined above at [8] to [10]. He explains that after he was aware of concerns regarding Winsan's financial status in February 2016 and doubted the feasibility of the China Contracts, he still considered making a small private investment to put Healthstats International in a position to meet its production obligations under the First China Contract which, if fully performed, would "create momentum and increase the chances of the Second China Contract also being performed".[5]

12 It is also telling that he states that he was prepared to make a small private investment because he liked Healthstats International's products and felt that with Mr Soh's assistance, Healthstats International would be able to increase its profitability in the coming years and penetrate other markets such as the US. It is noteworthy that this explanation is consistent with Dr Ting's evidence that Mr Yong saw the potential of the new service-based model. Additionally, Ms Hwang had already extended substantial loans to Healthstats International at this point and opportunistically, a substantial portion of the investment could be offset from these loans.[6] Mr Yong had explained that these loans were extended for the purpose of providing working capital for Healthstats International whilst he was considering whether to invest in it.[7] While the loans

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5 ROA Vol III (A) at pp 22 to 23 (paras 56 to 59); ROA Vol III (Z) at pp 57 (line 21) to 58 (line 5).

6 ROA Vol III (A) at pp 26 to 27 (paras 72 to 73).

7 ROA Vol III (A) at pp 20 (paras 50 to 51), 27 to 28 (paras 74 to 76), 37 to 38 (paras 94 to 97).

were made independently from the Subscription Agreement, they were later offset against the $5m due under the Subscription Agreement.

13 Despite his doubts about the potential completion of the China Contracts, Mr Yong felt that they displayed Healthstats International's ability to penetrate the Chinese market and its potential for growth.[8] As we explain below at [17], his cognisance that the China Contracts were not likely to be fulfilled undermines his assertion that the Second China Contract is a sham. On his own evidence, Mr Yong does not even say that the Representations were the substantial reason to enter into the Subscription Agreement. In our view, the Representations were not in play after Uncharted withdrew from the $27m investment. We agree with the Judge's conclusion that Mr Yong was nevertheless enthusiastic about investing in Healthstats International despite the risks he perceived and his decision to invest could not have been due to any Representations made by the defendants.[9] Even if they were still in play, for the same reasons, the appellants would not have proven that they had been substantially induced by the Representations to enter into the Subscription Agreement. For this reason, we affirm the Judge's decision to dismiss the appellants' claim in misrepresentation against the respondents.

14 The Judge had thoroughly scrutinised the evidence in relation to the Regulatory Representation, Product Representation and Revenue Representation. We see no reason for appellate intervention. We briefly address the appellants' main difficulties with each of the Representations in turn. We have considered all of the complaints raised by the appellants in this appeal and we are satisfied that to the extent that there is merit in any of those complaints,

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8 ROA Vol III (A) at p 35 (para 84).

9 Judgment at [243].

they do not undermine the final outcome of the Judge's decision dismissing the appellants' claims.

15 We begin with the Regulatory Representation. We agree with the Judge that while the respondents had wrongly represented that the BPro G2 was approved by the FDA, this did not play a substantial role in inducing the appellants to enter into the Subscription Agreement. Mr Yong's lack of concern from his remark – that it was "not something of concern" – is telling. Firstly, it is consistent with our view that Mr Yong's true motivation for entering into the Subscription Agreement had nothing to do with the Representations. He even said that he did not think that the FDA approval was important at that point in time.[10] Secondly, he explains that he had an interest in seeing the First China Contract being fulfilled so that the Second China Contract would be triggered.[11] This shows that the real and substantial inducement for the appellants to enter into the Subscription Agreement was not the representation that the BPro G2 was approved by the FDA but Mr Yong's assessment of Healthstats International's prospects. We note the appellant's argument based on the rule in *Browne v Dunn* (1893) 6 R 67 that it was not put to the appellants' witnesses that there was the existence of a prototype of the BPro G2 (referred to as the BPro G1 with a Cap). We do not see any prejudice to the appellants because Mr Yong's evidence does not even acknowledge the existence of the BPro G1 with a Cap. Even if there was a contravention of the rule in *Browne v Dunn* or the Judge erred in his finding as regards the BPro G1 with a Cap, this does not undermine the Judge's conclusion that the Regulatory Representation did not play a substantial role in inducing the appellants to enter into the Subscription Agreement.

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10 ROA Vol III (Z) at pp 226 (line 16) to 227 (line 5).

11 ROA Vol III (Z) at pp 226 (line 16) to 227 (line 14).

16 As regards the CasPro, we note that the appellants did not plead that the respondents had *fabricated* the submission for approval for the CasPro and misrepresented to the appellants that the CFDA approval was a *valid* one. The CasPro *was* approved by the CFDA, regardless of the appellants' assertions that the approval was not based on fully accurate data. There is no merit in this ground of misrepresentation whether fraudulent or negligent. In any event, the Judge correctly found that there was inadequate evidence that the respondents fabricated the submission to the CFDA. Mr Yong himself stated in cross-examination that he had no evidence of this.[12] Even if there were inaccuracies in the submission filed for CFDA approval, this does not necessarily show that the respondents fabricated the data. Mr Chua was not responsible for preparing the report and there was no evidence to show that he had checked the report, realised the errors and intended to hide it. As regards the appellants' contention that the Judge had wrongly relied on a 9 March 2012 email because it was not translated, the Judge did not in fact refer to the said email and this contention has no merit. While it ostensibly appeared that the Judge referred to "Ms Han's testimony" even though she had not testified at trial, it is clear that the Judge made a textual mistake and he was actually referring to Mr Chua's testimony where Mr Chua explained that Ms Han had told him that she had discussed and explained to the CFDA officer in charge of the application about the use of the clinical data for the MC3100 obtained in 2004 for the CFDA submission in 2012. This is evidence as to Mr Chua's state of mind that he was not fraudulent. The appellants did not adduce any evidence to contradict Mr Chua's testimony. Also, there is insufficient evidence to establish that Mr Chua must at least be negligent.

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12 ROA Vol III (AA) at pp 140 (line 10) to 142 (line 3).

17 Turning to the Revenue Representation, the appellants' claim fails at the outset because this is not an actionable misrepresentation of fact but a statement pertaining to the future. In an executive summary sent by Dr Ting to Mr Yong on 22 November 2015 ("Executive Summary"), it was stated that there were advanced book sales secured of "$1.5m *confirmed* in Q3/2015", "$18.0m *booked* for Year 2016" and "$38.2m *booked* for Year 2017" [emphasis added]. The Executive Summary also included a graph stating that the "Revenue Forecast from China (3 Years)" were $1.5m, $18m, $38.2m in 2015, 2016 and 2017 respectively. The use of the term "booked" in contradistinction to the use of the word "confirmed" in relation to Q3/2015 and the fact that the graph is titled "Revenue *Forecast*" [emphasis added] make clear that the figures for 2016 and 2017 were simply forecasts. Hence, the Revenue Representation is merely a statement of intention that the respondents intended to take steps to crystallise the revenue forecast. That must be so in light of the terms of the China Contracts. In addition, the defendants' expert, Mr Tan Wei Cheong, says that the term "booked" suggests some form of orders but that it did not mean that the revenue had crystallised.

18 Such a representation can only be actionable if it is proven that at the time it was made, the person who made it had no intention of doing what he asserted he would do. There is no evidence that the respondents had no intention to take steps to crystallise the revenue forecast. On the contrary, Healthstats International took loans from the second appellant as working capital for the First China Contract. Since the Second China Contract would be triggered only after the First China Contract was fulfilled, the taking of the loans is evidence of steps taken by Healthstats International to crystallise the revenue forecast. In this regard, we reject the appellants' contention that the Second China Contract is a sham contract. Clause 9.2 of the Second China Contract provided that it would only be operative upon fulfilment of the First China Contract (which was

not fulfilled yet). Thus, the absence of a working prototype for the BPro G3 at the time the Second China Contract was made does not show a common intention between Healthstats International and Healthstats China to give a false impression of creating legal relations.

19 The evidence relied upon by the appellants' witnesses, Mr Michael Tan ("Mr Tan"), Mr Koh Choon Huat ("Mr Koh") and Ms Li Wen Wen ("Ms Li"), to show otherwise also do not pass muster. Mr Tan's evidence that he did not see a physical copy of the Second China Contract and there were no records in the accounts, Mr Koh's evidence that he was not informed of any purchase orders or sales orders made under the Second China Contract and Ms Li's evidence that she understood that it was not meant to be implemented can all be explained by the fact that the Second China Contract had not been triggered since the First China Contract had not been fulfilled. Mr Tan, in particular, conceded that he was aware of the Second China Contract from references to a note to Healthstats International's shareholders dated 2 November 2015; discussion in an annual general meeting on 4 December 2015; an email from Mr Marcus Chua attaching both China Contracts for due diligence; and that the China Contracts were referred to in the Baker & McKenzie Report.[13] The Judge correctly found that the Second China Contract did exist and was genuine. As we foreshadowed earlier at [13], Mr Yong's cognisance that the China Contracts were not likely to be fulfilled and that his small private investment would go toward the *chances* of the Second China Contract being fulfilled show that he knew it was not an inevitable conclusion. This allegation that the Second China Contract is a sham is unmeritorious.

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[13] ROA Vol III (T) at pp 107 (line 25) to 108 (line 18).

20 Finally, we agree with the Judge that the Product Representation is also a statement of future intention that Healthstats International intended *to launch* the BPro G3 in the second quarter of 2016. This is apparent from the language of the Product Representation which refers to a future event of launching the BPro G3 in the second quarter of 2016. The Executive Summary also stated that the BPro G3 had a "*target* release date in Q2/2016" [emphasis added].[14] The appellants fail to show that the respondents had no intention for Healthstats International to launch the BPro G3 in the second quarter of 2016. The evidence adduced by the appellants' witnesses to the effect that they had never seen a prototype of the BPro G3 does not show this. Dr Ting, Mr Chua and Mr Tey Leong Teck (a firmware consultant with Healthstats International) had testified that Healthstats International had diverted more resources and focus on Mr Soh's plan to adopt a service-based model for the BPro G2 and seek to penetrate other markets like the US. We also note the appellants' argument based on the rule in *Browne v Dunn* that it was not put to the appellants' witnesses that Mr Yong directed that work on the BPro G3 be put on hold. Even if this evidence was disregarded, the evidence shows that Healthstats International's focus at that point was no longer the launch of the BPro G3 in the second quarter of 2016. Further, even if the state of preparedness for the launch of BPro G3 was unsatisfactory, this is not compelling evidence that Healthstats International did not have any intention to launch the BPro G3 in the second quarter of 2016 at the time the Product Representation was allegedly made. In any case, it is illogical for the appellants to claim to have relied on the Product Representation when they clearly knew in August 2016 before the signing of the Subscription Agreement that the BPro G3 was not launched in the second quarter of 2016.

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[14] ACB Vol V at p 87.

21 For completeness, the appellants do not seriously contend in this appeal that the tort of unlawful means conspiracy is made out. We see no merit in this claim and have no hesitation in dismissing it.

Conclusion

22 In sum, we dismiss AD/CA 121 and order that costs be fixed at $40,000 (all-in) in favour of the respondents. The usual consequential orders are to apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

Nair Suresh Sukumaran and Bhatt Chantik Jayesh (PK Wong & Nair LLC) for the appellants;
Kesavan Nair and Melissa Leong (Bayfront Law LLC) for the respondents.