IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 201

Suit No 374 of 2019
(Summons Nos 1803 and 2244 of 2019)

Between

Tan Choon Wee

… *Plaintiff*

And

(1) Pine Capital Group Limited
(2) Wang Meng
(3) Pan Ki Ro
(4) Trina Ann Savage
(5) Advance Capital Partners Assets Management Private Ltd

… *Defendants*

Originating Summons No 471 of 2019

In the matter of Sections 182 and 392 of the Companies Act (Cap 50)

And

In the matter of Advance Capital Partners Assets Management Private Ltd

Between

Pine Capital Group Ltd

… *Plaintiff*

And

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(1) Tan Choon Wee
(2) Advance Capital Partners Assets Management Ptd Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions] — [Interim orders]
[Equity] — [Remedies] — [Injunction]
[Companies] — [Directors] — [Removal]
[Civil Procedure] — [Appeals] — [Leave]

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Tan Choon Wee
v
Pine Capital Group Ltd and others and another matter

[2019] SGHC 201

High Court — Suit No 374 of 2019 (Summons Nos 1803 and 2244 of 2019) and Originating Summons No 471 of 2019
Lai Siu Chiu SJ
9, 24 April, 31 May 2019

30 August 2019

Lai Siu Chiu SJ:

Introduction

1 The two sets of proceedings here involve related parties. Hence this court has decided to write only one decision for both matters.

2 In Suit No 374 of 2019 ("the Suit"), Tan Choon Wee ("TCW") is the plaintiff who has sued Pine Capital Group Limited ("PCGL") a Catalist listed entity on Singapore's stock exchange, and Wang Meng ("Wang" or the "second defendant") as the first and second defendants respectively for declaratory orders in respect of shares in a company called Advance Capital Partners Asset Management Private Limited ("ACPAM") which is the fifth defendant in the Suit. The third defendant is a Korean national Pan Ki Ro ("Pan" or "the third defendant") while the fourth defendant Trina Ann Savage ("Trina" or "the fourth defendant") is a Singaporean all of whom PCGL wish to appoint as

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directors of ACPAM. (All the five defendants will be referred to collectively as "the defendants").

3 In Originating Summons No 471 of 2019 ("the OS"), PCGL is the plaintiff while TCW and ACPAM are the first and second defendants respectively.

4 TCW filed the Suit on 8 April 2019. On the same day, by way of Summons No 1803 of 2019 ("the injunction application") and his supporting affidavit filed therewith ("TCW's first affidavit"), TCW applied *ex parte* for *inter alia* the following orders:

(a) he and one Lin Kuan Liang Nicholas ("Lin") be reinstated as directors of ACPAM;

(b) that Wang, Pan and Trina be restrained from acting as or purporting to act as directors of ACPAM;

(c) that PCGL, Wang, Pan and Trina whether by themselves or by their servant(s), agent(s), nominee(s) or otherwise, be restrained from accessing, removing or otherwise dealing with any property belonging to ACPAM, him, Lin and, to the extent that they have removed any property from the offices of ACPAM, to return all such property within two days of the order to be made herein; and

(d) that PCGL, Wang, Pan and Trina whether by themselves or by their servant(s), agent(s), nominee(s) or otherwise, be restrained from representing or otherwise announcing that TCW and/or Lin have been removed as directors of ACPAM.

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5 The injunction application was heard and granted by this court on an urgent basis on 9 April 2019 ("the 9 April Order") in the presence of counsel for the defendants. The following orders were made:

> Pending the *inter partes* hearing of the injunction application:
>
> (a) the defendants shall not inform third parties of the removal of TCW and Lin as directors of ACPAM;
>
> (b) the defendants, their officers, servants and agents undertake not to remove any computers or laptops from the premises of ACPAM and shall not attempt to or gain access to the personal computers or laptops of any staff including Michelle Chee ("Michelle"), Lynn Woo ("Lynn") and Charlene Tan ("Charlene") [who is TCW's daughter];
>
> (c) Wang will not perform the functions of Chief Executive Officer ("CEO") of ACPAM pending the outcome of the injunction application;
>
> (d) the defendants and TCW were to file their response and reply affidavits respectively by certain timelines; and
>
> (e) costs were reserved.

6 The parties duly complied with the court's timelines and affidavits were filed. On 24 April 2019, the injunction application was heard on an *inter partes* basis after which this court:

> (a) dismissed the injunction application;
>
> (b) discharged the interim orders made under the 9 April Order once the orders made herein took effect;

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(c) directed that TCW, Michelle, Lynn and Charlene were required to deliver up to ACPAM its bank tokens that they currently held together with:

(i) login details of ACPAM'S payroll system;

(ii) login details of ACPAM's MASNET system; and

(iii) login details of ACPAM's Microsoft 365 system

(d) directed that ACPAM was at liberty to change its bank signatories by removing TCW, Lin, Lynn and Charlene and replacing them with other signatories; and

(e) ordered TCW to pay one set of (fixed) costs to PCGL and another set of costs to Wan, Pan, Trina and ACPAM.

("the first 24 April Order").

7 For expediency, this court heard the injunction application as well as the OS together on 24 April 2019. PCGL had filed the OS on 10 April 2019 together with an affidavit in support sworn by Wee Heng Yai Adrian ("Wee") who is a director of PCGL ("Wee's OS affidavit").

8 After disposing of the injunction application, the court dealt with the OS in which PCGL applied for the following orders pursuant to ss 182 and 392 of the Companies Act (Cap 50, 2006 Rev Ed) (the "Cos Act"):

(a) a declaration that the resolutions passed at the Extraordinary General Meeting ("EGM") of ACPAM on 5 April 2019 are valid;

(b) in the alternative, that:

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(i) a separate and further EGM of ACPAM be convened and held forthwith at ACPAM's registered office or other agreed venue for the purposes of considering the resolutions set out in the Schedule to the OS; and

(ii) at the EGM in (i), the presence of one member of ACPAM, either in person or by proxy, shall be deemed to constitute a meeting and that the presence of the said member shall be sufficient to form a quorum.

The court only granted the orders sought in (b) above ("the second 24 April Order").

9 On 29 April 2019, by way of Civil Appeal No 94 of 2019 ("CA 94/2019"), TCW appealed against the second 24 April Order.

10 TCW then applied for leave to appeal against the first 24 April Order by way of Summons No 2244 of 2019 ("the Leave Application"). I dismissed the Leave Application on 31 May 2019. TCW has now filed Civil Appeal Originating Summons No 17 of 2019 against my refusal to grant leave to appeal.

11 In addition to the injunction application, TCW filed on 12 April 2019 a second application in Summons No 1946 of 2019 ("the second injunction application") which prayers included one to restrain Wang, Pan and Trina from accessing or attempting to gain access to any computer or laptop that belongs to ACPAM.

12 On 16 April 2019, TCW filed a third application in Summons No 1990 of 2019 ("the third injunction application") in which he applied to restrain the

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defendants from holding any EGM or other meetings to remove him and Lin as directors of ACPAM pending the determination of the Suit.

13 The second and third injunction applications were not dealt with by this court.

The injunction application

14 Besides TCW's first affidavit, the following affidavits were filed by the parties for the injunction application:

(a) affidavit of Wee filed on 15 April 2019 ("Wee's first affidavit");

(b) affidavit of Wang filed on 15 April 2019 ("Wang's first affidavit"); and

(c) TCW's affidavit filed on 22 April 2019 ("TCW's third affidavit").[1]

Wee's OS affidavit as well as TCW's OS affidavit were considered for both the injunction application and the OS.

15 In TCW's first affidavit, he deposed to the following facts which prompted this court to grant him the 9 April Order:

(a) TCW holds 49% of the issued shares in ACPAM while PCGL holds the remaining 51%;

[1] TCW filed his second affidavit also on 22 April 2019 in respect of the OS.

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(b) Wang was formerly employed by ACPAM as a portfolio manager until his services were terminated on 18 March 2019 due to breaches of obligations of confidentiality;

(c) PCGL purportedly appointed Wang, Pan and Trina as directors of ACPAM pursuant to a resolution purportedly passed at an EGM convened on 5 April 2019 which EGM contravened the Articles of Association of ACPAM in that the requisite 14 days' notice was not given and there was no quorum;

(d) ACPAM is a Registered Fund Management Company ("RFMC") with the Monetary Authority of Singapore ("MAS") and comes under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA"). Under Rule 14A(2)(*b*) of the Securities and Futures (Licensing and Conduct of Business) Regulations (Reg 10, 2004 Rev Ed) ("SF(LCB)R"), persons appointed as directors of RFMC must be fit and proper to hold that office. However, the first to fourth defendants had not provided ACPAM with information to ensure that Wang, Pan and Trina were fit and proper persons to hold office as directors;

(e) In removing TCW and Lin as directors of ACPAM, the defendants had removed "the only directors of ACPAM who were cleared and accepted by the MAS as persons fit and proper persons to hold the office of a director of ACPAM"[2];

(f) In short, PCGL's appointment of Wang, Pan and Trina coupled with the removal of TCW and Lin, as directors had "caused ACPAM to

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2 Para 16 of TCW's first affidavit.

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be in violation of the regulations and at risk of losing its status as an RFMC";[3]

(g) Should MAS take an adverse view of the change of directors, TCW's interests as a shareholder of ACPAM would be irreparably harmed.

16 In addition to the above complaints, TCW's first affidavit alleged that Wang had taken steps to inform various parties of the removal of TCW and Lin as directors and that Wang, Pan and Trina had been appointed as their replacements in that:

(a) Wang had instructed ACPAM's compliance officer Michelle on 5 April 2019 to lodge the relevant forms with MAS to inform it of the change in composition of the board of ACPAM;

(b) Wang had also filed the change in directorships with the Accounting and Corporate Regulatory Authority ("ACRA");

(c) On 6 April 2019, Wang emailed MAS in his capacity as the executive director of ACPAM, stating that TCW and Lin had been removed as directors and were replaced by Wang, Pan and Trina;

(d) MAS forwarded Wang's email to Michelle, copied to TCW, seeking her confirmation that TCW and Lin had been legally removed in accordance with the Cos Act. Michelle replied to say the two had not been properly removed in accordance with the Cos Act and that the second to fourth defendants had not provided ACPAM with the

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[3] *Ibid*.

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necessary documentation to enable the latter to conduct proper background checks to ensure their suitability to be directors;

(e) Michelle informed MAS that Wang's appointment as director followed a dispute between him and ACPAM over his breaches of duty as an employee of ACPAM.

(f) On 6 April 2019, ACPAM's solicitors informed employees of ACPAM that:

(i) TCW and Lin had been removed as directors of ACPAM;

(ii) the second to fourth defendants had been appointed as directors of ACPAM;

(iii) the employees were not to take any further action without Wang's approval;

(iv) the employees were not to take instructions from TCW or Lin; and

(v) the employees were to refer all pending or outstanding matters to Wang;

(g) The purported new directors appeared to be intent on bringing ACPAM's business to a halt and to take control of its operations;

(h) ACPAM's solicitors (who also act for Wang personally) had written to TCW as CEO to give notice that ACPAM intended to investigate "…various allegations relating to [ACPAM] and its operations, including [TCW's] possible involvement in matters

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concerning potential conflicts of interest and possible lapses in internal control…" without giving particulars[4];

(i) The first to fourth defendants had added locks to the main door of ACPAM's office to prevent ACPAM's employees/TCW/Lin from gaining access to the office – TCW expressed fears over the possible removal and misappropriation of ACPAM's property (as well as his personal property) including records, computers and hard drives since he had no access to the office;

(j) TCW feared the first to fourth defendants would attempt to speak to ACPAM's bankers in order to gain control of its bank accounts. In order to protect ACPAM's interest, TCW intended to write to ACPAM's banks "to inform them of the situation, and to maintain the status quo pending the outcome of [the Suit]".[5]

17 Wee's and Wang's first affidavits painted a completely different picture from that given in TCW's first affidavit.

18 Wee's first affidavit deposed to the following events/facts:

(a) In March 2019, the board of PCGL comprised of TCW as the executive director and three non-executive directors namely Roy Ling Chung Yee ("LCY"), Chong Chee Hoong ("CCH") and Pan. Numerous complaints were received from PCGL's substantial shareholders[6] in respect *inter alia* of TCW's conduct and his management of the affairs

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4 Para 25 of TCW's first affidavit.

5 Para 27 of TCW's first affidavit.

6 Alauddin Ali and Jessie Sun.

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of PCGL, ACPAM and of Advance Opportunities Fund 1 ("AOF1") which is a fund managed by ACPAM;[7]

(b) On 7 February 2019, PCGL received notice to convene an EGM on 8 March 2019 to *inter alia* remove TCW, LCY and CCH as directors of PCGL;

(c) Before the EGM was convened, TCW voluntarily resigned as a director on 1 March 2019. This was followed by the resignations of CCH and LCY on 18 and 19 March 2019 respectively;

(d) PCGL was not even aware that Lin was a director of ACPAM until it conducted a search in ACRA on 4 April 2019;

(e) The directors who resigned were replaced by Wee (independent director), Pan (non-executive and non-independent director) and Tomi-Jae Wanlun Tjio (independent director and non-executive chairman);

(f) PCGL had grave and substantiated concerns over TCW's mismanagement and running down of the finances of ACPAM which included TCW's failure to disclose his conflict of interest when he made investment decisions for ACPAM from which he benefited personally and making repeated capital calls on behalf of ACPAM to which PCGL was forced to contribute. Despite the raising of such concerns by PCGL to ACPAM, there was no response.

19 To elaborate on [18(f)], in Wee's OS affidavit, he deposed to the following facts:

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7 See [20] below.

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(a) In May 2018, ACPAM issued a capital call to PCGL for $100,000 ostensibly to prevent ACPAM from breaching the base capital requirements applicable to ACPAM as well as for the settlement of ACPAM's expenses. PCGL complied with the capital call, contributed $100,000 and subscribed for a further 207 shares in ACPAM;

(b) In December 2018, ACPAM sought a further top-up from its shareholders amounting to $41,914.54 which fortunately was avoided at the eleventh hour due to incoming revenue;

(c) On 24 January 2019, ACPAM made a capital call for $102,000 and an interest-free shareholder's loan for $200,000. PCGL complied with the capital call contributing $189,819 in exchange for 383 shares but declined to provide the loan;

(d) On 29 March 2019, PCGL received another capital call for $66,654 to be paid by 30 March 2019 failing which TCW would be entitled to "full rights to singly contribute capital to [ACPAM] and in so doing, dilute [PCGL's] shareholding in ACPAM"[8];

(e) PCGL forwarded a cheque to ACPAM for $66,654 and requested information (and supporting documents) on ACPAM's need for a further capital call. PCGL's letter emphasised that its capital contribution was meant to meet ACPAM's base capital requirements and should not be used for other purposes without PCGL's prior consent. PCGL received neither the information nor the documentation it requested;

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8 Para 2.2.5 of Wee's OS affidavit.

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(f) PCGL consistently appeared to be the only or the primary cash contributor as TCW would purportedly "capitalise" his contributions via offsets of his alleged claims against ACPAM so much so that for the capital call on 24 January 2019 in (c), he contributed only $74 for the 378 shares issued to him claiming to offset the balance contribution against his unpaid and "waived" salaries (both of which had already been waived by him);

(g) TCW's practice in (f) to "capitalise" his contribution was repeated for the capital call on 29 March 2019 as PCGL discovered subsequently from ACPAM's employee that TCW offset his capital contribution against his March 2019 salary and other claims allegedly due to him;

(h) From the complaint letters it received in [18(a)], PCGL discovered that TCW had proposed that ACPAM invest $20m in Global Invacom Group Limited ("GI") by way of redeemable convertible notes ("the proposed RCN"). The $20m sum was to come from funds managed by ACPAM in particular AOF1 and Advance Credit Fund ("ACF"). TCW is one of the two directors in AOF1:

(i) GI intended to raise funds for acquisition purposes and was in discussions with Tactilis Private Limited ("Tactilis") to acquire Tactilis Sdn Bhd, a wholly owned subsidiary of Tactilis. At the time, TCW was a non-executive director as well as shareholder of Tactilis holding 8.2% shares. Despite being in a position of conflict, TCW failed to disclose his interest in Tactilis to ACPAM's and AOF1's board of directors. Neither did he recuse himself from decisions pertaining to the proposed RCN;

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(ii) It was only in February 2019 that TCW's interest in Tactilis came to light. Following objections from ACF's directors, TCW represented to them that he would procure ACF's withdrawal from participation in the proposed RCN. To-date however, PCGL was not aware if ACF had indeed withdrawn from such participation;

(iii) It also came to PCGL's attention that TCW had in May 2018 attempted to pressurise the directors of AOF1 and ACF into effecting a bridging loan to Tactilis of US$600,000.

20 After the resignations of TCW and PCGL's other two directors in [18(c)], PCGL made a public announcement on 21 March 2019 concerning the complaints in [18(a)]. It made a separate announcement on the same day that on 19 March 2019, PCGL had received a notice of termination ("the notice of termination") signed by TCW and Lin, of the management agreement between ACPAM and AOF1 which is ACPAM's flagship fund and main revenue source. Wee pointed out that the notice of termination was clearly against ACPAM'S interest as it deprived ACPAM of significant management revenue. Subsequently, PCGL learnt that AOF1 signed an agreement to be managed by another fund manager.

21 Concomitant with the notice of termination, PCGL learnt from ACPAM's employees that TCW had made preparations to leave ACPAM, and take some employees with him to another company.

22 Wang's first affidavit accused TCW of deliberately making untruthful and unsubstantiated statements in his affidavits that were designed to cast

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aspersions on the defendants' characters and taint the court's impression of the defendants. Wang deposed to the following facts/events:

(a) ACPAM's solicitors do not (as TCW alleged) act for him in his dispute with ACPAM over his employment – another law firm does;

(b) There was no basis for TCW's fears over his personal mail that was sent to ACPAM's office as such mail was/would be forwarded to his solicitors;

(c) In regard to TCW's assertion in [16(i)] that he was denied access to ACPAM's office, TCW failed to disclose that on 6 April 2019, he was suspended from work and that on the day he alluded to (namely 8 April 2019), the employees of ACPAM were told to report for work at 2.00pm and not 9.00am. Hence, the premises was locked when TCW came to the office that morning. What TCW failed to disclose was that he and Bernard Ong Kheng Chye (a director of ACPAM until 29 October 2018) had attended at ACPAM's office at 1.15am to remove the existing front door lock of ACPAM and replace it with a new lock;

(d) Wang is on the MAS Register of Representatives and was employed as Portfolio Manager and Fund Director of ACPAM until he was summarily dismissed on 18 March 2019 (by TCW) on alleged grounds which he disputed;

(e) On 5 April 2019, he was appointed a director of ACPAM together with Pan and Trina pursuant to a resolution passed at an EGM of ACPAM which resolution also removed TCW and Lin as directors of ACPAM;

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(f) Pan has extensive experience in asset/fund management and banking. He had been the CEO of Pine Asia Asset Management, an indirect subsidiary of PCGL (by being owned by a wholly owned subsidiary of PCGL) from April 2015 to April 2017;

(g) Trina is the head of Investor Relations and of Marketing for PCGL and has significant marketing and branding experience;

(h) TCW had deliberately exaggerated and overstated the Regulatory Risk issue by giving the impression that ACPAM's position as a RFMC had been jeopardised by his removal as a director;

(i) TCW had alleged that the appointment of Wang, Pan and Trina as directors had to be approved by MAS. That is incorrect. Even if all or any of them did not meet the fit and proper criteria to be appointed directors, that did not mean that ACPAM's status as a RFMC would be automatically revoked. Under the MAS Guidelines on Licensing, Registration and Conduct of Business for Fund Management Companies ("RFMC Registration Guidelines"), ACPAM as a RFMC only needs to notify MAS of any changes in the company's particulars within 14 days of such change by way of a notification in Form 23A via the Corporate e-Lodgment ("Cel") method;

(j) Owing to Michelle's wrongful withholding of ACPAM'S MASNET login details[9], ACPAM was unable to submit the requisite Form 23A via Cel by the deadline of 19 April 2019 (14 days from the appointment of Wang, Pan and Trina);

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9 See first 24 April Order at [6(c)] above.

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(k) Indeed, instead of helping ACPAM to inform MAS of the new director appointees, Michelle obstructed the process by challenging the three defendants' appointment in her letter to MAS dated 6 April 2019;

(l) MAS does not provide prior approval of new appointments which fact was known to TCW and yet, he misrepresented the position. Prior approval of directors of companies *before* their appointment is required from MAS only for holders of Capital Market Services licence ("CMS") under Regulation 12 of the SF(LCB)R. ACPAM does not hold a CMS licence. Indeed, as a RFMC, ACPAM is exempted from the requirement under the said Regulation 12 pursuant to Regulation 5(7) of the Second Schedule to the SF(LCB)R;

(m) Under the Guidelines on Fit and Proper Criteria issued by MAS which are applicable to all relevant persons carrying out activities regulated by MAS, sn 3 states:[10]

> The onus is on each relevant person to establish that it or he is a fit and proper person rather than for MAS to show otherwise. Where a relevant person is required under the relevant legislation to ensure that another relevant person is fit and proper, the onus is on the former to establish to the satisfaction of MAS that the latter is fit and proper…

It was for PCGL not MAS to determine whether Wang, Pan and Trina are fit and proper persons to be appointed as directors of ACPAM;

(n) It was telling that TCW could only make ambiguous suppositions in TCW's first affidavit such as "[*s*]*hould* the MAS take an

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10 Wee's first affidavit, WHYA-2 at pp 36 to 59.

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adverse view of the change of directors"[11] and there is a "real risk that [ACPAM] *may* lose its RFMC status" and "*should that happen*, there is a real risk that [TCW] will be irreparably harmed as a shareholder" [emphasis added];[12]

(o) Although MAS had been informed of the change of directorships and legal dispute, it had not raised any regulatory issues;

(p) Due to the lack of clarity as to the state of affairs of ACPAM, PCGL had to call for a trading suspension of its shares on 21 March 2019 in consultation with Singapore Exchange Ltd ("SGX"). Further, PCGL will appoint an independent reviewer to investigate the various allegations received concerning ACPAM;

(q) Although TCW had put across the position that ACPAM was in a poor financial state thereby necessitating urgent capital calls, he himself had been using ACPAM's finances as his "personal piggy bank"[13] – ACPAM had been paying for TCW's personal fibre broadband service, Singtel Mio-TV services, membership expenses at the Singapore Swimming Club, charges of Spotify (an audio streaming music platform) as well as the charges on six mobile telephone lines which bill for June 2019 itself came to $11,785.31.

23 Wee added that ACPAM is the only active operation subsidiary of PCGL; should ACPAM lose its status as a RFMC or be wound up[14], it could

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11 Para 17 of TCW's first affidavit.

12 Para 29 of TCW's first affidavit.

13 Para 85 of Wang's first affidavit.

14 One of TCW's prayers in the Suit.

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potentially cause the delisting of PCGL which would affect its 6,000 shareholders, not an outcome that PCGL and its directors would want in their own and in the company's, interests.

24 In contrast, Wee highlighted certain acts on the part of TCW that are detrimental to the interest of ACPAM should he remain as its director including the following:

(a) On 30 July 2018, MAS reprimanded TCW for (i) contravening s 92(*b*) of the SFA in his omission to declare certain information in a CMS licence application and (ii) para 5(71)(*a*) of the Second Schedule of the SF(LCB)R for failing to lodge a notice of change in particulars within 14 days after the date of change. PCGL was only made aware of this fact in mid-February 2019 when it received a copy of the reprimand letter from a shareholder of PCGL. The reprimand was a matter of concern to ACPAM as MAS' letter stated that it[15]

> …may also take this reprimand into account when considering actions to be taken against the [ACPAM] for any further contravention of the applicable laws and regulatory requirements, or in the assessment of [ACPAM's] future applications for licences and applications.

Further, a conviction for breach of s 93(*b*) renders the offender liable to a fine of $50,000;

(b) On 12 April 2019, MAS issued a reprimand to TCW as the CEO and director of ACPAM for (i) omitting information in a CMS licence application which omission caused the application to be misleading in a

15 Para 2.3.5 of Wee's first affidavit, exhibit WHYA-6 at p 131.

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material respect, and/or (ii) failing to discharge his duty and function as CEO and director.

25 On 10 April 2019, TCW withdrew RM3m from the bank account of AOF1.

26 Wang disclosed that ACPAM had rented out to PCGL a meeting room at its premises between 1 February 2018 to 9 May 2020. PCGL's employees occupy the room and the property in the meeting room belongs to PCGL. Consequently, when TCW changed the locks to the main door in the early hours of 8 April 2019, he not only hindered the efforts of Wang, Pan and Trina in securing ACPAM's property but also disrupted PCGL's operations.

27 Wee's first affidavit similarly took issue with TCW's assertions in [15(e) and 15(f)]. Wee repeated what Wang deposed to in regard to the appointment of fit and proper persons as directors of RFMCs like ACPAM.

28 Consequently, Wee deposed that there was no truth in TCW's assertions that Wang, Pan and Trina have to be "cleared and accepted" by MAS as fit and proper persons before they can be appointed as directors of ABPAM. All that is required is for ACPAM to file Form 23A for the appointments.

29 TCW's third affidavit was a response to the first affidavits of Wee and Wang. Here, TCW alluded to his affidavit filed in the OS proceedings on 16 April 2019 ("TCW's OS affidavit"). In TCW's OS affidavit as well in TCW's third affidavit, he deposed to an understanding between himself and one Sun Wei Yeh ("SWY") that he would be the CEO and an executive director of ACPAM. Accordingly, PCGL's attempts to remove him as a director and CEO

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were contrary to his legitimate expectations as a shareholder of ACPAM, emphasising that he founded ACPAM.

30 TCW alleged that SWY became a shareholder of PCGL on his representation to TCW that he (SWY) would bring funds in under ACPAM's management. SWY holds the majority shares in PCGL with his associate Jessie Sun ("Sun") through his company Prime Partners Pte Ltd ("Prime Partners") of which he is the sole shareholder.

31 TCW's third affidavit was replete with references to SWY and allegations of impropriety on the latter's part which he feared would violate the prohibitory directions issued by MAS against SWY and which could cause ACPAM to lose its RFMC licence. Should that happen, it would lead to the potential delisting of PCGL.

32 TCW's third affidavit sought to explain the complaints against him that Wee raised[16]. The complaints were from Alauddin Ahmed ("AA")[17] a non-executive director of AOF1 and ACF and Sun, the then Chief Operating Officer of PCGL. The complaints related primarily to a reverse takeover transaction between Tactilis and GI[18] which was eventually aborted.

33 TCW alleged that Sun was clearly partisan as she was a director of PCGL between 2 February 2017 to 15 August 2018. As for AA, TCW claimed that he was a close friend of one David Sarkis ("Sarkis") who is beholden to

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16 See [18(a)] above.

17 Who sued TCW, Lin and AOF1 in a derivative action on behalf of AOF1in Suit No 424 of 2019 which was discontinued on 27 May 2019.

18 See [19(h)] above.

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SWY as the latter had (through PCGL) bought out Sarkis' shares in a company called Silver Tree Hong Kong Limited enabling Sarkis to raise funds.

34 In regard to ACPAM's complaints against him, TCW pointed out that Wang was himself a complainant purportedly as ACPAM's only executive director after TCW was suspended as CEO. He criticised Wang for not appointing an independent reviewer to look into the complaints as ACPAM had announced it would, which indicated that PCGL was not interested in carrying out an independent and genuine investigation.

35 In regard to Wang's complaint in [22(q)] of his expenses being borne by ACPAM, TCW relied on clause 10.5 of his employment contract to justify his entitlement to such expenses being paid on his behalf.[19] He asserted that as ACPAM's CEO, he is contractually entitled to be reimbursed his expenses including telephone bills, Singtel broadband services and his membership fees at the Singapore Swimming Club. PCGL had not previously made an issue of such expenses that he incurred.

36 As for the various capital calls that ACPAM made, TCW defended them as being not "uncommon" for fund managers to raise funds in this manner in order to maintain the base capital requirements of MAS. In regard to Wee's complaint[20] that he failed to respond to questions that PCGL raised in regard to the necessity of the capital call on 29 March 2019, TCW complained he was not even given an opportunity to explain as PCGL unilaterally removed him as a director and denied him access to ACPAM's information. Moreover, he was

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19 Para 45 of TCW's third affidavit, exhibit TCW-20 at pp 187 to 188.

20 At [19(e)].

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overseas in the interval between PCGL's request and the EGM on 5 April 2019. PCGL's conduct showed the company was not interested in hearing his explanation.

37 TCW put the entire blame for his reprimands from MAS on SWY. He deposed that ACPAM had applied for a CMS licence from MAS on 9 June 2017. MAS rejected the application on 8 August 2017 because SWY did not make a declaration that he was a fit and proper person to be appointed as executive director and CEO of ACPAM. As SWY was reluctant to provide the declaration, ACPAM made a fresh application for a CMS licence on 22 September 2017 in which it was stated that he (TCW) would be the executive director and CEO of ACPAM.

38 On 28 September 2017, MAS asked TCW for an assessment of SWY for purposes of the application as well as that all substantial direct and indirect shareholders of ACPAM provide declarations that they were fit and proper persons to participate in a company which operates under a CMS licence. While TCW provided MAS with his declaration, SWY refused to do so. This resulted in MAS rejecting again ACPAM's application.

39 TCW deposed that he made various attempts between October 2017 and January 2018 to persuade SWY to provide the declaration to no avail. On 15 January 2018, TCW wrote to inform MAS that SWY would not provide the declaration requested. By its email reply dated 16 January 2018, MAS expressed its dissatisfaction with SWY's position and ACPAM's position. TCW deposed he continued to appease MAS without success.

40 On 9 April 2018, MAS wrote to ACPAM requiring the latter to take steps to ensure that SWY would not be appointed as a representative or a

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director of ACPAM and that SWY would not have any direct or indirect role in ACPAM's affairs nor should its shares be sold to SWY. TCW informed MAS on 7 May 2018 that there were limitations to ACPAM's ability to ensure that its indirect shareholders were fit and proper given that PCGL is a listed company. He emailed MAS on 10 May 2018 to comply with the directives given on 9 April 2018.

41 After a further email from MAS dated 28 June 2018 reiterating what it stated on 9 April 2018, MAS issued a reprimand on 30 July 2018 to ACPAM (and not to TCW personally) for omitting to state that SWY is its shareholder in its application for a CMS licence on 22 September 2017. MAS was also not informed that SWY was involved in several civil lawsuits in 2017. TCW was then approached by MAS representatives who insisted that if SWY was unwilling to provide the declaration requested, he should be persuaded to relinquish his direct and indirect interests in ACPAM.

42 As a result, on 17 October 2018, Pine Partners transferred its 9% direct shareholdings in ACPAM to TCW resulting in him holding 49% shares. However, SWY was unwilling to relinquish his shares in PCGL.

43 On 8 February 2019 MAS gave TCW notice that he would be reprimanded as a director and CEO of ACPAM, based on ACPAM's application for a CMS licence on 22 September 2017. Notwithstanding his explanation to MAS on 22 February 2019 that *inter alia* stated that SWY was not a direct shareholder of ACPAM and ACPAM did not appreciate that the declaration requirement applied to indirect shareholders, MAS reprimanded him by its letter dated 12 April 2019.

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44 Seen in its proper context, TCW asserted that the MAS reprimand in [41] was not an indication that he is not a fit and proper person to be a director of ACPAM. Rather, it evidences that MAS is concerned over SWY being an indirect shareholder of ACPAM and SWY's persistent refusal to provide the necessary information for ACPAM's CMS licence application.

45 Accordingly, TCW deposed that it made no sense for PCGL to proceed with the EGM on 5 April 2019 on the basis of urgency since the reprimand from MAS was in July 2018 for ACPAM's CMS licence application submitted in September 2017. He alleged that it was the actions of SWY through PCGL that caused ACPAM's ability to continue as a RFMC to be at risk.

46 TCW elaborated on his allegation by pointing out that SWY had increased his effective interest in ACPAM by acquiring the majority shareholding in PCGL. Secondly, all the current board members of PCGL are appointed by SWY and/or his associates including Pan and Wee. PCGL then purported to replace the entire board of ACPAM with persons associated with SWY.

47 In regard to Wang's allegation in [25] that he wrongfully withdrew RM3m from AOF1's bank account, TCW explained that it was done to fulfil AOF1's existing commitments and was done in the interest of AOF1 and ACPAM. TCW claimed he made active trades and transactions in the ordinary course of business for and on behalf of AOF1 which funds came from various investors. He deposed that his team (comprising of himself, Michelle, Lynn and Charlene) are the key employees in charge of managing the funds under ACPAM's management.

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48 TCW claimed that AOF1 had committed itself to three transactions with Tanco Holdings Berhad, Eden Inc Berhad and Tiger Synergy Berhad for which AOF1 must make payment by 12 April 2019. To meet the payment deadline, instructions had to be given to AOF1's bank (*ie*, CIMB Bank) by 10 April 2019 in order for the funds to reach the three payees in time. He had instructed his solicitors to seek the consent of Wang, Pan and Trina on the morning of 10 April 2019 through the trio's solicitors and to use the computers and bank tokens on ACPAM's premises for the limited purpose of carrying out the banking transaction on behalf of AOF1. The three defendants' response was to raise various spurious queries and subsequently requested that AOF1 undertake that it will indemnify ACPAM for any losses that ACPAM may incur as a result of consenting to the transaction.

49 TCW took the view that the defendants were being obstructive and did not appreciate the urgency and gravity of the situation. He claimed that any discussion with them would only cause further delays in effecting payment and would result in AOF1 defaulting on its obligations and ACPAM to be liable to AOF1 for causing the default. Consequently, TCW took it upon himself on 10 April 2019 to visit the main branch of CIMB and arrange for payment to be made by AOF1 when he "happened to be in Kuala Lumpur on that day for a business trip".[21] Had it not been for the defendants' obstructiveness, the payment could have been carried out ACPAM's premises using its bank tokens.

50 As for the alleged irregularities raised by Wee at [18(a)], TCW asserted that Wang had mischaracterised the concerns raised by AA and Sarkis in their emails dated 10 April 2019 addressed to ACPAM. The two had sought to

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21 Para 52 of TCW's third affidavit.

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redeem their investments in AOF1. He had informed them that their investment would be "gated" *ie*, they would be paid in stages in accordance with the terms of their investment. This was to prevent a run on the fund and to avoid the fund having to liquidate its investment at fire sale prices to the detriment of the entire value of the fund. The two merely expressed their unhappiness in their aforementioned emails even though as fund managers themselves, they were aware of the practice of gating redemptions. The Placing Memorandum of AOF1 clearly spelt out the redemption restrictions to not more than 20% of a relevant class of funds being redeemed. AA's and Sarkis' investment comprised of 100% of a particular class of funds.

51 TCW alleged that the first affidavits of Wee and Wang only made ambiguous suppositions as to whether the second to fourth defendants are fit and proper persons to be directors. He contended that it is untrue that MAS did not take an adverse position to their appointments and did not state that they cannot hold office. In support of his position, TCW referred to the response dated 9 April 2019 from MAS to Wang's email to the former dated 8 April 2019. I will return to this email exchange later[22] to explain why it did not help TCW's case.

52 TCW accused Wang of downplaying the gravity of appointing Wang, Pan and Trina as directors of ACPAM in violation of MAS' directives as they effectively gave SWY full control of ACPAM. This caused ACPAM to be at risk of losing its RFMC status with the potential consequence of PCGL being delisted to the detriment of its shareholders.

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22 See [85] below.

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53 As for Wang's insinuation that he was not fit and proper to be a director due to his suspension and fine in 2000 and 2004 respectively by SGX for breaching SGX's rules, TCW pointed out that the fact he was a director of PCGL after that clearly showed that was not the case.

54 As for Wang's request that he and the three ladies named in [6(c)] above should return the bank tokens and MASNET details of ACPAM, TCW pointed out that the 9 April Order in [5] put a "stand-still" in place. As Wang was prohibited by that order of court from exercising the functions of CEO of ACPAM, there was no reason for him to have either the bank tokens or MASNET details. TCW denied Wang's allegation that he attempted to or did, disable, ACPAM's email and web domain host and server, and its Microsoft 365 account.

55 TCW did not deny that he had changed the locks on the main door of ACPAM on 6 April 2019. He justified his action on the basis it was done to protect and secure ACPAM's offices as, by that date, it was clear to him that "the [first] to [fourth] defendants were going to attempt to access ACPAM's offices".[23]

56 TCW deposed that Wang's allegation that he and key employees had severely crippled ACPAM's business operations was untrue – apart from AOF1, ACPAM's only other fund is ACF which is not active.

The Leave Application

57 For the Leave Application, the following affidavits were filed:

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23 Para 72 of TCW's third affidavit.

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(a) TCW's affidavit filed on 6 May 2019 ("TCW's fourth affidavit");

(b) Wang's affidavit filed on 22 May 2019 (Wang's second affidavit");

(c) Wee's affidavit filed on 22 May 2019 ("Wee's third affidavit");

(d) TCW's affidavit filed on 30 May 2019 ("TCW's fifth affidavit").

58 Not surprisingly, the affidavits filed by Wang and Wee opposed the Leave Application.

59 Both Wang and Wee argued that there were no errors of law that warranted TCW being granted leave to appeal. Just because he had an automatic right of appeal in the OS did not mean he should be granted leave to appeal in the Suit.

60 TCW's fourth affidavit was a rehash of the allegations he levelled against SWY in TCW's OS and third affidavits referred to earlier at [29].

61 TCW and/or his counsel identified the following matters as the basis for the court to exercise its discretion to grant him leave to appeal pursuant to s 34(2)(*b*) of the Supreme Court of Judicature Act (Cap 323, 2006 Rev Ed):

(a) There had been a *prima facie* error of law committed by this court in granting leave to PCGL to convene a fresh EGM as that must be premised on the fact that the EGM of 5 April 2019 and the resolutions passed thereat were not valid and/or effectual. That meant that as a matter of law, the directors of ACPAM would have been TCW and Lin

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and further meant that they ought to be reinstated as directors of ACPAM;

(b) It was a question of importance upon which further argument and the decision of the Court of Appeal would be in the public interest as to whether he was entitled to restrain the second to fourth defendants from acting as directors of ACPAM pending the resolution of his minority oppression claim in the Suit;

(c) As the court made no order on prayer (a) of the OS which was to regularise the EGM on 5 April 2019, does it mean that the previous EGM remains invalid?

(d) Section 182 of the Cos Act was being used by the defendants in an unusual manner – to order a meeting in order to ratify a meeting that had already been held. This was a question that calls for a clear answer that is capable of being precisely formulated – making an order under s 182 of the Cos Act for a new EGM to be called to ratify a prior irregular means that the latter is invalid or, making such an order means that the prior irregular EGM remains "valid". This question had not been examined in Singapore previously;

(e) All three issues raised in (b) to (d) above gave rise to questions which called for clear answers from the Court of Appeal (citing the second and third tests in *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR (R) 862 ("*Lee Kuan Yew's case"*);

(f) Another error of this court was its reliance on TCW's apparent breach of the "standstill" orders made under the 9 April Order as a ground for dismissing the injunction application in the first 24 April

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Order. It was submitted that the reliefs TCW sought would not in any event have had a necessary and immediate relation to the reliefs he sought – TCW was relying on the facts surrounding the EGM on 5 April 2019 for his injunction application and this stands quite apart from his conduct relating to his apparent breach of the 9 April Order;

(g) Even if TCW's alleged wrongdoing bore the necessary relation to the relief he was seeking, the relief he sought should have been granted because the conduct of the second to fourth defendants was also worthy of censure. PCGL had taken steps between 4 and 5 April 2019, amounting to a corporate ambush to oust TCW from ACPAM by requisitioning, and then holding, an EGM. This was done when TCW was out of the country. The defendants' wrongful actions were designed to render futile the fruit of TCW's minority litigation;

(h) The fact that the injunction application was dismissed on the basis of TCW's unclean hands showed that there was a *prima facie* error in the court's decision;

(i) In regard to (f), it was argued on TCW's behalf that the defendants' allegation (that TCW withdrew RM3m from the bank account of AOFI)[24] ought not to be counted against him because TCW should be permitted to defend himself against it at trial;

(j) As for the defendants' other allegation[25] that he used ACPAM'S funds for his personal expenses, TCW was justified in doing so as he

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24 See [25].

25 At [22(q)] above.

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was entitled to be reimbursed such expenses under his employment contract. In any case, this issue is the subject of Suit No 490 of 2019 which is pending.

62 Wee's third affidavit[26] disputed the "interconnection" between the OS and the injunction application in the Suit as a ground for leave to appeal. Wee asserted that TCW's argument is misconceived – just because an appeal arises out of the same fact pattern is not a ground for leave to appeal. TCW's appeal (in CA 94/2019) in the OS can proceed independently without there being an appeal in the Suit for the injunction application. Further, the OS has no overlap with the legal test relevant to the injunction application, which is concerned with whether there is a serious question to be tried and whether the balance of convenience lies in favour of granting an injunction.

63 Wee added that there was no *prima facie* error of law as TCW had contended so as to warrant granting TCW leave to appeal. He referred in this regard to TCW's complaint[27] that this court had failed to account for the period 24 April 2019 and 10 May 2019 (when the second EGM referred to in the OS was held) and that during that interval, given the orders made in the OS, it must follow that TCW and Lin remained directors of ACPAM prior to 10 May 2019. Wee pointed out that part of the second 24 April Order provided that the interim measures made in the 9 April Order would be discharged once the orders made under the second 24 April Order are implemented. By directing that the appointments of the second to fourth defendants would be held in abeyance in

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26 Para 2.1 of Wee's third affidavit.

27 See [61(a) to 61(d)].

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the "holding orders" made that day, this court had catered for the interim period 24 April 2019 to 10 May 2019.

64 As for TCW's alleged legitimate expectation to participate in the management of ACPAM pursuant to the alleged agreement made between him and SWY in or around 2017, Wee deposed there was no evidence to support TCW's assertions. He referred in particular to the following factors that negated the existence of such an alleged agreement:

(a) There was no mention of the alleged agreement in the writ of summons filed in the Suit or in TCW's first affidavit, the first time the alleged agreement was referred to was in TCW's OS affidavit;

(b) Article 69 of ACPAM's Articles of Association[28] allows TCW to be removed as a director by way of an ordinary resolution – it states:

> The company may by ordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement…

(c) Clause 12.1 of TCW's letter of appointment dated 24 March 2017[29] expressly states:

> This [l]etter may be terminated either by you or the Company upon giving to the other party not less than 3 month [*sic*] notice in writing.

The letter of appointment was around the time that SWY and TCW made the alleged agreement;

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28 See exhibit WHY-6 at p 563 of Wee's OS affidavit.

29 See exhibit WHY-11 at p 35 of Wee's second affidavit filed on 22 April 2019 in the OS ("second OS affidavit").

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(d) In his letter (together with Lin) as director of AOF1 to investors dated 19 March 2019 TCW had written[30]

> It has recently come to the attention of the directors of AOFI that the majority shareholder of ACPAM, [PCGL] has received a requisition for the removal of Tan Choon Wee ("TCW"), CEO of ACPAM. We have reviewed the risk of the removal of TCW from ACPAM and its impact on AOF1.

TCW made no mention of his understanding with SWY and or his expectation that he could not be removed;

(e) Moreover, even on TCW's highest case, SWY and SWY's alleged associates Sun and JMO only obtained a majority of the shares in PCGL around 4 February 2019 – SWY was not in control of PCGL from 2017 onwards. Hence, the 2017 alleged agreement could not have continued to bind SWY;

(f) TCW claimed[31] that he withdrew RM3m to meet contractual payment obligations but he failed to explain why no mention was made of this fact at the 9 April 2019 hearing, which was one day before he made the withdrawal in Kuala Lumpur. Neither did he inform ACPAM after he made the withdrawal nor that the payment was to meet contractual obligations. Indeed, ACPAM only discovered the payment five days later when it saw the withdrawal in its bank statement;

(g) The dispute arose from a narrow set of facts, there was no law involved.

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30 See exhibit WHY-12 at p 40 of Wee's second OS affidavit.

31 Para 70 of TCW's fourth affidavit filed 6 May 2019 and [48] above.

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The submissions

(i) The injunction application

65 I move now to the arguments that were presented by the parties starting with those presented on behalf of TCW. Essentially, TCW's arguments were a rehash of his affidavit. According to him, only he is a fit and proper person to be ACPAM's director, not Wang or Pan or Trina.

66 In his submissions, TCW place great emphasis on the fact that SWY and him had an understanding that he would always remain a director and shareholder of ACPAM.

67 In regard to the EGM, it was submitted by TCW's counsel that its requisition by PCGL's corporate representative Hariz Lee ("Lee") was invalid for lack for authority. The corporate representative also had no authority to give notice of the meeting as that should have been done by a director. These were not procedural but substantive irregularities (*Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143).

68 Counsel for TCW pointed out that ACPAM and PCGL had not addressed the issue of the invalidity of the EGM that removed TCW as a director. He repeated his submission that notice of the EGM was given by Lee as a corporate representative of ACPAM instead of by a member of ACPAM. This mandatory requirement under s 176 of the Cos Act cannot be overlooked with the result that any resolution passed at the EGM is invalid. A court has no power to order directors to convene an EGM (*Smith v Fitzroy Finance Group Ltd* (1982) 6 ACLR 294 as PCGL sought to do by the OS. If TCW's case is one of oppression, a court cannot dispense with the requirement under s 176 and allow PCGL to hold a meeting.

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69 In regard to SWY, it was pointed out by counsel for ACPAM that nowhere in TCW's first affidavit did TCW raise the understanding – it was only in TCW's OS affidavit in response to PCGL's application in the OS that he made mention of the understanding. Moreover, if indeed there was such an agreement, then (according to PCGL's counsel, Mr Chan), there should be some (strong) evidence placed before the court instead of only a mere allegation. If there is no alleged agreement, then there is no prejudice to TCW in his removal from the board of ACPAM.

70 It was said by Mr Chan that there was nothing pleaded *vis-à-vis* the alleged agreement with SWY in the Suit nor in the affidavit to support the injunction application. That alleged agreement only surfaced in TCW's OS affidavit. Yet, the defendants noted that the alleged agreement formed almost the entire basis for the injunction application.

71 It was further pointed out by Mr Chan that if TCW is reinstated as a director of ACPAM, would he re-enter into a management agreement with AOF1? It seemed to him that TCW had adopted a "scorch earth" policy. TCW's attitude appeared to be "If I can't benefit from this, neither can you". In other words, TCW was protecting and could not look beyond, his own interests.

72 As for TCW's claims that MAS' reprimands were directed at SWY, counsel for the defendants (Mr Pillai) disagreed. He drew the court's attention to the language/contents of the reprimands – they were addressed to TCW.

73 Both counsel for ACPAM and PCGL contended that TCW had failed to satisfy the second and third principles required for injunction applications – quite apart from the fact that there must be triable issues. TCW did not address

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(i) the balance of convenience issue and (ii) whether damages would be an adequate remedy were the injunction to be discharged.

(ii) The Leave Application

74 While TCW contended he had, counsel for the defendants contended that he had failed to satisfy the requisite criteria for being granted leave to appeal namely:

> (a) there was a *prima facie* case of error of law that has a bearing on the decision of the court;
>
> (b) there is a question of law decided for the first time or, a question of law of importance upon which a decision of a higher tribunal would be to the public advantage and
>
> (c) there is a question of law on which there is a conflict of judicial authority and a pronouncement from a higher court in the judicial hierarchy is desirable citing *Lee Kuan Yew's* case, which principles were reaffirmed in *Abdul Rahman bin Shariff v Abdul Salim bin Syed* ("*Abdul Rahman*") [1999] 3 SLR(R) 138 at [31]).

Consequently, the defendants contended that the Leave Application must be dismissed *in limine.*

75 Counsel for PCGL referred to an exception to criterion no. I in [74(a)] namely where errors of fact are permitted to go on appeal. He referred to the case that was cited on behalf of TCW in that regard namely *Essar Steel Ltd v Bayerische Landesbank and others* [2004] 3 SLR(R) 25 ("*Essar Steel*"). However, he submitted that the exception did not apply in TCW's case.

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The decision

(i) The injunction application

76 This court was of the view from reviewing the facts, that TCW had come to court with unclean hands and was not entitled to the equitable remedy of an injunction that he sought.

77 Based on the tried and tested principles expounded in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid*") and restated by our courts in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR(R) 1 and more recently in *RGA Holdings International Inc v Loh Choon Phing Robin and another* [2017] 2 SLR 997, the balance of convenience did not lie in favour of the court continuing the interim injunction granted to TCW under the 9 April Order.

78 Indeed, it was clear to this court that TCW had misled the court into granting him the interim injunction - he misused the court's process to achieve his own ends. This conclusion is supported by TCW's conduct post-9 April 2019. The chronology of events set out at [18] to [25] above showed that on 10 April 2019, the very next day after the interim injunction was granted, unbeknownst to the court and to PCGL or ACPAM, TGCW went behind ACPAM's back (in the words of their counsel) to withdraw RM3m of AOF1's funds held in ACPAM's sub-account with CIMB in Kuala Lumpur.

79 In this regard, the court is highly sceptical of TCW's claim[32] that he "happened to be in Kuala Lumpur on a business trip" when he made the

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[32] See [49] above.

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withdrawal. TCW made the trip to Kuala Lumpur specifically to withdraw the money. The court's belief is reinforced by the fact that TCW's first affidavit was sworn before a Commissioner for Oaths in Singapore on 8 April 2019. He must have gone to Kuala Lumpur on 9 or 10 April 2019 to make the withdrawal – he did not "happen" to be in Kuala Lumpur as he claimed.

80 The court also refers to TCW's fourth affidavit[33]. Besides rehashing his allegation of a legitimate expectation from his agreement with SWY that he would remain the CEO and director of ACPAM, TCW deposed as follows[34]:

> 68 Third, I understand that Her Honour's order was based upon her concerns over my conduct in paying MYR3,000,000 out of AOF1's funds on 10 April 2019. I wish to say that, at the relevant time, I did not think that my actions were in breach of the Honourable Court's orders.
>
> 69 To my mind, the stand still orders bound the parties in respect of the affairs of ACPAM. I did not think that the orders extended to the affairs of AOF1. Accordingly, I thought that the transactions did not fall afoul of the stand still orders. If my understanding was incorrect, I wish to sincerely apologise to the Honourable Court for my actions. It was not my intention to breach the Honourable Court's orders.
>
> 70 I would add that the purpose of the payment was to fulfil obligations that AOF1 was subject to even before the stand still orders were made…AOF 1 [*sic*] was obliged to make payments to each of the Payees under subscription agreements previously entered with each of these entities…

TCW identified the "Payees" there as Tanco Holdings Bhd, Eden Inc Bhd and Tiger Synergy Bhd.

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33 At [57(a)].

34 Paras 68 to 70 of TCW's fourth affidavit.

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81 In reply to the above paragraphs in TCW's fourth affidavit, Wang's second affidavit deposed[35] to the following facts:

(a) The apparent confusion between the affairs of ACPAM and AOF1 – the bank account from which the RM3m was withdrawn was an AOF1 sub-account under ACPAM (which meant the account holder was ACPAM). The only way TCW could withdraw the sum from the said account was pursuant to ACPAM's rights under the investment agreement with AOF1. ACPAM handled all investment matters of AOF1 and managed all of AOF1's funds. Accordingly, when TCW withdrew the sum, he was acting in his capacity as a director of ACPAM and not in his capacity as a director of AOF1. Clearly, his action was against the standstill ordered in the 9 April Order;

(b) It was disingenuous of TCW to claim that he thought the 9 April Order only applied to ACPAM and not AOF1. If that was really the case, why would TCW need to seek ACPAM's consent to execute the said transaction?

(c) TCW well knew before the 9 April hearing that AOF1 had to make the payment (according to him). Yet, in seeking the 9 April Order, he did not see the need to inform the court and obtain the necessary directions and orders. Neither did TCW disclose his withdrawal of the RM3m *after* 10 April 2019; ACPAM only discovered it from their bank statement.

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35 Paras 28 to 30 of Wang's second affidavit.

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82 The court took a dim view of TCW's deliberate disregard of the standstill orders made on 9 April 2019. His explanation in [80] for his "inadvertent" breach is incredible and unacceptable to this court. It was a well-planned operation on his part – apply to court for an injunction to stop the defendants from removing him and, while he was still a director and CEO of ACPAM, go to Kuala Lumpur to effect the payment on behalf of AOF1 from ACPAM's CIMB account which he knew full well PCGL and other directors not aligned with him would have opposed and which they did. TCW made use of this court and misused the judicial process for his own ends. Such reprehensible conduct cannot be condoned.

83 TCW was also guilty of several material non-disclosures. In TCW's first affidavit, he had made himself out to be an indispensable CEO without whose services ACPAM would be doomed and would lose its RFMC licence issued by MAS. Nothing could be further from the truth. Indeed, the statement in TCW's first affidavit[36] that he and Lin were "the only directors of ACPAM who were cleared and accepted by the MAS as persons fit and proper persons to hold the office of a director of ACPAM" was a blatant untruth.

84 TCW failed to disclose the reprimands he had received in July 2018 and in April 2019 from MAS[37] which, contrary to his assertions, were all addressed to him personally. This is clearly seen from the fact that the April 2019 reprimand was headed:

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36 See [15(e)] above.

37 Exhibit WHYA-6 at p 128 of Wee's first affidavit.

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> MAS Reprimands Mr Tan Choon Wee for the Omission of Information in an Application to MAS and Failing to Discharge his Duty and Function as Chief Executive Officer and Director.

85 In MAS' letter dated 30 July 2018 to ACPAM marked for TCW's attention as its CEO, the heading was as follows:[38]

> REPRIMAND FOR CONTRAVENTIONS OF SECTION 92(B) OF THE SECURITIES AND FUTURES ACT (CAP. 289) ("SFA") AND PARAGRAPH 5(71)(a) OF THE SECOND SCHEDULE TO THE SECURITIES AND FUTURES (LICENSING AND CONDUCT OF BUSINESS) REGULATIONS (RG 10) ("SF(LCB)R") PURSUANT TO SECTION 334 OF THE SFA.

86 The only reference in the above letter to SWY was in paragraph three which relevant sections state:[39]

> The Company has contravened section 92(b) of the SFA, as it had omitted to declare certain information in its application for a capital markets services licence for fund management in Form 1A. The information so omitted was material to the application and without which the application was misleading. Specifically, the Company omitted to declare that a shareholder of the Company, Mr Sun Weiyeh [SWY]
>
> (a) had been a director and substantial shareholder of One Asia Investment Partners Pte Ltd, whose CMS licence in fund management was revoked by the Authority on 11 April 2017…
>
> (b) had been involved in several civil lawsuits, which were commenced….Form 1A requires disclosure of any judgment (in particular, that associated with a finding of fraud, misrepresentation or dishonesty) entered against the relevant person in any civil proceedings or is a party to any pending proceedings which may lead to such a judgment…

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38 Exhibit WHYA-6 at p 129 of Wee's first affidavit.

39 Exhibit WHYA-6 at p 130 of Wee's first affidavit.

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It was clear that MAS reprimanded TCW for *not* disclosing material information regarding SWY's background. MAS was *not* requesting SWY to provide information which the latter refused to disclose as TCW claimed[40].

87 Far worse, TCW knew as far back as 8 February 2019[41] that MAS intended to reprimand him. The letter from MAS of that date addressed to him personally as the director and CEO of ACPAM was headed;

> NOTICE OF INTENTION TO REPIMAND FOR COMMITTING MISCONDUCT UNDER SECTION 334(2) OF THE SECURITIES AND FUTURES ACT (CAP. 289) ("SFA") PURSUANT TO SECTION 334(1) OF THE SFA

Despite his representations to MAS by his letter dated 22 February 2019[42], MAS still reprimanded TCW by its letter dated 12 April 2019. I should add that in the public announcement made by MAS on the same day, the following extract appeared:[43]

> 4 MAS takes a serious view of Mr Tan's lapses. MAS expects CEOs and directors to carry out the duties and functions of their offices effectively, including ensuring that financial institutions comply with regularity requirements and providing complete and accurate information to MAS. Where appropriate, MAS has taken and will continue to take, regularity action against CEOs and directors of financial institutions that fail to comply with regularity requirements.

88 It therefore did not lie in TCW's mouth to say that the reprimands from MAS were directed at SWY and not at him personally.

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40 See [36] to [40] above.

41 Exhibit TCW-17 at pp 164-174 of TCW's third affidavit.

42 Exhibit TCW-18 at pp 176-179 of TCW's third affidavit.

43 Exhibit WHYA-6 at p 128 of Wee's first affidavit.

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89 TCW complained of being denied access to the office of ACPAM but failed to disclose that he himself (with the aid of a former director) had visited ACPAM's office and changed its front door lock to prevent anyone from entering the office, causing inconvenience to ACPAM's staff.

90 When the Suit was commenced and the injunction application was filed, neither TCW's first affidavit nor the writ of summons or the statement of claim made any mention of SWY. It was only in TCW's OS affidavit[44] and TCW's third affidavit that he first raised his alleged understanding with SWY that he would always remain a director and CEO of ACPAM. If there was such an understanding, why did TCW voluntarily resign as a director on 1 March 2019?[45]

91 Tellingly, this court notes that SWY is not a party to the Suit nor did TCW make any attempt to add SWY as a defendant *after* he raised his allegation of a common understanding with SWY. The omission is curious when the understanding he alleged he had with SWY is the *gravamen* of TCW's case that he cannot be removed as a director or CEO of ACPAM. None of the defendants were party to that understanding he had with SWY nor were they bound by it if it did exist – so why did TCW not sue SWY? It bears remembering that SWY through his shareholding in Pine Partners is a minority shareholder of ACPAM; he is not even a director. SWY only acquired a majority of the shares in PCGL in or about 4 February 2019. It is equally noteworthy that TCW's claim of his common understanding with SWY that he would always remain a director of ACPAM is inconsistent with one of the reliefs he has claimed in the Suit – that

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44 See [29] above.

45 See [18(c)] and Wee's first affidavit para 1.2.4.

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ACPAM be wound up. It is further inconsistent with clause 12.1 of his letter of appointment[46] and is also at odds with Article 69 of ACPAM's Articles of Association[47].

92 In giving the notice of termination in [20] together with Lin of the management agreement between ACPAM and AOF1 (which he also failed to disclose to this court), TCW had deprived ACPAM of its main revenue source, which contradicts his repeated claims that his actions in the Suit were prompted by his desire to protect ACPAM's interests. He had also breached his duties as a director of ACPAM in not disclosing his conflict of interest *vis-à-vis* Tactilis.

93 When this court inquired of his counsel (Mr Tan)[48] why TCW needed to have six mobile telephones and Spotify streaming services which monthly charges were borne by ACPAM, Mr Tan candidly admitted that he did not know. The court was made aware from Wang's first affidavit[49] and was also told by the defendants' counsel that the telephone charges of TCW for June 2019 alone totalled $11,785.31. TCW's contention[50] that clause 10.5 of his employment contract entitled him to have ACPAM bear those expenses is no answer to why he would need six instead of only one mobile telephone like other CEOs. Giving TCW the full benefit of the doubt, the court had even inquired of Mr Pillai if any of the six mobile telephones were for use in foreign countries and was told they were not.

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46 See [64(c)] above.

47 Set out at [64(b)].

48 See notes of arguments dated 24 April 2019 at p 29 lines 21-22.

49 See [22(q)] above.

50 See [35] above.

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94 The court also wondered why as a CEO, TCW would need to subscribe to Spotify's music streaming service and Singtel's television package. Spotify's subscribers are usually teenagers, students, young adults and the like. Whilst clause 10.5 of his contract of employment does state that TCW "will be reimbursed all telecommunication expenses incurred", surely it would not extend to music streaming service or television viewing packages. Indeed, in the ordinary course of business of any company, these services would not even be contemplated as coming within the scope of such a clause for a person in the position of a CEO.

95 There was little doubt that TCW abused the perquisites that were given to him as the CEO of ACPAM. Coupled with a prayer for ACPAM to be wound up as part of the reliefs that he claimed in the Suit, the court entertained grave doubts as to the *bona fides* of the injunction application. Did TCW want to stay on as ACPAM's CEO so that he could continue to have the company bear his unjustified and/or excessive expenses for as long as possible?

96 An injunction is an equitable relief. It is a truism that he who comes to equity must come with clean hands. Here, TCW's hands were not clean. His conduct did not warrant an injunction being granted to him even on an interim basis - he used the court's resources to achieve his own ends and not in the interests of ACPAM as he professed.

97 Indeed, TCW's stance was hypocritical - behind the back of the court, he withdrew funds from AOF1's sub-account maintained in ACPAM's CIMB account in Kuala Lumpur, despite deposing[51] that in order to protect ACPAM's

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[51] See [16(j)] above and para 27 of TCW's first affidavit.

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interests, he wanted to inform ACPAM'S banks to maintain the status quo pending the outcome of the Suit. If indeed TCW entertained any doubts whether AOF1 came within the parameters of the injunction order, it was incumbent on him to check with this court as to whether the scope of the injunction extended to AOF1's bank account.

98 The court heard no submissions from TCW on the tests for the granting of injunctions set out in *American Cyanamid*. In particular, nothing was said about where the balance of convenience lies or why damages would not be an adequate remedy if an injunction was refused. If TWC succeeds in reinstating himself as a director and CEO of ACPAM, his loss which would be purely pecuniary can be easily compensated by damages. On the facts, it was clear that the balance of convenience fell in favour of the second to fourth defendants being appointed as directors to ensure the continuing operations of ACPAM.

(ii) The Leave Application

99 The court refused TCW leave to appeal because he failed to satisfy any of the three limbs to do so as set out in *Lee Kuan Yew's* case and reaffirmed in *Abdul Rahman* namely:

(a) a *prima face* case of error of law;

(b) a question of general principle decided for the first time; and

(c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

100 In his arguments to persuade the court to grant leave to appeal, counsel for TCW had conflated the issues by relying on the court's decision in the OS. TCW had already filed an appeal against the court's decision in the OS via CA

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94/2019. This court's decision there has no relevance to the decision made in the first 24 April Order for which leave to appeal was required and refused - there was no interconnection between the two sets of proceedings. As the defendants pointed out, if this court had made an error in the second 24 April Order, those orders would be set aside by the appellate court. That would mean that TCW and Lin were not validly removed as directors and accordingly they would be reinstated. The injunction application that TCW sought would be rendered wholly academic and/or unnecessary.

101 The court would now deal with each limb for leave to appeal in turn.

Prima facie error of law

102 Earlier (at [75]), the court had alluded to *Essar Steel* as an exception to the rule that the error in question must be one of law, not fact. That case does not assist TCW as the comment made there by Kan Ting Chiu J (at [25]) to the effect that it would be a denial of justice to refuse leave to appeal where a judgment is the result of an error of fact is *obiter.* Kan J qualified his comment by adding that if any alleged error of fact can be relied on to seek leave to appeal, that would result in the virtual appeal hearings being conducted at the leave stage to establish whether there has been an error of fact.

103 If this court made an error of *fact* in thinking TCW (and Lin) could be removed as directors, that is no ground for granting leave to appeal, Both *Essar Steel* and *Abdul Rahman* were considered by the Court of Appeal in *IW v IX* [2006] 1 SLR (R) 135 as well as the English position propounded in *Smith v Cosworth Casting Process Ltd* [1997] 1 WLR 1538 ("*Smith v Cosworth"*), that leave to appeal should be granted if the applicant has an arguable case. Based on *Smith v Cosworth*, leave to appeal will be granted unless the grounds of

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appeal have no realistic prospects of success. However, the appellate court (at [14]) made it clear (and which it endorsed) that *Lee Kuan Yew's* case required a much higher threshold – the establishment of a *prima facie* case of error, before leave to appeal would be granted; it did not approve of the *Smith v Cosworth* test.

104 In TCW's fourth affidavit, he had relied on paragraph 68 (set out at [80] above) as an error of law for one of his reasons to be given leave to appeal. He further relied on the following paragraph:[52]

> Third, I understand that Her Honour's order was based upon her concerns over my conduct in paying MYR 3,000,000 out of AOF1's funds on 10 April 2019. I wish to say that, at the relevant time, I did not think that my actions were in breach of the Honourable Court's orders.

Neither *fact* can be said to give rise to errors of *law*. Moreover, the court had earlier pointed[53] to the *facts* that were at odds with TCW's alleged understanding with SWY. The fact that this court may have reached a wrong conclusion on the evidence presented in the affidavits does not give rise to an error of *law*.

105 Consequently, applying the test in *Lee Kuan Yew's* case and not the "realistic prospects of success" test in *Smith v Cosworth*, the court did not grant TCW leave to appeal. No submission was made to this court as to what errors of *law* had been made by the court's refusal to grant the equitable relief of an injunction to TCW in the exercise of the court's discretion.

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52 Para 68 of TCW's fourth affidavit.

53 At [90].

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Question of general principle decided for the first time

106 It cannot be said that the court's dismissal of the injunction application is something so novel that the question will be decided for the first time by the Court of Appeal.

A question of importance decided for the first time.

107 Neither can it be said that TCW's unsuccessful application gives rise to a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. TCW did not point to any conflict of judicial authority that would fall within this limb.

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108 As the court dismissed the Leave Application, there was no necessity to consider TCW's request in the same for his appeal to be heard on an expedited basis.

Lai Siu Chiu
Senior Judge

Tan Chuan Thye SC, Kok Chee Yeong Jared, Torsten Cheong, and Chiang Yuan Bo (Rajah & Tann Singapore LLP) for the plaintiff/applicant in S 374/2019 in Summonses No 1803/2019 and 2244/2019 and for the 1st defendant in OS 471/2019;
Chan Ming Onn David, Lee Ping and Ms Zhang Yi Ting (Shook Lin & Bok) for the 1st defendant in S 374/2019 and for the plaintiff in OS 471/2019;
Pillai Pradeep G and Jocelyn Lin (PRP Law LLC) for the 2nd to 5th defendants in S 374/2019 and the 2nd defendant in OS 471/2019.

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