IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 266

Suit No 992 of 2015

Between

JWR Pte Ltd

… *Plaintiff*

And

(1) Edmond Pereira Law Corporation
(2) Edmond Avethas Pereira

… *Defendants*

GROUNDS OF DECISION

[Tort] — [Negligence] — [Breach of duty]
[Contract] — [Breach]

Version No 2: 27 Oct 2020 (22:41 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **2**

THE UNDERLYING DISPUTE AS ALLEGED BY THE PLAINTIFF 2

LEGAL ADVICE OBTAINED AND PROCEEDINGS CONDUCTED 3

SUMMARY OF THE PLAINTIFF'S CASE **7**

SUMMARY OF THE DEFENDANTS' CASE **8**

THE DECISION **8**

ANALYSIS **10**

THE DUTY IN TORT 10

THE DUTY IN CONTRACT 11

ALLEGED BREACHES 12

Failure to render proper advice *12*

Failure to conduct Suit 896/2012 properly *18*

(1) The warrant to act and the events of 17 October 2012 19

(2) Commencing Suit 896/2012 against the wrong party 20

(3) Failing to include sufficient particulars in the statement of claim against Lee 21

(4) The striking out of Suit 896/2012 22

(5) Failing to apply for leave to amend the statement of claim 23

(6) Appeal against the assistant registrar's decision 24

(7) Failing to provide competent representation under r 16 of the Legal Profession Conduct Rules 1998. 24

PROOF OF LOSS 25

Version No 2: 27 Oct 2020 (22:41 hrs)

Likelihood of success.....*27*

(1) Section 343 Companies Act.....28

(2) Section 340 Companies Act.....29

Loss suffered.....*33*

(1) Quantum of loss.....33

(2) Recoverability of loss.....35

REFUND CLAIMED.....36

MISCELLANEOUS.....36

COSTS.....36

CONCLUSION.....38

Version No 2: 27 Oct 2020 (22:41 hrs)

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JWR Pte Ltd
v
Edmond Pereira Law Corp and another

[2019] SGHC 266

High Court — Suit No 992 of 2015
Aedit Abdullah J
12–14 March, 28 May 2019

12 November 2019

Aedit Abdullah J:

Introduction

1 The plaintiff in these proceedings is a company controlled by Dr Chen Walter Roland ("Dr Chen"), its sole shareholder and director. The first defendant is a law corporation set up by the second defendant, a practising advocate and solicitor who serves as the former's executive director.[1] The plaintiff commenced proceedings against the defendants for negligently providing advice and conducting proceedings in relation to a dispute that it was embroiled in previously. Following a three-day trial, I found that the plaintiff's claims were not established. The plaintiff has since appealed against my decision.

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[1] Second defendant's affidavit of evidence-in-chief ("AEIC") at para 6.

Version No 2: 27 Oct 2020 (22:41 hrs)

Background

2 The present action arose out of a dispute the plaintiff had with certain third parties. Legal proceedings were commenced, with the first and second defendants representing the plaintiff. The plaintiff, however, was eventually unsuccessful in its claim against the third parties.

The underlying dispute as alleged by the plaintiff

3 The plaintiff, a wholesale medical product trade company, was incorporated in 2006.[2] In that year, one Lee Fichow Helen ("Lee") proposed that Dr Chen be appointed the sole distributor of products ("Immunotec Products") manufactured by Immunotec Incorporated, a Canadian company ("Immunotec Inc").[3] Lee represented to Dr Chen that she was a director of Immunotec Research (S) Pte Ltd ("IRS"), and was the sole distributor of Immunotec Products in Singapore. Acting on Lee's representations, the plaintiff entered into an agreement with IRS in March 2006 whereby it was appointed as the sole distributor of Immunotec Products in Singapore.[4]

4 Sometime in July or August 2006, the plaintiff came to believe that there was another distributor of Immunotec Products in Singapore. Nonetheless, the plaintiff was assured by Lee that it was the sole distributor of Immunotec Products. At about this time, Lee also informed the Plaintiff that IRS could not continue to trade under its name, and was undergoing a name change to United

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2 Second defendant's AEIC at p 94.

3 Plaintiff's AEIC at para 4.

4 Plaintiff's AEIC at pp 14–31.

Version No 2: 27 Oct 2020 (22:41 hrs)

Yield International Pte Ltd ("UYI").[5] This necessitated a new agreement being entered into with UYI, which was signed on 18 August 2006.[6]

5 Subsequently, the plaintiff discovered that certain representations made by Lee were false:[7]

(a) IRS did not undergo a name change to UYI. Rather, they were both separate companies.

(b) There were other parallel importers in Singapore distributing Immunotec Products.

(c) The plaintiff had not been recognised by Immunotec Inc as the sole distributor of Immunotec Products in Singapore as Lee had not sought or obtained approval of this from Immunotec Inc.

After this was raised to Lee, she caused UYI to send a notice of termination on 18 October 2006 purporting to terminate the distributorship agreement with the plaintiff.[8]

Legal advice obtained and proceedings conducted

6 Almost six years later, on 8 October 2012, Dr Chen met with the second defendant and informed him that the plaintiff wished to commence legal proceedings against Lee and UYI.[9] On 13 October 2012, Dr Chen corresponded

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5 Plaintiff's AEIC at para 7.

6 Plaintiff's AEIC at p 47.

7 Plaintiff's AEIC at para 10.

8 Defendant's core bundle of documents (closing submissions) ("DCBCS") at pp 29–30.

9 DCBCS at pp 34–39.

Version No 2: 27 Oct 2020 (22:41 hrs)

with the defendants, giving his views on the dispute.[10] A letter was also sent on 15 October 2012 by Dr Chen to the defendants capturing these views and instructing the defendants to file a writ of summons against Lee and UYI as soon as possible.[11] On the same day (*ie*, 15 October 2012), the defendants advised the plaintiff by letter that proceedings against UYI would not be easy as it had been struck off the register of companies, and that the claim against Lee was unlikely to succeed as the agreement was between the plaintiff and UYI ("the 15 October Letter").[12] Dr Chen replied to this on 16 October 2012 maintaining that Lee had been acting in her personal capacity.[13]

7 The Defendants sent a follow-up letter of advice by email and post on 16 October 2012 ("the 16 October Letter"), stating that:[14]

(a) UYI and IRS had both been struck off;

(b) Lee had signed the distributorship agreements with the Plaintiff in her capacity as a director of UYI and IRS respectively; and

(c) piercing the corporate veil would require fraud and/or deceit.

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10 DCBCS at pp 41–56.

11 DCBCS at p 57.

12 DCBCS at pp 61–65.

13 DCBCS at p 71.

14 DCBCS at pp 74–75. The Minute Sheet dated 28 May 2019 incorrectly records the date of this letter as 17 October 2012.

Version No 2: 27 Oct 2020 (22:41 hrs)

The defendants' view was that there was insufficient evidence to succeed in a claim against Lee. Dr Chen, however, maintained that there was sufficient evidence.[15]

8 At a meeting with Dr Chen on the morning of 17 October 2012, the second defendant advised him of the difficulties in the plaintiff's case, including the need to take urgent action in light of the impending time bar. UYI could not be included in any suit as it had been struck off. There was also insufficient evidence to substantiate the plaintiff's claims. Dr Chen maintained that an action be commenced solely against Lee to keep the case alive.[16]

9 In the evening of 17 October 2012, the defendants commenced Suit 896 of 2012 ("Suit 896/2012") against Lee for misrepresentation and breach of contract.[17]

10 Subsequently, in April 2013, on Lee's application in Summons No 1759 of 2013 ("Summons 1759/2013"), Suit 896/2012 was struck out. Lee relied on two grounds for striking out: (a) the plaintiff's action was time-barred; and (b) the wrong party had been sued. The assistant registrar did not find that the suit was time-barred, but agreed that the wrong party had been sued. In relation to the plaintiff's attempt to pierce the corporate veil against Lee, the assistant registrar was of the view that this was not sufficiently pleaded in the plaintiff's statement of claim. While the assistant registrar would have been inclined to dismiss the application if there was evidence suggesting that the corporate veil could be pierced, no such evidence was included in the affidavit filed to resist

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15 DCBCS at pp 78–79.

16 Second defendant's AEIC at paras 24–25.

17 DCBCS at pp 87–90.

Version No 2: 27 Oct 2020 (22:41 hrs)

the application. The plaintiff's claim was thus struck out under O 18 r 19(*b*) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") on the basis that it was factually unsustainable.[18] No instructions to appeal were given by Dr Chen.

11 In a letter dated 8 July 2013, the plaintiff alleged that the defendants had been negligent in advising it on its claim against Lee, UYI and IRS. Numerous instances of alleged negligence were raised, which are elaborated on below (at [14]). The plaintiff claimed losses of about $115m. Unsurprisingly, these allegations were denied by the defendants.[19]

12 On 12 August 2013, the plaintiff sent a letter to the defendants reiterating its stance. It further threatened to lodge a complaint with the Law Society and commence a suit against the defendants for negligence if they refused to settle.[20] The defendants did not respond to the plaintiff's letter directly and informed its insurers about the threat of legal action.[21]

13 On 8 July 2015, the plaintiff proposed mediation of its dispute with the defendants.[22] The defendants failed to respond to the plaintiff's offer. The plaintiff then commenced the present action on 29 September 2015.[23]

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18 DCBCS at pp 943–944.

19 DCBCS at pp 1021–1022.

20 DCBCS at pp 1023–1027.

21 Second defendant's AEIC at para 87.

22 DCBCS at p 1028.

23 DCBCS at p 1029.

Version No 2: 27 Oct 2020 (22:41 hrs)

Summary of the plaintiff's case

14 The plaintiff's claims against the defendants were grounded in both the tort of negligence and contract. The plaintiff raised numerous alleged instances of failure to exercise due care and skill on the part of the defendants which can be broadly summarised as follows:[24]

(a) The defendants failed to advise the plaintiff on the possibility of making an application under s 343 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") to reinstate both UYI and IRS. This would allow a claim under s 340 CA for fraudulent trading to be brought against UYI and IRS to allow the imposition of personal liability on Lee.

(b) The defendants failed to conduct Suit 896/2012 properly by:

(i) commencing proceedings against the wrong party;

(ii) not including sufficient reference in the pleadings filed for Suit 896/2012 to lifting of the corporate veil against Lee; and

(iii) not including sufficient evidence in the pleadings and affidavit filed to resist Lee's striking out application to support the plaintiff's claims.

15 The effect of the defendants' negligence was that the plaintiff's claim in Suit 896/2012 was dismissed. Had the defendants not been negligent, the plaintiff was likely to succeed in its claim against Lee.[25]

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24 DCBCS at pp 1016–1020.

25 Plaintiff's closing submissions at para 19.

Version No 2: 27 Oct 2020 (22:41 hrs)

Summary of the defendants' case

16 The defendants contended that the pleadings in Suit 896/2012 were drafted based on the plaintiff's instructions.[26] The plaintiff was unlikely to succeed in an application under s 340 CA to impose personal liability on Lee.[27] In any event, the plaintiff would have been unable to make an application under s 343 CA to reinstate IRS and UYA in time; the defendants were first consulted by the plaintiff on 8 October 2012 and the time bar set in on 18 October 2012.[28] There was also insufficient evidence of the plaintiff having suffered any loss or that it would have succeeded in enforcing any judgment obtained in Suit 896/2012 against Lee had it prevailed.[29]

17 The defendants also sought costs on an indemnity basis against the plaintiff on the basis that its claim was brought for an improper purpose, and that its conduct in the present proceedings was unreasonable.[30]

The decision

18 I was not persuaded that the plaintiff's claim was made out on the balance of probabilities. The claim was primarily founded on the duty of a solicitor to advise his or her client with due care, skill and diligence. The requisite standard of care is that of a reasonably competent and diligent solicitor and not one of a guarantee of success: *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761 ("*Anwar Patrick Adrian*") at [168].

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26 Defendants' closing submissions at paras 34–42.

27 Defendants' closing submissions at paras 43–58.

28 Defendants' closing submissions at paras 63–66.

29 Defendants' closing submissions at paras 91–110.

30 Defendants' closing submissions at paras 116–123.

Version No 2: 27 Oct 2020 (22:41 hrs)

19 I was satisfied based on the evidence, including the 16 October Letter, that instructions were obtained and complied with by the defendants. While Dr Chen disputed having read the letter on 16 October 2012, I was not persuaded that the 16 October Letter was not given at that time.

20 While this was not an emergency situation, I accepted that the standard of care expected of a solicitor would depend in part on any time or deadline pressures faced, such as the need to bring a claim before the setting in of a limitation period. A solicitor would have to bear such constraints in mind in any advice and in the conduct of any work for a client. What may be possible early on in the process may not be feasible late in the day, and certain avenues may have to be abandoned.

21 I was of the view that adequate advice was given, as evidenced by an attendance note recorded contemporaneously by the second defendant during a meeting with Dr Chen on 8 October 2012 ("the 8 October Attendance Note").[31] Though this was not direct evidence of what was discussed or the advice rendered during the meeting, I was satisfied that it demonstrated that the matters in question were covered including, importantly, the question of the revival of IRS and/or UYI if they were found to have been struck off.

22 Loss and causation were also doubtful. The plaintiff's claims against Lee, IRS and UYI, whether under ss 340 and 343 CA or piercing the corporate veil, would have to be founded on available evidence. I was persuaded that there was insufficient evidence that would have enabled these claims to have been pursued with any success. The defendants were not remiss in this regard as they

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31 DCBCS at pp 34–38.

Version No 2: 27 Oct 2020 (22:41 hrs)

had constantly sought, but were unable to obtain such evidence from the plaintiff.

Analysis

23 I ruled against the plaintiff on the claims that were made. None of the alleged breaches were made out. Furthermore, the alleged losses suffered by the plaintiff were not substantiated at all.

The duty in tort

24 The plaintiff pleaded negligence on the part of the defendants through the failure to exercise due care, skill and diligence in the prosecution of its claim in Suit 896/2012. Neither side went into detail as regards the existence of a duty of care and its contents: the defendants did not dispute that they owed the plaintiff such a duty in the present case on the basis of the framework set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [115].

25 As mentioned above (at [18]), the defendants would have breached their duty of care towards to the plaintiff if they failed to take the same care that a reasonably competent and diligent solicitor would. In determining whether there is a breach of the duty of care, there has to be some specificity as to what should have been advised on by the defendants: *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC and another and another appeal* [2016] 2 SLR 928 ("*Nava Bharat*") at [8]. The precise duty had to be specified, before the question of breach could be examined.

Version No 2: 27 Oct 2020 (22:41 hrs)

The duty in contract

26 The plaintiff's claim for breach of contract was premised on the breach of an implied term of the retainer, under which the defendants owed a duty to exercise due care, skill and diligence in the prosecution of Suit 896/2012.

27 The retainer between the plaintiff and the defendants were largely captured by the warrant to act signed by Dr Chen on 17 October 2012, the material portions of which are set out here for convenience:

> Subject: Claim against [Lee] and/or [UYI]
>
> I/We, hereby agree to engage the services of [the first defendant] and hereby grant [the first defendant] my/our Warrant to Act for us in connection with legal proceedings relating to matters arising out of the matter, and shall indemnify and keep you indemnified against any consequences arising from any mistakes.
>
> I/We, hereby agree that if a dispute arises out of or in connection with this Engagement, including any question regarding its existence, validity or termination which cannot be settled through negotiation, they shall in good faith, try to settle the same by Mediation administered by the Singapore Mediation Centre before resorting to court action.

28 The defendants did not take issue with the implication of the term, which would be readily implied under the test set out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [101].

29 A solicitor may concurrently owe a client obligations in contract and a duty of care in tort: see *Anwar Patrick Adrian* at [165]. The point was not taken in the present case that there were limitations in the retainer which circumscribed or ousted the defendants' duty of care. These grounds do not therefore distinguish between contractual and tortious duties in the analysis of the alleged breaches.

Version No 2: 27 Oct 2020 (22:41 hrs)

Alleged breaches

30 As mentioned above (at [14]), the plaintiff's claim that the defendants failed to exercise due care and skill in the prosecution of Suit 896/2012 and related proceedings fall into two broad categories: (a) failure to advise the plaintiff of the possibility of utilising ss 343 and 340 CA; and (b) failure to conduct Suit 896/2012 properly. The matters falling into either category were intertwined, so that the lines between the two were not always distinct. For the purposes of these grounds, category (a) will address the defendants' advice to the plaintiff on its potential causes of action against Lee and/or IRS and UYI; category (b) deals with the alleged actions and omissions of the defendants relating to the litigation process.

31 I should add that the reasons for the plaintiff only commencing legal proceedings against Lee six years after their dispute first arose were not really before me.

Failure to render proper advice

32 The standard of care expected of a solicitor – that of a reasonably competent and diligent solicitor (see [18] above) – applies to all aspects of the solicitor-client relationship. This would include: the taking of instructions; appreciating the law and applying it to the facts of the case; and formulating advice to the client, including on the appropriate course of action to take.

33 Taking a perhaps generous reading of the statement of claim, the plaintiff essentially argued that the advice given by the defendants fell short in:[32]

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[32] Statement of claim (amendment no 1) at para 16.

Version No 2: 27 Oct 2020 (22:41 hrs)

(a) advising the plaintiff that it could not sue IRS and/or UYI; and

(b) failing to consider and advise on the possibility of making an application under s 343 CA to restore IRS and/or UYI, followed by an application under s 340 CA to impose personal liability on Lee.

The plaintiff's argument was that s 343 CA would overcome any difficulties posed by the dissolution of IRS and UYI. The application under s 340 CA would then have allowed for an order to be made declaring Lee to be personally liable for all the debts and liability of the companies.

34 For their part, the defendants argued that proper advice as permitted by circumstances and the available evidence was in fact given.

35 Following the guidance laid down by the Court of Appeal in *Nava Bharat* (see [25] above), it was not sufficient for the plaintiff to assert a general failure to give appropriate advice: there had to be some specificity as to what the defendants should have advised on.

36 The evidence relied upon by the plaintiff to prove the inadequacy of advice rendered to it by the defendants was the testimony of Dr Chen. Dr Chen testified that there was no mention of the possibility of utilising s 343 CA to restore IRS and UYI, or the invocation of s 340 CA, prior to the filing of the writ of summons in Suit 896/2012 on 17 October 2012.[33]

37 The defendants pointed to the 8 October Attendance Note and the 16 October Letter (the letter also being relevant to questions concerning the conduct of Suit 896/2012). The defendants alleged that initial instructions were

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[33] Notes of Evidence ("NEs") 13 March 2019, p 48 at line 14 – p 49 at line 28.

Version No 2: 27 Oct 2020 (22:41 hrs)

given by Dr Chen on 8 October 2012. The second defendant advised that it was essential that the status of UYI be determined as it would be difficult to bring an application to declare its dissolution void if it were struck off,[34] that the claim would potentially be time barred by 17 October 2012, and that there appeared to be little evidence to support the claims against Lee or UYI.[35] The second defendant did not wish to accept the instructions,[36] but Dr Chen prevailed upon him and the second defendant agreed to represent the plaintiff.[37]

38 Following correspondence from Dr Chen, the defendants informed the plaintiff on 15 October 2012 that it would be difficult to pursue proceedings against UYI as it had been struck off, and that it would be difficult to proceed against Lee.[38] This was reiterated in the 16 October Letter sent to the plaintiff.[39] Dr Chen insisted that the claim could proceed.[40]

39 On 17 October 2012, the second defendant met with Dr Chen and reiterated that the plaintiff did not have a good case. The second defendant advised filing a protective writ of summons, following which the matter should be handed over to another firm. It was not possible to include UYI as a party as it was already struck off and it would not be possible to reinstate it before the time bar.[41] Dr Chen then instructed the second defendant to proceed by

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34 Defendants' closing submissions at para 79.

35 DCBCS at pp 34–39; NE 14 March 19 at pp 9–11.

36 Second defendant's AEIC at para 10.

37 Second defendant's AEIC at paras 11–12.

38 DCBCS at pp 61–63.

39 DCBCS at pp 74–75.

40 DCBCS at pp 78–79.

41 Second defendant's AEIC at para 24.

Version No 2: 27 Oct 2020 (22:41 hrs)

commencing an action against Lee. This was evidenced by an attendance note recorded contemporaneously by the second defendant.[42]

40 I preferred the evidence for the defendants. There was adequate documentation supporting the defendants' case that Dr Chen had been advised on the possibility of restoring UYI and/or IRS. This was particularly in the form of the 8 October Attendance Note, the letters exchanged between the parties, and the warrant to act.

41 It is true that the documents do not expressly mention s 343 CA. But in broad terms, the evidence showed that the second defendant was aware of and had mentioned the existence of a mechanism to restore struck-off companies to Dr Chen. The 8 October Attendance Note states:[43]

> "If [UYI] is wound up -/ dissolved to declare [the] dissolution [void] but it is a difficult ex. Costs and must show proof."

Legal advice need not be detailed to the level of citation of specific sections, cases or authorities. Much will depend on the context, including the client, the point at which advice is given, and the purpose of the advice. It would often suffice for advice to be given at a higher level of generality and abstraction, without the citation or reference of specific statutory provisions or case law. Clients do not instruct lawyers to be lectured upon on legal doctrine.

42 The limitation period would also have added additional demands. The limitation period is six years for both contract and tort. Since the cause of action against Lee accrued on 18 October 2006, any claim against Lee, UYI and/or

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42 Second defendant's AEIC at para 25.

43 DCBCS at pp 34–39.

Version No 2: 27 Oct 2020 (22:41 hrs)

IRS had to be commenced by 17 October 2012, nine days after the plaintiff first consulted the defendants. There appeared to be several possible courses of action that could have been taken by the plaintiff:

(a) commence legal proceedings against Lee, UYI and/or IRS ahead of 18 October 2012; or

(b) commence legal proceedings at a later date while taking the position the claim was not time barred as it had been extended under the Limitation Act (Cap 163, 1996 Rev Ed).

Other options may have existed, but the duty of care imposed in contract and tort does not consist of a guarantee of a solution or success. These duties only require that the solicitor act in the same manner as a reasonably competent and diligent solicitor would. Failure by itself would not be sufficient to prove negligence or breach.

43 Filing the application ahead of the time bar would have been one option, but doing so would have been fraught with risk, particularly that of insufficient evidence. To my mind, shying away from commencing such a claim appeared to be a reasonable response.

44 It is, I think, important here that the defendants did ask the plaintiff to go elsewhere. Dr Chen, however, insisted that the defendants continue to represent the plaintiff. While this would not absolve the defendants of any negligence that occurred, it did go towards showing that the plaintiff was aware that the defendants had concluded that in their best assessment there was no case. In persisting in instructing the defendants, the plaintiff took the risk of anything falling short. This point was not, however, pleaded by the defendants as a supervening event breaking the chain of causation.

Version No 2: 27 Oct 2020 (22:41 hrs)

45 In the round, the advice given by the second defendant up till the meeting on 17 October 2012 was that there was an impending time bar coming up the same day, and that there appeared to be insufficient evidence. This was not an emergency situation, but I accepted that the standard of care expected of the defendants would have to be taken against the context of the time and deadline pressures, particularly the running out of the limitation period. Any professional advisor would have to bear such constraints in advising and conducting any work for a client. What may be possible early on in the process may not be feasible late in the day, and certain avenues may have to be abandoned. Any advice given by a solicitor must be taken against the context of the facts presented to him or her: a solicitor does not advise clients *in vacuo*. This flows from the requirement for specificity as to what should have been advised laid down in *Nava Bharat* (see [25] above). Here, the defendants were first approached by the plaintiff on 8 October 2012, some nine days before the plaintiff's claim against Lee would become time-barred (*ie*, after 17 October 2012). In the circumstances, given the impending time bar, the advice given by the defendants would seem appropriate: there was little likelihood in practical terms of applying for restoration in time as this was unlikely to be granted before 18 October 2012 to allow proceedings to be commenced against UYI and/or IRS.

46 In any event, even if I were to accept that the defendants were negligent in failing to advise on the possibility of utilising ss 343 and 340 CA to reinstate the companies and impose personal liability on Lee, I did not think that the plaintiff had shown that it had any chance of succeeding in those claims. I elaborate on the feasibility of the plaintiff's proposed applications under ss 343 and 340 CA below at [81]–[95].

Version No 2: 27 Oct 2020 (22:41 hrs)

Failure to conduct Suit 896/2012 properly

47 While there were aspects of the conduct of Suit 896/2012 that would overlap with the giving of advice, the focus of this section of the grounds is on the conduct of the suit itself.

48 The parties were in dispute about the warrant to act, which the defendants alleged had been signed on the plaintiff's behalf by Dr Chen. A solicitor intending to represent any party is required by O 64 r 7 (1) of the ROC to obtain a warrant to act from that party.

49 The other allegations in respect of the failure to conduct Suit 896/2012 properly were as follows:

(i) commencing Suit 896/2012 against the wrong party;[44]

(ii) failing to include sufficient particulars against Lee in the statement of claim filed in Suit 896/2012, resulting in the claim being struck out;[45]

(iii) failing to apply for leave to amend the statement of claim;[46] and

(iv) failing to provide competent representation under r 16 of the Legal Profession (Professional Conduct) Rules 1998 (S 156/1998).[47]

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44 Plaintiff's closing submissions at para 18(iii).

45 Plaintiff's closing submissions at para 18(v).

46 Plaintiff's closing submissions at para 18(vi).

47 Plaintiff's closing submissions at para 18(ix).

Version No 2: 27 Oct 2020 (22:41 hrs)

50 I found that the plaintiff failed to prove on a balance of probabilities that the defendants were negligent in the conduct of Suit 896/2012. The defendants persistently asked for more evidence. The plaintiff did not provide adequate instructions to allow the defendants to present a stronger case.

(1) The warrant to act and the events of 17 October 2012

51 The plaintiff denied that the events on 17 October 2012 were as what was described by the defendants. There was no meeting at the defendants' office at 9.30 am that day. Dr Chen only arrived at the defendants' office after 11.30am.[48] Dr Chen also denied having read the 16 October Letter prior to the meeting, claiming that he did not check his emails every day and that the hardcopy sent by mail only reached him on 17 October 2012.[49]

52 I was satisfied that the plaintiff's instructions were obtained and complied with. As mentioned above at [19], I did not accept Dr Chen's contention that he did not read the 16 October Letter on the same day. In the 16 October Letter, the defendants highlighted to the plaintiff that there was insufficient evidence to prove fraud and/or deceit on the part of Lee. In an email to the second defendant on 16 October 2012, Dr Chen asked the second defendant to elaborate on the sort of evidence required to sustain a claim in fraud or deceit.[50] To my mind, Dr Chen's email was strong evidence that he had read the 16 October Letter on the same day. Otherwise, there would have been no basis for the question posed to the second defendant.

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48 NE 12 March 19, p 52 at lines 2–7.

49 NE 13 March 19, p 13 at lines 10–25.

50 DCBCS at pp 74–79.

Version No 2: 27 Oct 2020 (22:41 hrs)

(2) Commencing Suit 896/2012 against the wrong party

53 As I understood it, the plaintiff's argument that Suit 896/2012 was commenced against the wrong party was closely linked to its claim that the defendants ought to have applied under s 343 CA to reinstate UYI and/or IRS. Proceedings could then be commenced against the companies whereby s 340 CA could be used to impose personal liability on Lee.

54 The defendants, on the other hand, contended that all work done for the purposes of Suit 896/2012 against Lee was done in accordance with Dr Chen's instructions.[51]

55 The plaintiff's claim against the defendants was that they had failed to consider the possibility of making a claim under ss 343 and 340 CA. As a result of this negligence, the plaintiff agreed with the defendants' recommendations to proceed with a claim against Lee *personally*. It followed that in commencing Suit 896/2012 against Lee, the defendants had not in fact sued the wrong party as they were simply complying with the plaintiff's instructions. The plaintiff appeared to conflate the question of the defendants having complied with the plaintiff's instructions with that of the defendants being negligent in giving advice.

56 In any event, I was satisfied that Dr Chen's instructions in relation to the conduct of Suit 896/2012 were complied with by the defendants. Dr Chen conceded during cross-examination that the writ of summons, statement of

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[51] Defendant's closing submissions at paras 34, 38–42.

Version No 2: 27 Oct 2020 (22:41 hrs)

claim and further and better particulars filed in Suit 896/2012 were consistent with instructions given to the defendants.[52]

57 In the circumstances, I found that the defendants had not breached their duty of care to the plaintiff by commencing proceedings against the wrong party. Whether the defendants should have advised the plaintiff to pursue applications under ss 343 and 340 CA went towards the question of whether they were negligent in the provision of advice to the plaintiff (which, as discussed above at [32]–[46], I found the defendants not to have been).

(3) Failing to include sufficient particulars in the statement of claim against Lee

58 The plaintiff maintained that it had provided sufficient evidence and instructions to the defendants to properly craft the statement of claim filed in Suit 896/2012. The defendants had breached their duty of care by failing to provide sufficient particulars to support the plaintiff's claim against Lee.[53]

59 The defendants pointed to the failure of the plaintiff and Dr Chen to provide sufficient evidence. The defendants had raised concerns about the lack of evidence at multiple points of time.[54]

60 While a solicitor has a duty to advise the client as to what evidence is required, and perhaps to assist in obtaining that evidence, the solicitor would ultimately have to depend on his client to bring in such evidence or, if such

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52 NE 12 March 19, p 16 at lines 8–19; NE 12 March 19, p 67 at line 31 – p 69 at line 4; NE 12 March 19, p 74 at line 5 – p 99 at line 29.

53 Plaintiff's closing submissions at para 18(v).

54 Defendants' closing submissions at para 35.

Version No 2: 27 Oct 2020 (22:41 hrs)

evidence is not in the client's possession, custody or control, to direct him to where these may be obtained. Certainly, there will on many occasions have to be an iterative, recurrent process in which the solicitor's advice is needed to hone the thinking of the client about where such evidence may possibly be found. In the present case, I was satisfied that the defendants flagged the concerns about the lack of evidence, and there was no cure or lead proffered by the plaintiff. Indeed, the plaintiff's Dr Chen seemed content to maintain his position about its claim, leaving the evidential situation unsatisfactory.

(4) The striking out of Suit 896/2012

61 The striking out application made by Lee in Summons 1759/2013 was on the basis that a claim could not be brought against her in her personal capacity, and that any claim for misrepresentation was time-barred.

62 The defendants alleged that Dr Chen was not willing to accept the second defendant's advice, and insisted on proceeding on the basis that Lee was guilty of fraud and could not use the separate legal personality of the company. Advice was given, and the plaintiff was urged to obtain independent advice or instruct new solicitors.[55]

63 The assistant registrar found that the plaintiff's misrepresentation claim against Lee was not time-barred. However, the assistant registrar was of the view that the statement of claim did not contain any mention of piercing the corporate veil. While the assistant registrar was inclined to dismiss Lee's striking out application, there was insufficient evidence provided in the affidavit filed by Dr Chen to resist the application; it was on this basis that the assistant

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[55] Defendants' closing submissions at paras 59–62.

Version No 2: 27 Oct 2020 (22:41 hrs)

registrar decided to strike out the plaintiff's claim in Suit 896/2012 under O 18 r 19(*b*) of the ROC.

64 In my view, the striking out of Suit 896/2012 was not attributable to any breach of the duty of care owed to the plaintiff on the part of the defendants. Rather, this was due to the failure of the plaintiff to provide sufficient evidence that would have allowed its claim to survive Lee's striking out application. The plaintiff was unable to point to any evidence provided to the defendants which the latter failed to include in the affidavit filed by Dr Chen to resist Lee's application

(5) Failing to apply for leave to amend the statement of claim

65 The plaintiff's claim that the defendants breached their duty of care in failing to apply for leave to amend the statement of claim failed for the same reasons as its claim founded upon the failure to include sufficient particulars in the statement of claim.

66 Any change to the pleadings would have ultimately been dependent on the instructions given by the plaintiff and the available evidence. As for any advice that ought to be given on this, such advice would have to be dependent on the state of the instructions. It is not incumbent on a lawyer to advise his or her client on all possible options; there is no obligation to be creative or inventive; what is competent must be measured and limited by the state of the instructions that have been received. Here, the plaintiff's claim was struck out under O 18 r 19(b) of the ROC for lack of evidence (see [63] above). It follows that any amendment to the statement of claim would not have remedied this fundamental flaw in the plaintiff's case. I therefore found that the defendants

Version No 2: 27 Oct 2020 (22:41 hrs)

had not breached their duty of care to the plaintiff in failing to apply to amend the statement of claim.

(6) Appeal against the assistant registrar's decision

67 This was not specifically pleaded, but will be dealt with for completeness. The evidence was that there was discussion between the parties about the assistant registrar's decision, with the plaintiff's Dr Chen maintaining the strength of his case, and the defendants taking the position that an appeal would be difficult.[56] That was where the parties left the matter, and it thus does not figure in the present case.

68 In the circumstances, the plaintiff had failed to make out its claims against the defendants. There was no breach of any obligation in contract or tort.

(7) Failing to provide competent representation under r 16 of the Legal Profession Conduct Rules 1998.

69 The plaintiff claimed that the defendants violated r 16 of the Legal Profession (Professional Conduct) Rules 1998 (S 156/1998) in failing to provide competent representation.[57] It should be noted at the outset that the applicable version of the professional conduct rules at the material time was the Legal Profession (Professional Conduct) Rules 2010 (Cap 161, R1, 2010 Rev Ed) ("the PCR").

70 I am doubtful that r 16 of the PCR creates an obligation that is actionable in a civil claim by any person complaining of the breach. While not articulated

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56 DCBCS 949–1003.

57 Statement of claim (amendment no 1) at para 14(ix).

Version No 2: 27 Oct 2020 (22:41 hrs)

as such by the plaintiff, the basis for such a claim would presumably have been the breach of a statutory duty. For a statutory duty to create a private right of action, the party asserting such a right must show that Parliament intended for the existence of a private right of action. The mere existence of a statutory remedy would also not be decisive as to the existence of a private right of action, and each statute would have to be interpreted contextually: see *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd* [2014] 2 SLR 360 at [39], citing *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549.

71 The plaintiff did not attempt to make out the existence of any private right in its pleadings or in its arguments. I did not see anything on the surface of the PCR or the Legal Profession Act (Cap 161, 2009 Rev Ed) that would suggest the existence of such a private right of action.

72 A breach of the PCR might be evidence pointing to a breach of a contractual or tortious duty, but for the reasons given above, I did not find that there was any such breach by the defendants. The plaintiff's reference to the PCR did not take its case any further.

Proof of loss

73 I was of the view that even if the defendants were found to have been negligent in advising on and conducting Suit 896/2012, the plaintiff had failed to prove that it had suffered any loss, or that anything could have been recovered from the lawsuit.

74 The defendants argued that the plaintiff had not adduced any evidence which would allow the court to conclude that it would have succeeded in the

Version No 2: 27 Oct 2020 (22:41 hrs)

claims against Lee, UYI and IRS. The plaintiff had also failed to prove that it had suffered any losses, or that such losses were recoverable.[58]

75 For damages to be recoverable, it must be shown that there was a substantial chance of success in the cause of action pursued. A substantial chance is taken in contradistinction to a speculative one: see *Sports Connection Pte Ltd v Asia Law Corp* [2015] 5 SLR 453 at [75]–[89], citing *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("*Allied Maples*"); see also *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661 at [132]–[139]. I understood this to mean that such a chance could be less than on the balance of probabilities, but above something that was negligible or marginal.

76 An illustrative case in this regard is the decision of the English Court of Appeal in *Hatswell v Goldbergs (a firm)* [2001] EWCA Civ 2084 ("*Hatswell*"). In *Hatswell*, the defendant solicitors were negligent in advising the plaintiff to pursue an action against a doctor for medical negligence prior to his claim becoming time-barred. The English Court of Appeal adopted a two-step test in determining the quantum of damage recoverable at [48]:

> The process for the court is a two-stage process. First, the court must be satisfied that the claimant has lost something of value. An action which is bound to fail (or, as it was put in this court in [*Allied Maples*] has no substantial prospect of success and is merely speculative) is not something of value. It is only if the claim passes that test that the court has to evaluate in percentage terms of the full value of the claim what has been lost.

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58 Defendants' closing submissions at paras 82–110.

Version No 2: 27 Oct 2020 (22:41 hrs)

The English Court of Appeal, in finding that the plaintiff's claim was bound to fail, upheld the assessment of the trial judge that the loss of chance from the defendant solicitor's negligence was nil (at [56]).

77 The same principles were applicable in the present case. The plaintiff was required to show that there was a substantial chance of success in Suit 896/2012. The plaintiff also had to demonstrate that it had suffered loss as a result of its failure in Suit 896/2012, and that such losses could have been recovered from Lee, UYI and IRS.

78 Even on this lower threshold, I was of the view that the plaintiff was unlikely to succeed in its claim against Lee, UYI and IRS. First, it was unlikely that the plaintiff could have successfully applied to reinstate UYI and IRS before the time bar set in on 18 October 2012, such as to allow proceedings to be commenced against the companies. Second, there was insufficient evidence to show that the plaintiff would have succeeded in an application under s 340 CA to hold Lee personally liable. It followed that the plaintiff would not have suffered any loss even if the defendants were found to have been negligent in the present action.

79 I was also not satisfied that the plaintiff had showed that it had suffered any losses from the alleged fraud committed by Lee, or that it would have been able to successfully enforce any judgment obtained against either Lee or the companies.

Likelihood of success

80 The defendants contended that the plaintiff failed to show that the action against the companies, even if they had been reinstated, as well as against Lee, had a substantial chance of success.

Version No 2: 27 Oct 2020 (22:41 hrs)

81 It was unlikely that an action to reinstate the companies under s 343 CA, as well as to proceed against Lee personally under s 340 CA, would have had a substantial chance of succeeding based on the evidence that was available then, and the evidence before me in this claim.

82 First, no authority was cited by the plaintiff to show that the very act of filing an application under s 343 CA could have frozen the running of the time bar, nor does it appear to have been part of its pleaded case. Second, I noted that there was no opinion exhibited that supported the use of s 340 CA in the way contended for by the plaintiff. No specific case was cited either that involved an analogous claim. It seemed a little bit odd in the circumstances that the plaintiff set such store by s 340 CA. I elaborate on my reasons below.

(1) Section 343 Companies Act

83 The plaintiff claimed that UYI and/or IRS could have been reinstated by 17 October 2012 had an application been made on 12 October 2012.[59] The plaintiff also contended that an option would have been to sue the companies first before applying subsequently to restore them.[60]

84 The defendants argued that it was not possible to reinstate UYI and/or IRS and commence legal proceedings against them before the time bar set in on 18 October 2012.

85 The dissolution of a company can be declared void by an application under s 343 CA: see, *eg*, *Lee Hung Pin v Lim Bee Lian* [2015] 4 SLR 1004 ("*Lee*

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59 NE 13 March 19, p 50 at lines 23–26.

60 Plaintiff's further and better particulars at p 46.

Version No 2: 27 Oct 2020 (22:41 hrs)

Hung Pin"). In *Lee Hung Pin*, I recognised that the discretion conferred on the court in s 343(1) CA was to be exercised "carefully and judicially, bearing in mind the likely objectives of the grant of that power" (at [25]). Reasons would have to be given to persuade the court to grant such a declaration. But more importantly, an application under s 343 CA would have had to take time, which was not possible in the circumstances given the looming time bar. Certainly, some request for urgency and expediency could have been made to the courts. Even then, cogent reasons would have had to be given for the delay in pursuing the claims against UYI and/or IRS, and in then seeking to restore them ahead of such proceedings. It was not clear to me that such reasons were raised by the plaintiff even at the hearing before me.

86 It was also not apparent to me how an action could have been commenced against UYI and/or IRS (which had been struck off) prior to an application being granted for their restoration under s 343 CA. No authority was cited to me for the proposition that reinstatement of a previously struck off company under s 343 CA would retrospectively confer validity on an action commenced when that same company did not possess legal status.

(2) Section 340 Companies Act

87 The plaintiff alleged that it was defrauded by Lee through UYI and/or IRS. An application under s 340 CA would allow it to obtain an order making Lee personally liable for the debts of the companies.

88 The defendants argued that the elements for an action under s 340 CA were not met. The plaintiff was only a contingent creditor. There was also a lack of evidence to show that the business of UYI and/or IRS had been carried out with intent to defraud its creditors, and that Lee was knowingly a party to the

Version No 2: 27 Oct 2020 (22:41 hrs)

carrying on of the business of the companies in that manner. What the plaintiff had against Lee fell short.

89 Section 340 CA requires that the application for a declaration imposing personal liability on a director of a company be made by "the liquidator or any creditor or contributory". The defendant took the position that the plaintiff lacked standing as it did not satisfy any of these requirements; the plaintiff could at best be described as a contingent creditor, and there was no case law interpreting the meaning of creditor in s 340 CA to include a contingent creditor. To my mind, there was some room for the plaintiff to have made itself out as a creditor. I did not consider this to be an insurmountable obstacle for the plaintiff.

90 Rather, this aspect of the case turned on the lack of sufficient evidence to support the plaintiff's claim. In this regard, the more serious the allegation of fraud under s 340 CA, the more the plaintiff would have had to do in order to establish its case, though the requisite standard of proof remains that of a balance of probabilities: see *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict* [2005] 3 SLR(R) 263 at [14].

91 In a claim under s 340 CA, it must be shown that the business of the company was carried on with "intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose", and that the defendant was "knowingly a party to the carrying on of the business in that manner": see *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271 at [102]. I accepted the arguments of the defendants that these elements would have presented considerable obstacles given the instructions given to the second defendant at the material time:

Version No 2: 27 Oct 2020 (22:41 hrs)

(a) The business of UYI and/or IRS must be carried on to defraud. The commission of fraud alone is not enough; the business as a whole must be implicated: see *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek* [2007] 2 SLR(R) 77 at [17]–[26]. This would entail a considerable amount of evidence about the activities of the companies.

(b) There also had to be evidence to show that Lee was involved in fraud. The allegations made by the plaintiff centred on alleged misrepresentations by Lee that she was the sole distributor of Immunotec Products in Singapore and that she could assign her distributorship rights to the plaintiff (through UYI and/or IRS).[61] The plaintiff claimed that these representations were false as the sole distributorship was granted to Lee in her personal capacity and not to UYI and/or IRS.[62] Lee also could not have transferred distributorship rights to Immunotec Products for the term specified in the agreement between the plaintiff and UYI (*ie*, three years with an option to renew for a further two years) as her agreement with Immunotec Inc was due to expire in 2007.[63]

92 I was satisfied that what the plaintiff claimed was evidence of the business of UYI and/or IRS being carried on fraudulently by Lee fell short, as submitted by the defendants. No documentary evidence was provided to support various contentions such as:

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61 Statement of claim (amendment no 1) at para 3.

62 Statement of claim (amendment no 1) at para 9(iv)

63 Statement of claim (amendment no 1) at para 9(vi)

Version No 2: 27 Oct 2020 (22:41 hrs)

(a) Lee's knowledge that UYI and/or IRS were not authorised by Immunotec Inc to appoint the plaintiff as sole distributor of Immunotec Products (as the sole distributorship belonged to Lee personally);

(b) fraudulent mixing of the financial accounts of UYI and IRS;[64] and

(c) fraudulent misrepresentations and breach of fiduciary duty on the part of Lee.[65]

93 In fact, the evidence demonstrated that the second defendant had persistently requested for more evidence to substantiate a claim against Lee.[66]

94 At the very least, there was sufficient doubt about the feasibility of a claim under s 340 CA.

95 The plaintiff argued that further evidence could have been obtained on discovery had Suit 896/2012 not been struck out.[67] But to get to that point, there had to be sufficient basis for the allegation to be made, such that it would at least survive a striking out application by going beyond a bare allegation. As it was, the assistant registrar, in striking out Suit 896/2012, found that there was no evidence given that would support a piercing of the corporate veil (see [63] below). While this was on a different point, it demonstrated that it was more likely than not that the plaintiff would have difficulty maintaining a cause of action under s 340 CA. Furthermore, no evidence was given that such evidence

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64 Plaintiff's submissions at para 30(xi).

65 Plaintiff's submissions at para 30(xiii).

66 Defendants' submissions at para 59.

67 Plaintiff's reply submissions at para 13(d).

Version No 2: 27 Oct 2020 (22:41 hrs)

would have in fact been discoverable had the defendants helped the plaintiff persist in the suit.

Loss suffered

96 The defendants also argued that, in any event, the plaintiff failed to show loss in respect to the claims against Lee, UYI and IRS that would have been recoverable.

97 The plaintiff relied on the following evidence to demonstrate its alleged losses:

(a) a valuation report on the plaintiff's business report ("the Fiducia Report") prepared by its expert witness, Mr Soo Hon Weng ("Mr Soo"); and

(b) an in-house valuation prepared by Dr Chen ("Dr Chen's Valuation Report").

(1) Quantum of loss

98 The plaintiff's claims on the quantum of its alleged losses were weak and unsubstantiated. Also, as argued by the defendants, the losses claimed by the plaintiff varied significantly over time. The initial figure was losses of about $252,000 with loss of profits of up to $18.9 million in 2012; this grew to about $43.2m in the further and better particulars filed in Suit 896/2012, to about $115.4m in its letter to the defendants on 8 July 2013.[68] In the further and better

[68] Defendants' closing submissions at para 93.

Version No 2: 27 Oct 2020 (22:41 hrs)

particulars filed in the present action, the losses fell back to about $2 million,[69] going up to about $4.5 million in a disclosed valuation estimate.[70] The Fiducia report valued the plaintiff's loss of distributorship rights at about $9.1m.[71] Finally, Dr Chen's Valuation Report gave a range of $3.1 billion to $8.9 billion, with a minimum terminal value of about $143 million based on projections up till 2030.[72]

99 These valuations relied upon by the plaintiff were not substantiated. The figures relied upon by the plaintiff in its own internal valuations were, at the very least, wildly optimistic. There was no discounting at all for adverse conditions or the effects of substitution or competition; no tail-off was accounted for in the growth projections, and essentially, it assumed that growth would continue on an endless upward trend. The appetite for such products was projected to be ceaseless and, for want of a better term, humongous.

100 No commodity or product has, to the court's knowledge, displayed such a continuous, endless upward trend, returning exponential profits over such an extended period of time.

101 The Fiducia report, prepared by Mr Soo, was disavowed by the plaintiff. The figures presented in the Fiducia report were not as optimistic as in Dr Chen's Valuation Report. However, there were still issues, as argued by the

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69 Plaintiff's further and better particulars at p 11. *Postscript: After the issuing of these grounds to the parties, it was pointed out that these figures were erroneous. In the further and better particulars, the figures should be about $2 billion and $4.5 billion respectively. The findings and the reasoning are not affected.*

70 DCBCS at p 1039.

71 DCBCS at p 1050.

72 DCBCS at p 1138.

Version No 2: 27 Oct 2020 (22:41 hrs)

defendants, given that it was founded on unsubstantiated assumptions and assertions that were not supported by evidence.[73] The information relied upon in the preparation of the Fiducia report were provided by the plaintiff. Furthermore, that information was based on a report prepared by Dr Chen himself.[74] There was nothing to show that the report prepared by Dr Chen could be relied upon; the Fiducia report was based on extremely flimsy evidence. I must also record that it was surprising that Mr Soo, in preparing the Fiducia Report, failed to display greater criticality and analysis of the factual basis undergirding his expert opinion; I was not confident that Mr Soo truly understood his role as an expert witness in court proceedings.

102 Dr Chen's Valuation Report, titled "Revised 3rd Valuation of Sole Distributorship",[75] also contained information that was not substantiated. It also did not satisfy the requirements to be admitted into evidence under s 47(1) of the Evidence Act (Cap 97, 1997 Rev Ed). Nothing was shown at trial to establish Dr Chen's expertise in business valuation. At the most charitable, his view of the losses suffered by the plaintiff was wildly optimistic with little evidential basis. I therefore disregarded Dr Chen's Valuation Report entirely.

(2) Recoverability of loss

103 A further difficulty was the fact that the plaintiff was unable to establish that Lee, UYI and IRS could have satisfied any award made in the plaintiff's favour: if all the plaintiff could obtain in the absence of any negligence by the defendants was a paper judgment against the companies or Lee, the defendants

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73 Defendant's closing submissions at para 94(4).

74 Defendant's closing submissions at para 94(4); NE 13 March 19, p 96 at lines 7–13.

75 Plaintiff's AEIC at pp 277–310.

Version No 2: 27 Oct 2020 (22:41 hrs)

could not be made liable for any alleged monetary loss. Otherwise, the plaintiff would be in a better position as a result of the defendants' alleged negligence when compared to if everything had gone smoothly.

Refund claimed

104 There was also a claim for a refund of legal fees paid to the defendants for work done in relation to Suit 896/2012, which was not made out. Here, I found that the defendants had complied with the plaintiff's instructions and did not breach their duty of care. There was thus no basis to deny the defendants of their fees: see *Paul Davidson Taylor (a firm) v White* [2004] EWCA Civ 1511 at [38].

Miscellaneous

105 It appeared to me that parties took the view that the claim against Lee for fraudulent misrepresentation in Suit 896/2012 required a piercing of the corporate veil. I had some doubts as to the correctness of this view. A director is *personally liable* for his own torts committed in relation to the company's affairs: see *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [84], citing *Company Directors: Duties, Liabilities and Remedies* (Simon Mortimore ed) (Oxford University Press, 2009) at para 27.22. However, as neither parties' pleaded case turned on this point, I need not say more.

Costs

106 In the circumstances, while I awarded costs against the plaintiff, I did not agree with the defendants that this was an appropriate case to impose costs on an indemnity basis.

Version No 2: 27 Oct 2020 (22:41 hrs)

107 Vinodh Coomaraswamy J in *Tan Chin Yew Joseph v Saxo Capital Markets Pte Ltd* [2013] SGHC 274 at [98] considered when an award of indemnity costs should be made:

> 98 Order 59 r 5 sets out several factors which a court should take into account in considering whether it is "appropriate" to make an exceptional award of indemnity costs. These factors include the conduct of the paying party before and during the proceedings. However, the list in Order 59 r 5 is not exhaustive. In *Macmillan Inc v Bishopsgate Investment Trust plc* (10 December 1993, unreported), Millet J held:
>
> > The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.

Coomaraswamy J also cited approvingly the list of factors set out by Tomlinson J (as he then was) in *Three Rivers District Council v The Governor and Co of the Bank of England (No 6)* [2006] EWHC 816 (Comm) at [25] (at [99]).

108 There were aspects of plaintiff's case that did not appear well founded and were not supported by evidence. However, given the relative brevity of the trial, it was not necessary for any sanction to be imposed on the plaintiff.

Version No 2: 27 Oct 2020 (22:41 hrs)

Conclusion

109 For the reasons above, the plaintiff's claim was dismissed.

Aedit Abdullah
Judge

Syn Kok Kay (Patrick Chin, Syn & Co) for the plaintiff;
Christopher Anand Daniel, Harjean Kaur and J Jayaletchmi
(Advocatus Law LLP) for the defendants.

Version No 2: 27 Oct 2020 (22:41 hrs)