IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 20

Originating Summons No 509 of 2016

Between

Liberty Sky Investments Ltd

… Plaintiff

And

(1) Oversea-Chinese Banking Corporation Ltd
(2) Dr Goh Seng Heng

… Defendants

GROUNDS OF DECISION

[Civil Procedure] – [Disclosure of documents]

Liberty Sky Investments Ltd
v
Oversea-Chinese Banking Corp Ltd and another

[2017] SGHC 20

High Court — Originating Summons No 509 of 2016
Debbie Ong JC
29 July, 20 September, 8 and 10 November 2016

8 February 2017

Debbie Ong JC:

Introduction

1 This is a decision in respect of Originating Summons No 509 of 2016 ("OS 509/2016") taken out by Liberty Sky Investments Ltd ("LSI") against the 1st defendant, Oversea-Chinese Banking Corporation Ltd ("OCBC"), for the disclosure of certain documents relating to an account of its customer, the 2nd defendant, Dr Goh Seng Heng ("Dr Goh").

2 OS 509/2016 is related to Suit No 1311 of 2015 ("S 1311/2015"), which is an action by LSI against Dr Goh, and his daughter, Dr Michelle Goh, for the rescission of a Sale and Purchase Agreement between LSI and Dr Goh dated 25 November 2014 ("the SPA"). The SPA concerned the purchase of shares by LSI in a company known as Aesthetic Medical Partners Pte Ltd ("AMP"). It is not disputed that LSI transferred a sum of $14,422,050 ("the

Sale Price") to Dr Goh's bank account with OCBC ("the Account" or "Dr Goh's Account") pursuant to the SPA. In this application, LSI seeks the disclosure of documents relating to the Account to discover if the Sale Price remained in that account, or had been transferred to any third parties. It may then, if appropriate, commence proceedings to trace and recover the Sale Price from these third parties and take such steps as may be necessary to protect its interest in the monies.

3 OCBC takes the position that it would abide by the orders made by the court. Consequently, OCBC did not participate in the proceedings. Shortly after LSI filed this application, Dr Goh applied to be added as a defendant in the proceedings, and was granted leave to do so. He made arguments against the grant of the application. Having heard the arguments, I allowed LSI's application and ordered that there shall be discovery of the relevant banking documents. Dr Goh has appealed against the decision and I now give fuller grounds of my decision. He has also applied for a stay of execution of my order, which I have granted.

Background to the application

The parties

4 LSI is an investment company incorporated in Seychelles. It is controlled by Mdm Gong Ruilin ("Mdm Gong"), a Chinese national based in Shanghai. Mdm Gong is married to Mr Lin Lijun ("Mr Lin"), who is also a Chinese national.

5 AMP is a company incorporated in Singapore. It is in the business of providing aesthetic facial treatments and procedures through a clinic under the name and style of "Dr Goh Seng Heng & Partners". The clinic holds itself out

as providing personalised and specialised dermatological treatments and is where Dr Goh and Dr Michelle Goh practise. AMP also operates a chain of clinics known as "PPP Laser Clinic" and sells skincare products under the name "the PPP shop". Dr Goh was the Group Executive Chairman of AMP from 6 January 2012 to 30 June 2014, and Dr Michelle Goh was the Chief Executive Officer and a director of the company from November 2011 to June 2015. Dr Goh and Dr Michelle Goh were at all material times shareholders of AMP. On or prior to 17 October 2013, Dr Goh and Dr Michelle Goh respectively owned 41.62% and 1.7% of the shares in AMP.

6 Mdm Gong and Mr Lin came to know Dr Goh and Dr Michelle Goh as they were interested in investing in the PPP Laser Clinic franchise in Suzhou, China. Eventually, Mdm Gong and Mr Lin acquired the franchise rights to operate a PPP Laser Clinic in Suzhou. In or around October 2014, Mdm Gong had various meetings with Dr Goh which led to the execution of the SPA on 25 November 2014.

LSI's claim in S 1311/2015

7 LSI's case in S 1311/2015 is that it had been induced to enter into the SPA by misrepresentations made by Dr Goh and Dr Michelle Goh or their agents and/or representatives. LSI elected to rescind the purchase upon discovering the misrepresentations, and claims, amongst other things, a return of the Sale Price paid under the SPA and a declaration that Dr Goh holds the Sale Price on resulting or constructive trust for LSI.

8 The pleaded misrepresentations, which LSI alleges was first made by Dr Goh to Mdm Gong on the evening of 23 October 2014, may be summarised as follows:

(a) A trade sale of all the shares in AMP to Mr Peter Lim, or a company controlled by Mr Peter Lim, was imminent and would likely take place within one month from 23 October 2014 ("the Trade Sale representation").

(b) In the event that the trade sale to Mr Peter Lim did not materialise, Dr Goh and Dr Michelle Goh planned to list AMP through an initial public offering ("IPO") on the Singapore Exchange Mainboard, which was targeted for completion around March to June 2015, and that in any case an IPO would take place no later than 24 months after any acquisition of shares in AMP by LSI ("the IPO representation").

(c) There were minority shareholders in AMP who could stifle the trade sale or IPO. Dr Goh and Dr Michelle Goh needed to buy out the interests of these shareholders, and as Dr Goh did not have the requisite funds for this purpose, he required funding assistance from Mdm Gong and/or Mr Lin (or their nominee, *ie*, LSI) ("the Minority Shareholders representation").

LSI alleges that these misrepresentations were repeated again to Mdm Gong on 24 October 2014 and to Mr Lin on 25 October 2014.

9 According to LSI, in reliance on these alleged misrepresentations, it entered into the SPA with Dr Goh on 25 November 2014 for its purchase of 32,049 shares in AMP from Dr Goh. The SPA provided, amongst other things, the following terms:

4. Other Terms:

…

> ii. The company guarantees the value of the Purchaser's capital for 24 months from the SPA date.
>
> iii. In the event the company is sold at a trade sale after this SPA at a higher price than Buyer's purchase price, the Purchaser will be entitled to retain the full trade sale's transaction share price.
>
> iv. If the company is sold at a trade sale at a price below Purchaser's purchase price + 15% IRR within 24 months from SPA date, the Purchaser is entitled to recoup their cost+15% annualized IRR from the company.
>
> v. If an IPO event takes place instead of a trade sale, the share price is determined by the market circumstances and the capital and IRR guarantee will not apply.
>
> …
>
> vii. In the event there is no IPO or trade sale at the end of the 24 months from the SPA date, the Purchaser can sell the above shares back to seller or the company with a prior notification of 21 days, at the principle [*sic*] and annualized IRR as specified above. The principle [*sic*] and the IRR return are guaranteed by the company [AMP]. The payment and share transfer shall be completed within 21 days.
>
> viii. After 24 months from SPA date, the above capital and IRR guarantees will lapse.
>
> …

The SPA thus contemplated the possibility of a trade sale or IPO. It also provided LSI the option, in the event that no trade sale or IPO took place within 24 months from the date of the SPA, to sell the shares back to Dr Goh or AMP at a certain guaranteed price.

10 The Sale Price was transferred by LSI to Dr Goh's Account in two tranches: the first payment amounting to $7,650,000 was transferred on 19 December 2014 and the second payment of $6,772,050 was transferred on 21 January 2015.

The procedural history

11 As events transpired, the relationship between the parties soured. On 24 November 2015, LSI sent a letter of demand to Dr Goh and Dr Michelle Goh, rescinding the SPA and demanding a return of the Sale Price. LSI also requested a confirmation that the Sale Price remained in Dr Goh's Account or, in the event the Sale Price had been transferred out of the Account, a disclosure of the relevant banking documents. By a letter dated 7 December 2015 from Tan Rajah & Cheah (the former solicitors of Dr Goh and Dr Michelle Goh), these requests were refused.

12 Thereafter, on 31 December 2015, LSI commenced S 1311/2015. On 23 May 2016, LSI filed Summons No 2483 of 2016 ("SUM 2483/2016"), seeking a freezing injunction against Dr Goh and Dr Michelle Goh. LSI also took out OS 509/2016.

13 As SUM 2483/2016 and OS 509/2016 were related, the applications were heard together. On 10 November 2016, I granted both applications in LSI's favour. In respect of SUM 2483/2016, I found that LSI had made out a good arguable case against Dr Goh in relation to its claims in S 1311/2015 and that, on the facts, there was a risk that Dr Goh would dissipate his assets which would frustrate LSI's claim. In particular, LSI had presented solid evidence demonstrating a lack of probity on Dr Goh's part in his dealings with others that was indicative of a propensity to dissipate assets through the use of covert devices. However, I found that LSI had not made out its case against Dr Michelle Goh, and declined to grant a freezing injunction against her.

The present application

14 In this application (*ie*, OS 509/2016), LSI seeks from OCBC discovery relating to information concerning the movement of the Sale Price paid into Dr Goh's Account. LSI cites the following reasons in support of its application:

> (a) if Dr Goh and/or Dr Michelle Goh are found liable for fraud in inducing LSI to pay the Sale Price into Dr Goh's Account, the Sale Price will be subject to a resulting or constructive trust, and LSI would therefore have a proprietary interest in the Sale Price;
>
> (b) any person or persons who receive the monies constituting the Sale Price (or any part thereof) may be liable to LSI for knowing receipt or to account to LSI for the Sale Price (or any part thereof, as the case may be) as resulting or constructive trustees; and
>
> (c) in the event that the Sale Price had been transferred to any third parties, LSI may have to commence legal proceedings to recover the Sale Price from these parties or to protect LSI's interest in respect of the said monies.

15 LSI's purpose in making the application is to identify third parties, if any, from whom it may seek recovery of monies by its assertion of a proprietary claim to the Sale Price. There is no dispute between the parties that LSI would be entitled to follow or trace the Sale Price in equity if the SPA was rescinded for fraudulent misrepresentation (see *Shalson and others v Russo and others* [2005] 2 WLR 1213 at [122]–[127]). If LSI succeeds in its claim in fraudulent misrepresentation, it has a right to the rescission of the contract (see *Ross River Ltd & Another v Cambridge City Football Club Ltd* [2007] EWHC

2115 at [193], accepted in Singapore in *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31 at [77]).

16 In its written submissions, LSI relies on the court's inherent jurisdiction and on O 24 r 6(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). In respect of the former, LSI relies on the observations of Sundaresh Menon JC (as he then was) in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 ("*UMCI*"), where His Honour held that the court's inherent jurisdiction could be resorted to for orders which were reasonably necessary in order for justice to be done, and that this (at [96]):

> … [extended to] the power to make suitable orders and directions that [were] reasonably required to prepare the way for a just and proper trial of the issues between the parties and for evidence to be gathered.

17 LSI also relies, alternatively, on O 24 r 6(5) of the Rules of Court, which provides that:

> An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

18 LSI further highlights the court's jurisdiction to grant orders of discovery against non-parties by drawing support from the decision of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 ("*Norwich Pharmacal*"). Orders made for pre-action discovery pursuant to this decision – known as "*Norwich Pharmacal* orders" – allow the applicant to seek information from third parties for the purpose of identifying the person

or persons who may be liable to him. The oft-cited passage of Lord Reid's judgment in *Norwich Pharmacal* reads (at 175):

> … [I]f through no fault of his own a man gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

19 It has been observed that the jurisdiction found in O 24 r 6 overlaps with the court's jurisdiction to grant a *Norwich Pharmacal* order (see, for example, *UMCI* at [91] and Foo Chee Hock gen ed, *Singapore Civil Procedure 2017, Vol 1* (Sweet & Maxwell, 2017) at para 24/6/9). The Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey James*") observed (at [24] and [37]) that O 26A r 1(5) (which is similar to O 24 r 6(5), save that it applies to pre-action interrogatories) was intended to be a codification of the principles set out in *Norwich Pharmacal*.

20 In *Dorsey James*, the Court of Appeal considered the case law on *Norwich Pharmacal* orders, and explained the requirements for the grant of such an order. First, the person from whom discovery is sought must have had been involved in the wrongdoing, though the involvement may have been completely innocent (at [39]). Second, the applicant must be able to show a reasonable *prima facie* case of wrongdoing against the person whose information or identity is sought of (at [44]). Third, the applicant must show that the disclosure sought is necessary to enable him to take action, or at least that it is just and convenient in the interests of justice to make the order sought. Two significant considerations in the last factor are whether there

exists an alternative and more appropriate method to obtain the information and whether the order is proportionate in the circumstances (at [45]).

21 Besides *Norwich Pharmacal*, LSI also relies on the decision of the English Court of Appeal in *Bankers Trust Co v Shapira and others* [1980] 1 WLR 1274 ("*Bankers Trust*"). There, Lord Denning emphasised the importance of discovery in allowing funds to be traced, and referred to the decision of the House of Lords in *Norwich Pharmacal* which he said exemplified the court's powers in ordering discovery. He set out the principles applicable to the making of such orders as follows (at 1282):

> This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. *It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money – as, for instance, when the customer has got the money by fraud – or other wrongdoing – and paid it into his account at the bank.* The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled … to lift the latch of the banker's door … The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank … *If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents – for that is the only way of tracing the money or of knowing what has happened to it* … So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery: and the documents, once seen, must be used solely for the purpose of following and tracing the money: and not for any other purpose.
>
> [emphasis added]

22 Indeed, the *Norwich Pharmacal* order is "more extensive where a proprietary action is contemplated" (Jeffrey Pinsler, *Singapore Court Practice 2017*, Vol 1 (LexisNexis, 2017) at p 1205). *Bankers Trust* appears to have

approved the use of the *Norwich Pharmacal* jurisdiction against third parties, such as banks, in a tracing claim, though some have observed that the jurisdictions underpinning the decisions in *Norwich Pharmacal* and *Bankers Trust* are separate and distinct (see, for example, *Re Murphy's Settlements* [1998] 3 All ER 1 at 8–9).

23 In the present case, whether or not the jurisdictions in *Norwich Pharmacal* and *Bankers Trust* are distinct or overlapping, I am of the view that LSI's case falls within the ambit of O 24 r 6(5) of the Rules of Court, *Norwich Pharmacal* and *Bankers Trust*. The purpose of the order which LSI seeks is primarily to identify potential parties to sue, in the event that the Sale Price had been transferred out of Dr Goh's Account to other third parties. The action against these third parties would be based on LSI's proprietary right to the Sale Price (or the traceable proceeds thereof). In turn, LSI would have a proprietary right to the Sale Price if the transfer was induced by fraud on Dr Goh's part.

24 A similar application for the disclosure of documents by a third party was made in *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd and others and another appeal* [2016] 4 SLR 1392 ("*La Dolce Vita*"). In that case, the plaintiffs similarly alleged that it had been induced to make a purchase based on fraudulent misrepresentations by the defendant. The plaintiffs applied to court for discovery of the defendant's banking documents from the defendant's banks for the purpose of (a) identifying third parties for the potential commencement of proceedings against them; (b) ascertaining the full nature of the wrongdoing perpetrated by the defendant and to enable the plaintiffs to plead their case properly; and (c) to trace assets in support of the plaintiffs' proprietary claim against the defendant and third parties who received the monies from her (see *La Dolce Vita* at [21]). In allowing the

application for pre-action discovery under O 24 r 6(5) of the Rules of Court, Andrew Ang SJ held that the plaintiffs were required to establish three elements: (a) the defendant's banks had facilitated wrongdoing; (b) there was wrongdoing on the defendant's part; and (c) disclosure was necessary, just and convenient (at [53]). The learned Judge elaborated on the requirements under O 24 r 6(5) of the Rules of Court as follows (at [56]):

> The only criterion made express in O 24 r 6(5) was that it was "just" for such a discovery order to be made. Order 24 r 6 was subject to O 24 r 7, which imported a requirement of necessity. As the Court of Appeal explained in *Dorsey James*, the prescribed test then becomes one of "justness underpinned by 'necessity'" (at [33]). The Court of Appeal in *Dorsey James* also explained that O 26A r 1(5) was meant to be a codification of the Court's *Norwich Pharmacal* jurisdiction (see [24] and [28]). The extent (if any) to which recourse may be had to the inherent jurisdiction of the court for an order for pre-action disclosure … and how this interacts with the provisions in the Rules of Court on pre-action disclosure and para 12 of the First Schedule to the [Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)] will have to be considered at an appropriate time. *For the time being, it sufficed for me to proceed on the basis that if the requirements … above were satisfied, then the Plaintiffs would be entitled to succeed under O 24 r 6(5). In other words, if those requirements were satisfied then disclosure would clearly meet the prescribed test of justness underpinned by necessity.* [emphasis added]

Whether an order of discovery ought to be made against OCBC

25 I apply the principles and requirements stated in *Dorsey James* and *La Dolce Vita* to the present application. It is noted that if there was wrongdoing on Dr Goh's part, it is not disputed that OCBC would have facilitated that wrongdoing, given that the bank account to which LSI transferred the Sale Price was Dr Goh's Account with OCBC. The following analysis will thus focus on whether there is a *prima facie* case of wrongdoing on Dr Goh's part, and whether disclosure is necessary, just and convenient in the circumstances.

Whether there is a prima facie *case of wrongdoing on Dr Goh's part*

26 LSI's primary case in S 1311/2015 is in fraudulent misrepresentation. In the context of OS 509/2016, it is LSI's primary case which is relevant, because if LSI is able to prove the allegations of fraudulent misrepresentation, it would have a proprietary claim to follow and trace the Sale Price.

27 LSI's pleaded facts in S 1311/2015 supporting the alleged cause of action in fraudulent misrepresentation are that Dr Goh made the representations set out at [8] above with the knowledge that the representations were false, intending that LSI should act on those representations, and LSI entered into the SPA in reliance on the false representations.

28 These misrepresentations would be actionable if they played a real and substantial role in LSI's decision to enter into the SPA. LSI did not have to prove that the misrepresentations were the *sole* inducement for it to enter into the SPA. As the Court of Appeal held in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [23] (referred to in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [94]):

> The misrepresentations need not be the sole inducement to them, so long as they had played a real and substantial part and operated in their minds, no matter how strong or how many were the other matters which played their part in inducing them to act and invest …

LSI would be entitled to rescind the SPA as long as one of the three pleaded misrepresentations had an operative effect on LSI's decision to enter into the SPA.

29 Dr Goh contends that there is no *prima facie* case of fraud or wrongdoing. He submits that the issues as to whether he made the alleged fraudulent misrepresentations and whether LSI was induced by the representations to enter the SPA are the subject of serious dispute in S 1311/2015. He argues that:

(a) He and Dr Michelle Goh did not make the representations in question. In the alternative, the representations were in relation to future events.

(b) Even if they made the representations, the representations were not false and neither he nor Dr Michelle Goh believed them to be false. In relation to the Trade Sale and IPO representations, Dr Goh highlights that AMP undertook substantial efforts to achieve either a trade sale or an IPO. Further, with regard to the Minority Shareholders representation, Dr Goh's position is that there were minority shareholders with voting rights in AMP who wanted to exit the company, and whom he and Dr Michelle Goh wanted to buy out.

(c) In any event, LSI was not induced to enter into the SPA by the representations. In this connection, LSI was aware of the possibility that a trade sale or IPO might not take place. It was promised the option to sell the shares back to Dr Goh or AMP at a certain guaranteed price.

30 At this stage, for the purpose of OS 509/2016, there is no requirement that LSI must prove on a balance of probabilities that Dr Goh is liable for the fraudulent misrepresentations. It would be sufficient if "some reasonable basis for contending that a wrong may have been committed" can be demonstrated (see *Dorsey James* at [43]).

(1) Did Dr Goh make the representations?

31 Having assessed the evidence, I find that there is a reasonable *prima facie* case that Dr Goh made the representations in question to LSI through Mdm Gong and Mr Lin. LSI referred to documentary evidence exhibited in Mdm Gong's affidavit for this purpose. These sources show that Dr Goh had indicated to Mdm Gong and Mr Lin that a trade sale or IPO was imminent. They also show that Dr Goh was pressing Mdm Gong and Mr Lin for funds to buy out the shares of the minority shareholders in AMP, giving the impression that he did not have such funds himself and that he was in urgent need of such funds. I set out some illustrations here:

(a) In an email dated 10 November 2014 from Mr Lee Kin Yun (whom, LSI submits, was at all material times an agent and/or representative of Dr Goh and Dr Michelle Goh) sent to Mr Lin and copied to Mdm Gong and Dr Goh, Mr Lee stated that AMP "[is] doing dual track IPO and/or trade sale, the Board is working on both these options" and the "SGX IPO timing target is around June 2015".

(b) In an email dated 23 November 2014 from Dr Goh to Mr Lin and copied to Mdm Gong, Dr Goh stated:

> thank u very much for aligning yourself to my approach to business [and] friendship.
>
> there is a small hiccup in the sale of share to u.
>
> immediately, we can release only 17k of shares at 450 per share to you. the re stocking of my shares is taking a bit of time. *i will need your cash asap to assist the buy back from most of the minority shareholders*. …
>
> [emphasis added]

(c) On 24 November 2014 (just prior to the execution of the SPA on 25 November 2014), Dr Goh and Mdm Gong discussed the

guarantee over the WhatsApp messaging platform. Dr Goh explained to Mdm Gong that the reason for using AMP to repurchase the shares at a guaranteed price if no IPO or trade sale was concluded after 24 months after the date of the SPA was "because we did not give you sufficient time [and] material for Due Diligence" and that a "quick decision" was required, though it was "not fair for a quick decision based on impulsion and little cognition, thus the 2 years of guarantees [*sic*]". Dr Goh assured Mdm Gong that the "chances are that nobody need[s] to guarantee anything once IPO or Trade Sales [*sic*] take place *very soon*" [emphasis added].

(d) Subsequently, on 25 November 2014 (*ie*, the date the SPA was executed), Dr Goh told Mdm Gong to "sign the SPA if [you] can, and i will appreciate if you can tt money to my Bank of Singapore Account asap" as he "[needed] the money to take out immediately the minority shareholders with voting rights".

(e) After the SPA was executed, but prior to the second tranche of payment, Dr Goh sent a WhatsApp message to Mdm Gong on 13 January 2015, stating that the "Trade Sales deal [was] on [*sic*]". Dr Goh explained that the deal was meant to be executed in October 2014 but that there was a minor complication, and that the "buyer wanted to meet [him] directly [and] close the deal". Dr Goh said that the buyer was "a mini Jack Ma with billions" and referred to him as Peter Lim, "9th in the Singapore Forbes richest list". While the trade sale was designated as "Plan A", Dr Goh also informed Mdm Gong that "Plan B" was for an IPO, "in the event that [the trade sale] deal did not reach [his] satisfaction on terms [and] conditions". Dr Goh concluded by seeking more funding "to proceed with buying back more shares from

> the Minority Investors". After a further exchange of messages, Dr Goh told Mdm Gong that "the Peter Lim deal is on tomorrow".

32 I am aware that there may be some gaps in the documentary evidence currently presented. For example, I did not come across any written correspondence in the evidence placed before me that referred to the IPO as specifically taking place on the SGX Mainboard and which unequivocally demonstrates that Dr Goh had represented that the trade sale to Mr Peter Lim was likely to take place within one month from 23 October 2014. I note that LSI's pleaded case in S 1311/2015 is that the representations were first made to Mdm Gong at a dinner meeting on the night of 23 October 2014 and repeated on other subsequent occasions. In other words, LSI's case is that the representations were also made orally and, seen from this perspective, it is not surprising that the details of the representations were not set out in full in the documentary evidence, although it is clear that allusions were made to them in written correspondence. In my view, the examples of the representations made by Dr Goh contained in the documentary evidence, taken together with Mdm Gong's affidavit evidence and the terms set out in the SPA, are sufficient to draw the inference on a *prima facie* basis that Dr Goh did make the Trade Sale, IPO and Minority Shareholders representations.

33 Dr Goh submits that the pleaded representations relate to statements of future intent and are not actionable on that basis. In *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886, the Court of Appeal cited (at [83]) the observations of Lewison J (as he then was) in *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Limited* [2010] EWHC 358 (Ch) at [198] that a statement of future intent might contain an implicit representation that:

(a) its maker had an honest belief in the statement;

(b) its maker had reasonable grounds to make the statement; or

(c) its maker had the present intention to carry out the matters expressed in the statement.

34 In the present circumstances, I find that while that the Minority Shareholders representation is a statement of present fact, the Trade Sale and IPO representations may broadly be said on its face to be statements of future intent. However, what is contained in these statements of future intent and conveyed to the representee (*ie*, LSI) are implied representations as to the current state of affairs and the present beliefs and intentions of the representor (*ie*, Dr Goh). I accept LSI's submission that the Trade Sale and IPO representations encompass the implied representations that Dr Goh had an honest belief in the representations, had reasonable grounds to make the statements and had the present intention to carry out the matters expressed in the statements. In particular, where the IPO representation is concerned, the pleaded representation is in fact that Dr Goh planned to list AMP on the SGX Mainboard, which is a statement of present fact as to Dr Goh's state of mind when he made that representation.

(2) Were the representations false?

35 First, with respect to the Trade Sale representation, there is some evidence that discussions took place in or around October 2014 concerning a potential trade sale of the shares in AMP to Thomson Medical Pte Ltd ("Thomson Medical"), a company owned by Mr Peter Lim, an entrepreneur. In an affidavit filed on 29 June 2016 in OS 509/2016, Dr Goh exhibited a draft document entitled "Project Laser" dated 8 October 2014 which concerned the

"potential acquisition" of AMP by Thomson Medical for the sum of $300m in support of his position that there were efforts on his part to bring about a trade sale of AMP. However, the document exhibited is only a short document of three pages. Furthermore, the document expressly states that it is *not* a legally binding document; it merely "sets out the principal terms and conditions" and stated that the parties "agree to negotiate in good faith until the execution of … legally binding definitive agreements". I was not referred to evidence documenting subsequent negotiations between AMP or Dr Goh and Thomson Medical, or any follow-up action taken on Dr Goh's part to ensure that the trade sale was achieved. This being the case, Dr Goh's representation that a trade sale was imminent in or around late October 2014 and his subsequent statement on 24 November 2014 that a trade sale would take place "very soon" appear on their face, to have been made without a reasonable basis or an honest belief in their truth.

36 Dr Goh also points to correspondence indicating that a trade sale to Temasek Holdings was in the works. However, these only relate to some emails exchanged in September 2014 which show some preliminary matters being discussed. The last correspondence in this email chain is dated 17 September 2014, and no subsequent correspondence relating to preparations for a trade sale to Temasek Holdings has been exhibited. In my view, these email exchanges in September 2014 cannot be said to be a reasonable basis or grounds for an honest belief that a trade sale of AMP could be said to be "imminent" in October 2014, especially in the absence of any evidence of follow-up action being taken. Besides a potential trade sale to Temasek Holdings, Dr Goh also exhibited a one-page document entitled "Summary of Indicative Bids" which appears to set out five different bids for a purchase of a stake in AMP. It is not clear to me when this document was prepared and it

was scant on detail. Important information, such as the identity of the bidder, was missing. In any case, the document expressly stated that it was prepared for "internal review" purposes only. There is therefore little weight, if any, which can be placed on the document.

37 In respect of the IPO representation, Dr Goh points to efforts made in October and November 2013 to appoint financial and legal advisors for a possible IPO. A draft prospectus was prepared by the lawyers by the end of November 2013, and in February 2014, AMP was in discussion with banks regarding the timelines for an IPO. However, as pointed out by LSI, these alleged efforts to achieve an IPO comprised no more than correspondence exchanged between the officers of AMP and its legal and financial advisors on a few occasions, with the last communication exchanged on 25 February 2014. I do not think this gives rise to reasonable grounds for the representation made more than seven months later on 23 October 2014 that an IPO on the SGX was in progress, or that it would take place "very soon" (see [31(c)] above).

38 In respect of the Minority Shareholders representation, it is not disputed that Dr Goh had an agreement with two of the minority shareholders under which these shareholders had given Dr Goh a proxy over all their voting rights. It is not clear that the minority shareholders would have been able to stifle any potential trade sale or IPO, or indeed, that there was an intention on their part to do so.

39 For completeness, it should be mentioned that there is also other evidence that suggests that Dr Goh could not have honestly believed that a trade sale was imminent or that an IPO was in the works and targeted for completion around March to June 2015 as he represented in October 2014. There is supportive evidence in a report prepared by Ferrier Hodgson

Singapore ("the Report") which was adduced in Suit No 111 of 2016, an action by AMP against Dr Goh and Dr Michelle Goh and certain other parties for breach of fiduciary duty, amongst other things. The Report records that payments were made by AMP to Dr Goh between July 2014 and October 2015 under a license agreement dated 1 July 2014 ("the LA"). The LA provided that Dr Goh was to be paid a one-time down-payment of $3,745,000, monthly payments of $267,500 for the period of 1 July 2014 to 30 June 2015, a payment of $535,000 on 1 January of every calendar year and, thereafter, monthly royalty payments of $267,500 in perpetuity. These payments were "royalty payments" which were for intellectual property in Dr Goh's name and trade marks relating to his name and medical methods, which he purportedly licensed to AMP. Between July 2014 and October 2015, Dr Goh was paid approximately $8m. The Report notes that the the payment of royalties under the LA was substantially responsible for the deterioration in AMP's financial position, and gives the impression that Dr Goh was systematically extracting funds from AMP to the detriment of the other shareholders and creditors of AMP.

40 In the application for the freezing injunction (*ie*, SUM 2483/2016), LSI relied on matters raised in the Report to demonstrate that there was a risk that Dr Goh would dissipate assets. Although LSI referred to the Report in its written submissions in OS 509/2016, counsel for LSI confirmed during a hearing on 8 November 2016 that the Report was not relied on for this application. For this reason, I did not consider the Report in my finding that the IPO and Trade Sale representations were on a *prima facie* review made fraudulently. Nevertheless, I note that the material in the Report, if proved to be true, would be corroborative of my view that Dr Goh could not have had an honest belief in the Trade Sale and IPO representations when he made them in

October 2014; in the light of AMP's actual financial situation as documented in the Report, it is improbable that Dr Goh genuinely believed then that a trade sale or IPO could be concluded within the stated timeframes, if at all.

(3) Was LSI induced by the representations to enter into the SPA?

41 The last issue within this inquiry is whether LSI may be said to have been induced by the representations to enter into the SPA. Dr Goh's argument is that LSI was not so induced; by entering the SPA on the terms set out at [9] above, LSI was aware of, and accepted, the possibility that a trade sale or an IPO might not take place.

42 As stated above, the test for inducement does not require that the misrepresentation be the sole cause for a party to enter into the contract. It suffices for the purposes of liability that one or more of the misrepresentations played a real and substantial part in inducing LSI to enter into the SPA.

43 While it is clear from the terms of the SPA that LSI accepted the possibility that neither a trade sale nor an IPO would be concluded, it does not necessarily follow that LSI accepted that this would be a plausible or likely outcome. The mere presence of the option to resell AMP's shares back to AMP or Dr Goh at a guaranteed price 24 months after the date of the SPA does not necessarily lead to the conclusion that the representations did not play a real and substantial part in inducing AMP to enter into the SPA. The matrix of facts prior to the execution of the SPA on 25 November 2014 must be considered. First, it is not disputed that LSI did not conduct any substantial due diligence before entering into the SPA. This was because of the urgency of the transaction conveyed by Dr Goh (see [31(c)] above). In fact, Dr Goh's pressing need for a "quick decision" on LSI's part appears to be a reason why

the option to resell AMP's shares back to AMP or Dr Goh was included in the SPA in the first place.

44 It is also clear from the documentary evidence that Mdm Gong trusted Dr Goh. Dr Goh referred to Mdm Gong and Mr Lin as his "good disciples", and the tenor of the correspondence between Mdm Gong and Dr Goh prior to and after the execution of the SPA suggests that Mdm Gong admired, trusted and respected Dr Goh for his business acumen. Against this background where Mdm Gong seems to have reposed a fair amount of trust in Dr Goh as her "ShiFu", I find it more than plausible that she and Mr Lin (and therefore LSI) would have believed the truth of Dr Goh's representations, and acted on them to enter into the SPA speedily, even foregoing the opportunity to conduct proper due diligence despite the substantial sums involved. I therefore conclude that there is a *prima facie* case that the representations made by Dr Goh were material in inducing LSI to execute the SPA.

(4) Conclusion

45 I find that LSI has demonstrated a *prima facie* case of its claim in fraudulent misrepresentation against Dr Goh. Consequently, there is good ground for the contention that the Sale Price that had been transferred to Dr Goh's Account belongs in equity to LSI.

Whether disclosure is necessary, just and convenient

46 The final requirement is that the disclosure must be necessary, just and convenient. In my view, this requirement is made out. It is necessary, just and convenient to order disclosure of these documents from the banks in order for LSI to trace and follow the Sale Price monies. As the Sale Price had been transferred less than two years ago, it is possible that LSI would obtain useful

information from the documents to follow and trace the monies, possibly into the hands of third parties. OCBC did not resist the application for discovery and was prepared to abide by any order made by the court.

47 It ought to be emphasised that the assessment of wrongdoing, at this stage, is a *prima facie* one. It may well be that LSI would not succeed in its action in fraudulent misrepresentation against Dr Goh at trial, where proof of its case on a balance of probabilities is required. Having found that there is a *prima facie* case of wrongdoing on Dr Goh's part, the balance of convenience lies in favour of granting the application so that LSI may commence protective proceedings if necessary. The order may be an intrusive one, but any prejudice to Dr Goh may be ameliorated by the condition that the documents disclosed be used for the sole purpose of following and tracing the monies and not for any other collateral purposes.

Whether OS 509/2016 is an abuse of process

48 Dr Goh also submits that OS 509/2016 is an abuse of process as it should have been brought as a summons for *specific discovery* in S 1311/2015. LSI highlights in response that it had made attempts at seeking this information from Dr Goh, such as in a letter of demand dated 24 November 2015 and in a further request dated 6 May 2016. In both instances, Dr Goh did not accede to LSI's request. LSI also points to an inconsistency in Dr Goh's position set out in an affidavit dated 17 June 2016:

> [LSI] should not have commenced OS 509 against OCBC. The Documents are related to Suit 1311. Any application for the Documents should be made in Suit 1311. However, I am advised that at this stage, [LSI] is not entitled to the Documents as they are not relevant to the issues in dispute in Suit 1311. Any application for the Documents in Suit 1311 is bound to fail.

49 It appears from the affidavit that while Dr Goh states on the one hand that "any application for the Documents should be made in Suit 1311", he also says in the same breath that the information which LSI seeks is "not relevant to the issues in dispute in Suit 1311" and that any application for such documents would be "bound to fail". LSI submits that it has no other practicable option but to commence OS 509/2016 to seek discovery from OCBC directly.

50 Dr Goh's submission that the application ought to have been brought as a summons in S 1311/2015 is not entirely without merit when one considers that an application under O 24 r 6(5) may also be made by summons in an on-going matter pursuant to O 24 r 6(2) of the Rules of Court. It is noted that LSI's pleaded relief in S 1311/2015 includes a declaration that the Sale Price is held by Dr Goh on resulting or constructive trust for LSI. In line with that, information concerning the Sale Price (or the traceable proceeds thereof) would be relevant to the relief LSI may obtain if successful in proving its case in S 1311/2015.

51 However, I do not find that the present application amounts to an abuse of process by virtue of the argument that LSI could have brought a similar action for third-party discovery against OCBC by way of summons in S 1311/2015. Dr Goh came to know of the application in OS 509/2016 ahead of the date fixed for its hearing, and applied successfully to be added as a defendant in the proceedings. He had ample opportunity to make submissions as to why the order for discovery of his banking documents against OCBC ought not to be made, and he did in fact fully present his case. Hence, even if it could be argued that LSI should have commenced the application for third-party discovery as a summons in S 1311/2015, no prejudice was caused to Dr Goh.

52 Dr Goh further argues that it is an abuse of process for LSI to bring the application in OS 509/2016 after a substantial delay. LSI counters that delay is not a relevant factor to be considered. It points out that there is no authority which has held that delay may be a basis upon which an application for pre-action discovery or *Norwich Pharmacal* orders should be dismissed.

53 I accept that delay may be a relevant factor to be borne in mind when considering if an application for pre-action discovery ought to be granted. However, I do not think that delay in itself necessarily amounts to an abuse of process. In my view, whether the applicant had delayed in bringing its application for pre-action discovery is one facet of the entire inquiry as to whether the test of justness underpinned by necessity under O 24 r 6(5) read with O 24 r 7 of the Rules of Court may be met. As the Court of Appeal noted in *Dorsey James* at [47], the commencement of proceedings ought to be the key consideration that underpins an application for pre-action discovery, and such an application ought not to be employed for other collateral reasons. The broad question that the court must evaluate in every application for pre-action discovery – which has been observed to be "quintessentially intrusive in nature" (see *Dorsey James* at [27]) – is whether the application is a *bona fide* one. Delay in the commencement of such an application may serve to cast doubt upon the true intentions of the applicant. I find the following observations of the Court of Appeal in *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 at [109], made in the context of delay in a Mareva injunction application, helpful in this context of pre-action disclosure:

> A plaintiff who is genuinely concerned that the defendant will dissipate his assets would be expected to act with urgency in seeking Mareva relief. Of course, delay by itself will not be dispositive of the plaintiff's application for such relief. The

> length of the delay and any explanations for it should be considered against all the circumstances of the case …

54 On the facts, I am satisfied that LSI's application for discovery is made *bona fide* and is a genuine attempt to obtain information in order to follow and trace the Sale Price. The demand letter sent on 24 November 2015 by LSI's solicitors to Dr Goh and Dr Michelle Goh is, in my view, the appropriate starting reference point as LSI may be said to have taken the firm position to rescind the SPA and trace the Sale Price then. Subsequently, when these demands were not acceded to, LSI commenced S 1311/2015 on 31 December 2015, and the present application was commenced about five months later on 23 May 2016. In the period prior to the commencement of the present application, LSI made an attempt to ascertain if it could obtain the information from Dr Goh voluntarily. In my view, the period from the letter of demand to the commencement of the present application does not amount to substantial delay in the context of these circumstances. Some allowance must be given to LSI, after it had decided to rescind the SPA, to take advice and consider its options. Moreover, it is reasonable for an applicant to first attempt to obtain the information through out-of-court mechanisms before resorting to an application for discovery under the Rules of Court. In fact, such attempts ought to be encouraged. This was a course that LSI employed, though it was ultimately unsuccessful in obtaining the information it sought through such means. In the circumstances, I do not find that any delay may be said to be indicative of a lack of *bona fides* on the part of LSI. Thus, the application ought not to be dismissed on the ground of the alleged delay alone.

Conclusion

55 For the reasons above, I allowed LSI's application. I granted Dr Goh's application for a stay of execution of the order until the outcome of the appeal

to prevent the appeal from being rendered nugatory. I ordered that the costs of OS 509/2016 as between LSI and Dr Goh be costs in the cause of S 1311/2015. As for the costs involving OCBC, I noted LSI's assurances that it would indemnify OCBC for any costs it incurred in complying with the discovery orders and indeed these cost orders were prayed for in the summons.

Debbie Ong
Judicial Commissioner

Harpreet Singh Nehal SC, Keith Han, Tan Tian Yi (Cavenagh Law LLP) for the plaintiff;
Adrian Tan, Kenneth Chua, Lim Siok Khoon, Hari Veluri (Morgan Lewis Stamford LLC) for the second defendant.