IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 190

Suit No 886 of 2018

Between

Hamid Marine Services & Engrg Pte Ltd

… *Plaintiff*

And

(1) Foo Siew Wei
(2) Foo Siew Ping
(3) Foo Tak Yi

… *Defendants*

JUDGMENT

[Companies] — [Directors] — [Duties]

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v
Foo Siew Wei and others

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Kannan Ramesh J
9–12, 16 June, 7 July 2020

14 September 2020 Judgment reserved.

Kannan Ramesh J:

Introduction

1 The plaintiff, Hamid Marine Services & Engrg Pte Ltd, is a company incorporated in Singapore, and was part of a group of related companies providing various services in the marine services industry (the "Mectrade Group"). The present shareholders and officers of the plaintiff are Chen Hong Hua ("CHH") and her two children, Foo Su Mian ("FSM") and Foo Yong Yee ("FYY") (collectively, the "Shareholders"). The first and second defendants, Foo Siew Wei and Foo Siew Ping respectively, are sisters and former directors of the plaintiff. The third defendant, Foo Tak Yi, is the father of the first and second defendants. While the third defendant was not a director of the plaintiff at all material times, he was involved in the day-to-day management and operations of the plaintiff until late-2014. He was, and remains, involved in the management and operations of the other companies in the Mectrade Group.

2 This suit arises out of the plaintiff's claim that (a) the first and second defendants breached their fiduciary duties to the plaintiff; and (b) the third defendant wrongfully intervened in the affairs of the plaintiff despite not being a director/officer of the plaintiff – that is, he "acted against the company [in] assist[ing] the two directors in causing the damage to the company". To this end, the plaintiff has levelled numerous allegations against the defendants including: (a) conflict of interest; (b) misappropriating and/or failing to account for monies owed or belonging to the plaintiff; (c) diversion of the plaintiff's labour resources and business opportunities to other companies in the Mectrade Group, and in so doing failing to conduct transactions at arm's length; (d) failing to keep proper accounts; (e) wrongly including persons who were employees of other companies in the Mectrade Group on the plaintiff's payroll; and (f) deliberately destroying the plaintiff's business by wrongfully repatriating the plaintiff's foreign worker workforce and failing to hand over the plaintiff's assets and documents, after the first and second defendants were removed as directors.

3 The plaintiff claims to have suffered loss as a result of the aforementioned actions. It argues that the defendants are jointly and severally liable for (a) a total sum of $1,100,574.36; (b) the value of the plaintiff's business; (c) "special damages" (that have not been particularised); and (d) any other damages assessed and payable by the defendants due to their respective breaches. In addition, the plaintiff seeks a declaration that the first and second defendants have breached their duties to the plaintiff, as well as an order that the defendants deliver up all properties, contracts and financial documents of the plaintiff which are in their possession and control. The suit has not been bifurcated.

4 Having assessed the evidence and considered the submissions of the parties, I dismiss the plaintiff's claims in their entirety. I set out the reasons for my decision below.

Background facts

The Mectrade Group

5 The Mectrade Group had its beginnings in the incorporation of Mectrade Engineering (Pte) Ltd ("MEPL") sometime around 1975. It is unclear whether MEPL was set-up by CHH's late husband, one Foo Sack You ("FSY"), the third defendant, or both. However, it is agreed that FSY and the third defendant did enter into business together. They grew their business as close friends. In the years that followed, other companies were established and became part of the Mectrade Group. The plaintiff was one such company and was incorporated in 1998. The Mectrade Group comprised several companies; the ownership of these companies prior to FSY's demise on 14 October 2011 was as follows:

(a) The plaintiff – the shares were held by FSY and the first defendant in the ratio of 55:45 respectively.

(b) Mectrade Fabricators Pte Ltd ("MFPL") – the shares were held by FSY and the third defendant in the ratio of 50:50.

(c) MEPL – the shares were held by FSY and the third defendant in the ratio of 50:50.

(d) Sen-Hong Piping and Engineering Pte Ltd – the shares were held by FSY, one Lee Hui, and the third defendant's wife in the ratio of 55:22.5:22.5 respectively.

(e) Mec-Sin Precision Engineering Services, which was a sole-proprietorship owned by FSY.

(f) Mec-Con Industries Pte Ltd ("Mec-Con"), which was wholly owned by the defendants' family.

6 The Mectrade Group functioned as a group for about 30 years. The companies in the Mectrade Group, in particular the first four companies listed above, operated primarily in the marine services industry. There was some overlap in terms of the nature of the work undertaken by the companies (I elaborate on this at [24] below). It is common ground that the companies in the Mectrade Group "shared common resources", and that there were inter-company transactions and inter-company billings as a result.

7 A significant part of the business of the plaintiff involved work with Dyna-Mac Engineering Services Pte Ltd ("Dyna-Mac"). Dyna-Mac is a registered shipyard in Singapore at 45 Gul Road, Singapore 629350. As the operator of the shipyard, Dyna-Mac's business had some 40 to 50 resident contractors ("RC(s)") under it who were awarded various projects from time to time depending on the nature of the skillsets and expertise that were needed. The plaintiff was one such RC, and was a contractor of Dyna-Mac between 2007 and 2014. The plaintiff undertook mainly structural works for Dyna-Mac such as steel fabrication.

8 In accordance with regulations issued by the Ministry of Manpower ("MOM"), Dyna-Mac was required to sponsor foreign workers employed by its RCs. Sponsorship carried with it several obligations and responsibilities. One such obligation was Dyna-Mac's guarantee to the authorities that its RCs would perform their obligations as employers. Accordingly, if the RCs defaulted, *eg*,

by failing to pay foreign worker levies, Dyna-Mac would be liable for the same. Two consequences followed as a result. First, Dyna-Mac exercised control over the number of foreign workers each RC employed for a given project. This was negotiated with the relevant RC. Second, each RC and its foreign workers were only allowed to work on projects for *other* shipyards if Dyna-Mac's permission was obtained.

9 The third defendant and the owner of Dyna-Mac had a good personal and professional relationship. All the projects undertaken by the plaintiff for Dyna-Mac were supervised by the third defendant. Dyna-Mac was generally satisfied with the plaintiff's work. Given the relationship that the third defendant had with Dyna-Mac and the quality of its work, the plaintiff was able to secure several projects between 2007 and 2014. The plaintiff's work for Dyna-Mac concluded around 2014. This broadly coincided with the removal of the first and second defendants as directors of the plaintiff.

Foo Sack You's passing and acrimonious events thereafter

10 Assisted by some of their family members, FSY and the third defendant operated the Mectrade Group together. They were the patriarchs of their respective families. FSY mainly managed the backroom. He worked in the office and handled *inter alia* administrative and accounting matters. The third defendant, on the other hand, was in charge of operations. He was on the ground at the relevant shipyards. The first and second defendants worked in the office and assisted FSY with the finance and accounting matters for the Mectrade Group. The Shareholders were not involved in the running of the business. While CHH was FSY's personal assistant, she was rarely present in the office. This was the arrangement until FSY passed away, suddenly, on 14 October 2011.

11 Up until FSY's passing, FSY and the first defendant were the only two registered directors of the plaintiff. The first defendant was brought into the plaintiff's business by FSY. Upon FSY's passing, the second defendant was appointed a director of the plaintiff. The first defendant invited the second defendant to assume the role after consulting her and the third defendant. The first defendant did not see it as "natural" for one of FSY's family members to succeed him as director because "they were actually not working in [the plaintiff]". I understand this to mean that the Shareholders were not involved in or familiar with the business of the Mectrade Group generally, and the plaintiff specifically.

12 After FSY's passing, his shares in the Mectrade Group companies devolved to the Shareholders. This happened in or around early 2012. It is the plaintiff's case that at or about that time, the defendants began freezing the Shareholders out of the business of the plaintiff. The defendants, on the other hand, describe CHH as having "[taken] up arms" against them. The ensuing friction resulted in the commencement of several lawsuits. The disputes culminated in a settlement agreement being entered into on or about 2 March 2016 between MEPL, MFPL, the first and third defendants, and CHH (the "Settlement Agreement"). Under the Settlement Agreement, the first defendant's 45% shareholding in the plaintiff was transferred to CHH. No payment was provided for in the Settlement Agreement for the transfer of these shares. Further, the Settlement Agreement provided for payment by the first and second defendants to CHH of the sum of $1,600,000 for CHH's shares in MEPL. This payment was made and the shares transferred.

13 The Settlement Agreement did not put an end to litigation between the parties. According to the defendants, CHH did not abide by her obligations under the Settlement Agreement, compelling the defendants to commence HC/S

667/2017 against CHH in 2017 ("Suit 667"). In Suit 667, the defendants claimed that CHH had not complied with the Settlement Agreement, and sought an order that CHH specifically perform her obligations therein. In retaliation, the Shareholders commenced the present action in the name of the plaintiff. Suit 667 was discontinued on 22 July 2019.

Removal of the first and second defendants as directors of the plaintiff

14 As a result of the breakdown in the relationship between the Shareholders and the defendants, the first and second defendants were removed as directors of the plaintiff. On 12 September 2014, two resolutions were passed by the Shareholders at an extraordinary general meeting ("EGM") of the plaintiff in the first and second defendants' absence. It was resolved that the first and second defendants be removed as directors. Notably, notice of the EGM, which had purportedly been sent to the first and second defendants, was never produced in this suit. When questioned, CHH simply stated that the notice "can be found in another file". This raised questions of whether the first and second defendants had been properly removed as directors. That said, counsel for the defendants confirmed at trial that the first and second defendants were not challenging their removal as directors.

The parties' cases

15 Given the sheer number of disparate allegations made against the defendants (see [2] above), I will discuss the parties' specific arguments as I address each individual (group of) allegation(s) in my analysis below.

16 In broad terms, it is the plaintiff's case that after FSY's demise, the Shareholders were shut out of the business of the plaintiff. The Shareholders did

not receive "a cent of dividend or salary" from the plaintiff since 14 October 2011, when FSY passed on. They were also never shown the plaintiff's accounts from 2011, even after the first and second defendants' removal as directors. They only received the accounts in 2018. When they were eventually provided the accounts, the defendants' alleged misconduct came to light, including *inter alia* the diversion of the plaintiff's labour workforce, misappropriation of the plaintiff's monies, and diversion of business opportunities away from the plaintiff to other companies in the Mectrade Group. Further, after discovering that they had been removed as directors of the plaintiff, the defendants proceeded to destroy the hitherto viable business of the plaintiff before handing it over in a shambolic state to the Shareholders. The present suit was consequently commenced.

17 The defendants' broad case is that the allegations of misconduct have been made in a "scattergun" fashion, and none have any evidential basis.Counsel for the plaintiff has incorrectly attempted to shift the legal burden of proof onto the defendants to "show that they have in fact been honest", when the burden is on the plaintiff to prove its case. The defendants deny that they ran the plaintiff's business to the ground. There is accordingly no breach by any of the defendants.

Witnesses at trial

18 In support of the parties' cases, the following witnesses gave evidence:

(a) For the plaintiff:

(i) CHH;

(ii) Mr Teo Boon Hwee ("Mr Teo"), Chief Marketing Officer of Dyna-Mac, who gave evidence under

subpoena and did not provide an affidavit of evidence-in-chief ("AEIC") – instead, he gave oral evidence based on the parties' lists of questions; and

(iii) Mr Thio Khiaw Ping Kelvin ("Mr Thio") of Ardent Corporate Recovery Pte Ltd as an expert witness.

(b) For the defendants:

(i) the first, second and third defendants; and

(ii) Mr Abuthahir Abdul Gafoor ("Mr Abuthahir") of AAG Corporate Advisory Pte Ltd as an expert witness.

19 The expert witnesses, Mr Thio and Mr Abuthahir, tendered expert reports stating their opinions on the defendants' alleged breaches and the nature of the plaintiff's business. At the court's direction, they also tendered a joint expert report ("JER") setting out the issues on which they had reached consensus, and those that had to be ventilated at trial. The experts gave their evidence concurrently by consent following the testimony of the factual witnesses.

Issues

20 There are two main issues before me:

(a) First, whether the first and second defendants breached fiduciary duties and/or committed breach of trust *vis-à-vis* the plaintiff; and

(b) Second, the nature of the cause of action against the third defendant, and whether it has been made out.

The parties provided a detailed list of issues; to the extent that narrower lines of inquiry might have been identified therein, they have been subsumed in the two main issues above.

The claims against the first and second defendants

21 I first address the alleged breaches of fiduciary duty that occurred before 24 September 2014, *ie*, the date of the first and second defendants' removal as directors of the plaintiff, before addressing the events after. As for the former, the plaintiff's case hinges on establishing that the first and second defendants engaged in the alleged misconduct. It is undisputed that the first and second defendants owed fiduciary duties to the plaintiff up to the time of their removal as directors, *ie*, 24 September 2014. As for the latter, a key question is whether the first and second defendants owed fiduciary duties after their removal. This is considered below (see [64]).

Alleged breaches of fiduciary duty before 24 September 2014

22 As mentioned, the plaintiff levelled numerous allegations against the first and second defendants (see [2] above). Suffice to say, these allegations were disjointed and disorganised. In its pleadings and at trial, the plaintiff repeatedly used terms such as "failing to deal at arm's length" without describing with specificity which transactions/acts fell within the allegation. The inadequacy of the pleadings was an observation I made at a Judge Pre-Trial Conference on 18 May 2020 (the "PTC"). The plaintiff was invited to amend its pleadings to clarify and particularise several aspects of its claim. Despite taking up the invitation, the amended pleadings did not address the shortcomings. The plaintiff's pleadings clearly did not serve the purpose for which they were intended. Accordingly, I had to parse the pleadings and evidence as best as I could to understand what the plaintiff's claims actually

were. This was obviously not satisfactory. In so far as the events before 24 September 2014 were concerned, my understanding of the plaintiff's claims was as follows:

(a) that the first and second defendants were in conflict of interest in dealing with the plaintiff and the other Mectrade Group companies;

(b) that the defendants (without specifying on multiple occasions which defendant) misappropriated various sums owed or belonging to the plaintiff;

(c) that the defendants breached their fiduciary duties by:

(i) mismanaging the plaintiff's foreign worker workforce;

(ii) diverting the plaintiff's business opportunities to other companies in the Mectrade Group;

(iii) failing to keep proper accounts as directors of the plaintiff; and

(iv) wrongfully including on the plaintiff's payroll employees of other companies in the Mectrade Group.

These were, at least in my view, the claims that were discernible from the Statement of Claim (Amendment No 2), in particular paragraphs 6 and 49 to 51. I address each (group of) allegation(s) in turn. To the extent that further allegations have been levelled by the plaintiff's witnesses in their AEICs and/or oral evidence, it will be explained below why I do not address them in this Judgment.

Conflict of interest

23 The plaintiff alleges that the first and second defendants were in conflict of interest by virtue of concurrently holding directorships in the plaintiff *as well as* the other companies in the Mectrade Group, including MEPL and MFPL. At trial, counsel for the plaintiff repeatedly suggested to the first defendant that the Mectrade Group was run as one entity, given that the companies shared premises, had the same officers/directors, and were engaged in overlapping fields of work. It was asserted that conducting the Mectrade Group's business in this manner placed the first and second defendants in a position of conflict.

24 The allegation is unsustainable. It is common for individuals to hold multiple directorships in companies within the same group without breaching the no-conflict rule. The mere fact that a director holds multiple offices in this manner does not, *ipso facto*, create a conflict of interest. There may be cases where holding concurrent offices in two companies represents a conflict, *eg*, when the two companies are direct competitors and/or acting in the interest of one *necessarily* involves acting *against* the interest of the other. That is not the case here. The plaintiff has not shown how acting in MEPL/MFPL's interest meant acting against the plaintiff's interests. There are two points to note. First, the third defendant had testified that the businesses of the plaintiff, MEPL and MFLP did not overlap significantly – whereas the plaintiff's principal activity was shipbuilding, MEPL was a manufacturer; MFPL did a mix of both shipbuilding and manufacturing. The third defendant's evidence was not challenged. That being the case, it cannot be said that the companies in the Mectrade Group were direct competitors. The very premise of the allegation does not exist. Second, due to the nature of the RC structure in the industry (see [7] and [8] above), the plaintiff's, MEPL's and MFPL's projects were not easily transferable as between the companies. The companies by and large were

restricted to performing projects *at their respective shipyards*. Accordingly, there was little possibility of competition as between them.

25 However, were there *specific* occasions when the companies competed? I deal with this below (see [42]–[53]). But before that, it worth noting that significant portions of the plaintiff's case on the defendants' alleged breaches rest heavily on Mr Thio's expert evidence. Mr Thio is of course not a witness of fact. Thus, in so far as there is no evidence supporting the facts which Mr Thio relies on to form his opinion, there is an issue as to admissibility of his opinion. Further, to the extent that Mr Thio has conceded certain claims in the JER, the same will have to be rejected. These will be highlighted in the course of this Judgment.

Misappropriating sums owed or belonging to the plaintiff

26 The next category of allegations is that the defendants misappropriated and/or failed to account for sums owed or belonging to the plaintiff. Notably, in many of these allegations, the plaintiff did not specify whether it was the first, second or third defendant, or all three working in collusion, who had misappropriated the relevant sums. This rendered the plaintiff's claims unclear and gave rise to questions over their veracity. The plaintiff must surely assert against whom the allegations are made, particularly in light of their gravity.

27 I note as a starting point that multiple unsubstantiated allegations have been levelled against the defendants. I set out below some examples:

(a) In the first iteration of the Statement of Claim, it was alleged that the defendants had opened a "secret" bank account. This was eventually deleted when the Statement of Claim was amended on 9 October 2019 in Statement of Claim (Amendment No 1). Yet, in CHH's AEIC dated

9 March 2020 (*ie*, after the aforementioned amendment to the pleadings), allegations to this effect were still made, *ie*, that the first defendant had "taken away the plaintiff company's money and squirrelled it… into another bank account". When questioned, counsel for the plaintiff was unable to explain why CHH's assertion was made given the aforesaid amendment in the Statement of Claim (Amendment No 1).

(b) In CHH's AEIC, it was alleged on several occasions that the first defendant "drew out money" from the plaintiff's accounts for the purpose of satisfying a judgment debt, but instead kept the money for herself. No evidence was adduced of such malfeasance and the point was not pursued at trial. Notably, this point was not pleaded.

(c) In the JER, Mr Thio alleged that he was unable to ascertain whether one Ng Swee Guat had received salary of $6,691.50. This allegation, however, was not pleaded. The suggestion was that this sum had been misappropriated by the defendants, though it is difficult to see how a failure to ascertain whether monies were received by the said Ng Swee Guat supports the conclusion that the defendants misappropriated the same.

(d) As pointed out by the defendants in paragraph 60 of their written closing submissions, other allegations of a similar character were made by the plaintiff.

28 Accordingly, in so far as allegations have not been pleaded, I will not address them in this Judgment. Further, as will be apparent from the analysis below, virtually *all* of the plaintiff's pleaded allegations of misappropriation suffer from a paucity of evidence.

(1) Allegedly misappropriated sums relating to foreign workers

29 The plaintiff claims that the defendants misappropriated three specific sums, which were to be used to make payments related to the plaintiff's foreign workers: the sums are $38,332.67, $32,386.50 and $12,740. I shall address each in turn.

30 The plaintiff asserts that the defendants misappropriated the sum of $38,332.67 "directly from Dyna-Mac" – this sum was supposed to be paid to the MOM for foreign worker levy. The evidence demonstrates that the allegation is untrue. The documents show that the MOM requested payment of foreign worker levy in the sum of $38,332.67, which was *in fact paid* to the plaintiff by Dyna-Mac via cheque. The Dyna-Mac payment voucher dated 16 December 2014 evidences this. The authenticity of the payment voucher was not challenged.

31 When referred to these documents, CHH admitted that she had, prior to the trial, not been aware of their existence. She accepted that the cheque appended to the said payment voucher was for the purpose of payment of foreign worker levy. *Yet*, she continued to maintain that the defendants received the sum of $38,332.67.

32 Next, a cheque for $32,386.50 had been issued to the first defendant by Mr Teo. This sum was meant to be used to pay the foreign workers' salaries. The plaintiff alleges that this sum was misappropriated by the first defendant. I disagree. The first defendant's evidence is that she paid the plaintiff's foreign workers their salary using this sum. Consistent with this, Mr Teo testified that he had disbursed the sum of $32,386.50 to the first defendant *for the purpose of payment of the foreign workers' salaries*. Critically, he gave evidence that he

believed the first defendant had in fact used the sum for this very purpose. This was because Dyna-Mac did not subsequently receive any complaints from the MOM regarding the issue of unpaid foreign worker salaries. This evidence was not challenged.

33 The plaintiff alleges that the sum of $12,740, meant for the cost of return air tickets for repatriating the plaintiff's foreign workers, was misappropriated by the defendants. The plaintiff's payment voucher dated 17 December 2014 demonstrates that this sum had in fact been paid to the plaintiff by Dyna-Mac via cheque. CHH's answer when cross-examined on this document was that "[n]ow I have seen this, but at that point in time, I did not know". Notwithstanding this, CHH continued to assert that the said sum had not been paid to the plaintiff. This only serves to demonstrate the unsustainability of the plaintiff's claim.

(2) The remaining allegations of loss

34 Save for an allegation that relates to the sum of $77,638 that needs to be examined further, the rest of the plaintiff's allegations are not borne out by the evidence. As regards this sum, the allegation is that payments totalling $77,638 were made by the plaintiff without supporting documents. However, Mr Abuthahir states that this sum has been accounted for in the plaintiff's salary records; he appends supporting documents to his report. The plaintiff has not challenged Mr Abuthahir's conclusion or the supporting documents he relies on. Indeed, Mr Thio agrees that the evidence available is not sufficient to make out the plaintiff's claims. It must therefore follow that the plaintiff has not made out its case on this sum.

35 As for the rest of the allegations, there is a dearth of evidence. It is significant that in its written closing submissions, the plaintiff was not able to point to any evidentiary basis for its claims. The allegations are as follows:

(a) That the plaintiff suffered losses in the form of subcontract labour costs equivalent to $270,909. No particulars were given in the Statement of Claim (Amendment No 2) or CHH's AEIC. Mr Thio asserts that such costs were unnecessary without offering a basis for his assertion.

(b) That the plaintiff suffered loss in the sum of $13,347, which were "paid by Dyna-Mac [to the plaintiff] but not traced to bank statements". Similarly, no particulars whatsoever were provided.

(c) That the plaintiff suffered various miscellaneous losses enumerated at paragraph 50 of the Statement of Claim (Amendment No 2), including:

(i) Assets and equipment worth $15,000;

(ii) Retainers/receivables worth $150,000;

(iii) Wrongful transfers from the plaintiff's bank account amounting to $500,000;

(iv) Income tax, GST and penalties amounting to $5,000;

(v) Costs and expenses incurred to retrieve bank statements amounting to $1,500; and

(vi) Legal fees amounting to $3,500.

The plaintiff claims these sums as "special damages". No particulars were pleaded as regards each item. Nor was any supporting evidence adduced. It is relevant that CHH admitted in cross-examination that she had in fact *not* provided any particulars or explanations of these claims in her AEIC.

(d) That there were account receivables in the sum of $21,594.17 owed by Dyna-Mac to the plaintiff that had not been paid to the latter. No particulars were provided of this sum.

(e) That there was diversion of another sum of "receivable monies which were owed by Dyna-Mac to [the plaintiff] for work already carried out". No specific value was indicated, and no particulars were provided.

(f) That the defendants failed to account for three cheques totalling $9,699.19 – the first defendant's unchallenged evidence is that these were crossed cheques payable to the plaintiff. Mr Thio concedes in the JER that this issue "has been resolved".

36 I expressly reminded counsel for the plaintiff at trial that the plaintiff had to prove all losses it claims to have suffered. Counsel for the plaintiff acknowledged this and assured that it would be done. However, in written closing submissions, the plaintiff continued to make unspecific and non-particularised allegations, asserting that over and above the claims enumerated in the preceding paragraphs, the defendants had misappropriated various other unknown sums. In support of these submissions, counsel for the plaintiff simply reproduced a seven-page long excerpt from the Court of Appeal's decision in *Sim Poh Ping v Winsta Holding Pte Ltd* [2020] SGCA 35 ("*Winsta*"). However, the excerpt cited describes the methodology for *causation* in equitable

compensation, and discusses the question of burden of proof on the issue of liability. The Court of Appeal did not dispense with the need for a plaintiff to prove its loss (see also *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [7]). The reproduced portion of *Winsta* accordingly does not assist the plaintiff.

Mismanagement of the plaintiff's labour resources

37 It is unclear what the plaintiff's precise case is with regard to the plaintiff's labour resources. During cross-examination, CHH agreed that the sole basis of the claim was that the plaintiff's foreign workers were diverted from its projects with Dyna-Mac to *inter alia* MEPL and MFPL's projects. This was consistent with counsel for the plaintiff's position during the PTC on 18 May 2020. Yet, in her AEIC, CHH suggested that the claim was for loss of earnings and profits due to the maintenance of a higher headcount of foreign workers than that required to fulfil the plaintiff's outstanding projects. Counsel for the plaintiff also dedicated significant portions of the cross-examination to investigating the *over-employment* of foreign workers. It must be pointed out that this was not a claim that was pleaded.

38 It is important to remember that the two claims rest on mutually inconsistent factual premises. The first proceeds on the basis that the plaintiff has suffered a loss of profits because its foreign labour force was diverted to projects of other companies in the Mectrade Group resulting in the plaintiff not being able to complete ongoing projects and/or take on new projects. The second proceeds on quite a different basis. The assumption here is that the plaintiff had insufficient projects and was therefore carrying unnecessary overheads in the form of excess foreign workers. As the factual premises of both claims are different (and indeed at opposite ends of the spectrum), the plaintiff

has to decide which facts it wishes to advance. However, for reasons unexplained, the plaintiff has pursued both claims. This raises doubts as to their tenability.

(1) Downsizing the workforce

39 The plaintiff claims that the defendants' failure to downsize its foreign labour force caused it to incur greater costs and suffer a loss of earnings. As mentioned, counsel for the plaintiff accepted during the PTC on 18 May 2020 that the plaintiff would *not* be pursuing the claim that there was *over-employment* of foreign workers. Yet, during trial, many of the lines of questioning were focused on the reasons why the plaintiff's workforce was not downsized. I raised to counsel the concession that he had made at the PTC and the fact that the point had not been pleaded. Counsel acknowledged his concession but continued to pursue the point in cross-examination.

40 In any event, this claim is without merit. Counsel for the plaintiff repeatedly suggested to the defendants that the foreign workers could have been terminated when they were no longer needed. Specifically, the first defendant was cross-examined on why idle workers could not be released; it was suggested to her that it was "obvious that [the plaintiff] had too many workers". She explained that the plaintiff needed to maintain a sizeable workforce for the fulfilment of present and future projects, and that to periodically increase and decrease the size of their workforce would incur additional time, costs and the loss of opportunities. I accept the first defendant's explanation.

41 The first defendant's testimony is consistent with the evidence of the other witnesses. In particular, the evidence of Mr Teo of Dyna-Mac is significant. He testified that Dyna-Mac might not issue enough work orders to

occupy all of an RC's foreign workers. This was because work in the marine industry, as described by Mr Teo, was "lumpy", with ebbs and flows. This inevitably meant that the workers would not be fully occupied all the time. Unless there was a significant downturn, workers had to be retained, not released, whenever there was a drop in projects. Otherwise, there would be insufficient workers when there is an uptick in projects. Further, Dyna-Mac might not award the relevant RC a project if the RC's workforce was insufficient. Mr Abuthahir made a similar point. He described the plaintiff's employment arrangement with Dyna-Mac as a "chicken-and-egg" situation. Dyna-Mac would only sponsor workers for an RC if there was enough work; the RC would thereafter have to keep its workforce "so that they [could] undertake work in Dyna-Mac's shipyard". The RC could ill afford to terminate the employments of the idle workers, for it would then be unable to fulfil future projects when these became available in due course. The third defendant testified similarly. He stated that once workers were sponsored by Dyna-Mac, they would remain with the plaintiff *until the expiry of the work permits*. Accordingly, he (the third defendant) would re-deploy these workers to other Mectrade Group companies' projects if the plaintiff had insufficient work from Dyna-Mac for them, "so that [they] could still pay them their salaries". The argument by the plaintiff in this regard therefore demonstrates a lack of understanding of the industry and the manner in which labour is managed by industry players.

(2) Re-deploying idle workers

42 The plaintiff asserts that because the plaintiff's foreign workers were re-deployed to work for other companies in the Mectrade Group, the plaintiff's interests were "severely prejudiced". The argument essentially is that the plaintiff's ongoing projects and its ability to secure new projects were

compromised as a result. This allegation folds into the broader allegation that the transactions between the plaintiff and the other companies in the Mectrade Group were not carried out at arm's length. I do not accept the plaintiff's allegation for two cumulative reasons.

43 First, counsel for the plaintiff suggested that it was illegal and a breach of the plaintiff's obligation to Dyna-Mac to re-deploy the plaintiff's foreign workers (who were sponsored by Dyna-Mac) to work for other companies in the Mectrade Group. Counsel relied on, *inter alia*, the first defendant's AEIC where she had stated that the plaintiff could not "deploy its foreign workers to other shipyards to do work". The point was, however, clarified on the stand by both Mr Teo and the first defendant. Both gave evidence that workers could be re-deployed *subject to Dyna-Mac's agreement*. As there is no evidence that Dyna-Mac did not give its consent for the re-deployment of the plaintiff's workers, I cannot accept the plaintiff's suggestion that the re-deployment was unauthorised and therefore a breach of its obligations to Dyna-Mac. It is in fact pertinent that nothing in the record demonstrates that Dyna-Mac took issue with the re-deployment of the plaintiff's workers. As for the plaintiff's point on illegality, I take this as a reference to re-deployment being in breach of manpower regulations. In this regard, I note that it is not the plaintiff's suggestion that Dyna-Mac's consent was not sufficient to make re-deployment permissible. That being the case, the illegality point is not relevant.

44 Second, and more importantly, it seems the more pertinent question is whether the re-deployment did in fact cause the plaintiff's loss, even if Dyna-Mac did not give its consent and there was illegality as alleged. I accept the evidence of Mr Teo that the foreign workers, once employed for a project for Dyna-Mac, would be captive to the project, *ie*, they cannot be re-deployed until the project is completed or approval of Dyna-Mac is given. *However*, there is

no evidence that the foreign workers who were re-deployed were engaged in ongoing projects at that time. These were underutilised foreign workers. Their salaries and associated costs would have had to be paid by the plaintiff regardless. This was confirmed by Mr Teo, who gave evidence that the workers sponsored by Dyna-Mac were *on the plaintiff's payroll*. If the plaintiff was unable to pay the workers' salaries, Dyna-Mac would make payment and set off the payment against sums it owed to the plaintiff.

45 This being the case, it is evident that the re-deployment of workers was actually *in the plaintiff's interest*. This was a practice instituted by FSY – the first and second defendants merely continued it after his passing. There was a labour supply agreement between the plaintiff and MEPL/MFPL. The first defendant testified that the plaintiff would be paid "labour supply" charges when MEPL or MFPL used its workers. The plaintiff's accounts support this. They show that the plaintiff received substantial revenue from MEPL and MFPL between 2005 and 2013. Mr Thio accepted this. Thus, the plaintiffs were paid for the use of its workers pursuant to an arrangement that had been put in place by FSY. There was no "free labour" being diverted to MEPL and MFPL.

46 Counsel for the plaintiff suggested to the first defendant that the "revenue that [the plaintiff] gained from Mectrade doesn't compensate [the plaintiff] for [its number of] workers". He further asserted that the revenue from *Dyna-Mac* was insufficient to pay "the cost of hiring workers [of] about [$60,000] a month". It seems to me the argument misses the point. The question is not whether there was sufficient revenue from Dyna-Mac and/or the other companies in the Mectrade Group to warrant the number of foreign workers on the plaintiff's books. The number of workers employed by the plaintiff was agreed with Dyna-Mac, and was largely set in stone. If there was a dip in the number of projects from Dyna-Mac, a solution was needed to tide the plaintiff

over the short-term drop in revenue. FSY used re-deployment as the solution. His practice was continued by the first and second defendants after his passing. It is difficult to see how this could have caused the plaintiff loss, or for that matter how it could be said that the first and second defendants breached fiduciary duties as a result.

47 The plaintiff also questioned the "basis" of the hourly rates in the labour supply agreements. In his expert report, Mr Thio asserted that the provenance of these rates was "not clear", the suggestion being that MEPL/MFPL were underpaying for the labour supply. However, during cross-examination, Mr Thio accepted that he was *not* expressing the opinion that the labour rates charged by the plaintiff were "too low", "not determined at arm's length" or that the hours billed were fictitious. He clarified that his point was that clearer evidence of how the labour rates were charged, *eg*, time cards, would have been *preferable*. However, Mr Thio conceded that (a) he had no evidence that the labour rates were improperly set; (b) the rates that were used by the defendants had been set by FSY; (c) the higher labour rates, against which MEPL/MFPL's labour supply rates were compared, were an imperfect basis of comparison because labour rates could vary according to the specific type of work undertaken by the workers; and (d) he did not look into the labour supply agreements before 2011 which FSY had entered into. The burden is on the plaintiff to show that the labour rates were improperly set and invoiced. It seems self-evident from the above that the plaintiff has not discharged this burden.

48 In connection with the issues concerning the plaintiff's labour resources that have just been discussed, counsel for the plaintiff suggested that the *projects* that were taken up by MEPL/MFPL (in relation to which the plaintiff's workers were re-deployed) could have been allocated to the plaintiff instead; the plaintiff could then have performed these projects by using the workers who had been

re-deployed. This is a different point on diversion of *business opportunities*, which I now turn to.

Diversion of the plaintiff's business opportunities

49 The substance of the allegation is that the defendants (a) diverted a Dyna-Mac project worth in excess of $300,000 from the plaintiff to companies owned by the defendants (*ie*, Mec-Con); and (b) turned away projects offered to the plaintiff by entities such as GSI, ABB, Italmec, Oval and AHE. The plaintiff's claim is for loss of profits that it would have otherwise made. The allegation suffers from a lack of particularisation and evidence at various levels.

50 First, there are no particulars of the projects that were allegedly diverted away. This is compounded by an absence of any evidence in the AEICs of (a) these projects being offered to the plaintiff; and (b) the defendants diverting them away. Counsel for the plaintiff merely put to the first defendant that the plaintiff had turned down project offers from entities such as GSI, ABB, Italmec, Oval and AHE. This is clearly insufficient to discharge the plaintiff's burden. It is relevant in this regard that there is no evidence that the plaintiff had any prior commercial relationship with GSI, ABB, Italmec, Oval and AHE. It is difficult to fathom why these companies would have offered projects to the plaintiff when they did not have a prior business history with it.

51 The third defendant's evidence in this regard is also relevant. He testified that "there [weren't] enough projects to go around because… Dyna-Mac has other contractors… [and] the works from Dyna-Mac [were] actually on a declining trend". His evidence was not challenged. I see no reason not to accept his evidence. This undermines the plaintiff's assertion that there was in fact a Dyna-Mac project worth $300,000 that was diverted away.

52 Second, while MEPL/MFPL did undertake projects using the plaintiff's workers, there is no evidence that these projects were offered to the plaintiff. In this regard, the RC structure adopted by Dyna-Mac and other companies in the industry is relevant (see [7] and [8] above). This structure meant that companies such as the plaintiff were primarily restricted to accepting and working on projects in their designated shipyard and could not hop between different shipyards to undertake projects. Further, as stated earlier (see [24] above), there is only a partial overlap between the plaintiff's and MFPL's businesses, and no overlap at all between those of the plaintiff and MEPL. Accordingly, and by necessary inference, projects that were undertaken by other companies in the Mectrade Group were not opportunities that were diverted away from the plaintiff. Mr Thio was incorrect to "assume" that a project could be secured for "whichever company within the [Mectrade Group]". It is for the plaintiff to show that these were projects that were capable of being offered and in fact were offered to the plaintiff. Having failed to show this, the plaintiff cannot argue that these projects were *diverted*, since diversion presupposes that the injured party was deprived of an opportunity that *it could have seized*.

53 Third, there is no particularisation and evidence of the loss of profits that was suffered in relation to each project. There is a complete absence of information on the value of each contract and the expected profits that were lost as a result. In the Statement of Claim (Amendment No 2), all that has been pleaded is that the loss of profits that arose as a result of such diversion is "to be assessed". The AEICs and Mr Thio's expert report conspicuously fail to address the profits that were allegedly lost. As the trial has not been bifurcated, the plaintiff has to prove its case on both liability and quantum at trial. There is no evidence on the former as noted earlier. Similarly, there is no evidence on the latter. The claim is therefore unsustainable.

Failing to keep proper accounting and business records

54 The Shareholders did not have sight of the plaintiff's accounting and business records when they took control of the plaintiff in September 2014. Subsequently, these records were disclosed in the defendants' List of Documents dated 24 December 2018, as well as on 17 and 19 July 2019 pursuant to requests for specific discovery. Having reviewed the records, the plaintiff claims that the first and second defendants have failed to keep proper records in breach of their fiduciary duties on the basis that the records disclosed are "inaccurate" and "exaggerated". It is relevant that the specific allegation here is not that the records were handed over late but that they were not accurate. The allegation that the records were not *timeously* disclosed is a separate one which I discuss below (see [71] onwards).

55 The plaintiff relies on the evidence of CHH that she was told by one "Jackson", an accountant purportedly employed by the plaintiff, that he had "quarrelled with [the defendants] because they wanted him to do illegal things". This evidence is hearsay and inadmissible. Jackson was not called as a witness. That apart, when questioned, CHH was not able to confirm whether there was a person by the name of Jackson on the plaintiff's payroll; in fact, she could not even confirm that Jackson was the said accountant's actual name. Neither was any evidence adduced recording the existence of such a person, his purported involvement in the company, or when the alleged conversation between him and CHH had taken place. CHH simply asserted that such a person existed and had all along worked for the plaintiff. Clearly, this is wholly inadequate.

56 In any case, even if the first and second defendants failed to keep proper accounting/business records as directors of the plaintiff, it has not been shown that this caused the plaintiff loss.

57 I should add that I do not see why the records disclosed were not proper. When cross-examining the first defendant, counsel for the plaintiff proceeded on the basis that the records (in particular the table at page 1014 of the first defendant's AEIC) were accurate. For example, counsel for the plaintiff used the numbers reflected in the records to make the point that the plaintiff's revenue from Dyna-Mac had been decreasing over the years (*ie*, between 2011 and 2014). Further, it was not put to the first defendant that the records were forged, inaccurate, or lacking in any material sense.

58 Accordingly, I reject the plaintiff's claim.

Wrongfully including persons on the plaintiff's payroll

(1) Chua Ek Kwang and Foo Sack Hoe

59 The plaintiff alleges that the defendants included one Mr Chua Ek Kwang and one Mr Foo Sack Hoe on the plaintiff's payroll when they were not the plaintiff's employees. The first defendant testified that Mr Chua Ek Kwang was employed as a driver by the plaintiff, and Mr Foo Sack Hoe, who is the brother of FSY, assisted the plaintiff in purchasing consumables for the site workers. Her evidence was not challenged, and counsel for the plaintiff subsequently stated that he was not pursuing the point. He conceded that he has "no concrete claim for loss and damage" in this regard. This claim is therefore untenable.

(2) The defendants' family members

60 The plaintiff alleges that the defendants included two of their family members – one Mr Foo Jian Yong (the brother of the first and second defendants) and one Mr Lim Gee Tong (the first defendant's husband) – on the

plaintiff's payroll when they were not employees. I had pointed out to counsel during the PTC on 18 May 2020 that a bare allegation of nepotism is irrelevant. It had to be shown that these individuals were *wrongfully* included on the payroll, and that this caused loss to the plaintiff. Counsel for the plaintiff indicated then that the relevant evidence would be adduced from Mr Thio. However, Mr Thio's expert report makes no mention of Mr Foo Jian Yong and Mr Lim Gee Tong.

61 There are two further points. First, the first defendant's evidence that Mr Lim Gee Tong had actively contributed to the plaintiff's business was never meaningfully challenged by the plaintiff. Apart from putting its case to the first defendant, the plaintiff offered no evidence to challenge her testimony. Second, apart from putting its case on Mr Foo Jian Yong to the first defendant, the plaintiff did not explore the issue with the defendants at trial. Accordingly, I do not accept the plaintiff's claims that these persons had been wrongfully included on its payroll.

Conclusion on events before 24 September 2014

62 In conclusion, none of the plaintiff's claims against the first and second defendants as regards events occurring prior to 24 September 2014 have been made out.

Alleged breaches of fiduciary duty after 24 September 2014

63 As noted earlier, it is common ground that 24 September 2014 was when the first and second defendants were removed as directors of the plaintiff. The plaintiff alleges that after the first and second defendants became aware of their removal, they set out to "destroy" the plaintiff's business operations and thereafter handed over an unviable business to CHH. The plaintiff claims the

value of its business, to be assessed. I do not find that the claim has been made out.

64 Upon their removal as directors, the first and second defendants ceased owing fiduciary duties to the plaintiff. This being the case, any improper conduct on their part as alleged cannot be assessed with reference to a breach of fiduciary duties. A claim in tort, for example in conspiracy, is a possibility but that is not the pleaded case. The plaintiff's pleadings are restricted to breaches of fiduciary duties and/or breaches of trust parasitic on the existence of such duties. There is accordingly no basis in law for the plaintiff's claims against the first and second defendants as regards events after 24 September 2014.

65 Counsel for the plaintiff argues in written closing submissions that the first and second defendants were *de facto* directors after the Shareholders surreptitiously removed them from the plaintiff's board. This has not been pleaded. Nor was it explored and put to the first and second defendants in cross-examination. It is a belated attempt to shore up a deficiency in the plaintiff's case. There is thus, strictly speaking, no need for me to address the merits of this argument. For completeness, I will briefly explain why, in any event, the plaintiff's case is unsustainable on the facts.

Repatriating foreign workers

66 The plaintiff alleges that in arranging for the repatriation of the plaintiff's foreign workers, the first and second defendants drove the plaintiff's business into the ground. I do not accept the allegation.

67 First, the defendants had no choice but to repatriate the foreign workers. They sought Dyna-Mac's help for this. The plaintiff had not paid the foreign worker levy for the months of September and October 2014. The third defendant

testified that when he contacted CHH regarding the foreign workers, she had said that "she [had] nothing to do with this". The first defendant corroborated this. Their evidence in this regard was not challenged. On 1 December 2014, the MOM notified the plaintiff that the work permits of the foreign workers had been revoked as the levy had not been paid. This meant that the foreign workers had to be repatriated. It was the Shareholders' responsibility to ensure that the plaintiff made payment of foreign worker levy, as they had taken charge of the plaintiff. It was the Shareholders' failure to do so that caused the repatriation of the workers. CHH's response to the third defendant as set out above exhibited nonchalance. In such circumstances, it would be incorrect to attribute fault to the first and second defendants.

68 It is relevant that the plaintiff also failed to make other payments related to the foreign workers who were to be repatriated such as outstanding salaries and the costs of air tickets. The defendants liaised directly with Dyna-Mac to ensure the workers were paid their salaries and other outstanding payments were settled. The first defendant testified that she did so because it was "[her] responsibility to settle this project with Dyna-Mac". The third defendant similarly testified that "[he] had promised the workers that [he] would send them back safely to be with their families… [he] recognise[d] [the workers] to be a huge responsibility of [his]". I accept their explanations.

69 Second, repatriation of the foreign workers was necessary as otherwise, the plaintiff would continue to incur costs – such as workers' salaries, accommodation costs and foreign worker levies – in relation to them. This was particularly relevant as the workflow from Dyna-Mac had slowed down significantly. The defendants testified that the plaintiff barely had any work from Dyna-Mac (or any other source) at this point in time (see [51] above).

Their evidence was not challenged and the documentary evidence corroborates their testimony.

70 Accordingly, this claim must fail.

Failing to hand over the plaintiff's assets and documents

71 The plaintiff alleges that the defendants crippled its business by failing to hand over its assets. While it is accepted that some chattels were not handed over, the plaintiff has not shown how this caused its business to struggle.

72 In fact, the evidence suggests that the real reason why the plaintiff's business struggled was the unfamiliarity of the Shareholders with its business. As observed earlier, prior to FSY's passing, CHH served as his personal assistant but was infrequently seen in the office (see [10] above). The plaintiff's business was essentially run by FSY and the third defendant with the assistance of the first defendant. After FSY's passing, the plaintiff's business continued to be managed by the first and third defendants, this time with the assistance of the second defendant. There is little evidence that the Shareholders made any effort to familiarise themselves with the plaintiff's business at any time prior to the removal of the first and second defendants as directors on 24 September 2014. As an illustration, when questioned, CHH acknowledged that she was not even aware that the entry "BFWL" for $13,500 in the plaintiff's bank account statements for the period of 1 October to 31 October 2014 referred to *foreign workers' levy*. CHH also acknowledged that she "[doesn't] know Dyna-Mac at all".

73 Thus, having decided to oust the defendants from the plaintiff's business, it seems inevitable that the Shareholders would struggle. In this regard, two factors are relevant. First, the plaintiff's primary customer was

Dyna-Mac whose relationship was with the third defendant. Removing the third defendant would inevitably mean that projects from Dyna-Mac would dry up completely. Mr Teo in fact testified that "after 2014, there was no contact person for [the plaintiff]… [n]obody [contacted] us… [w]e [didn't] know who to reach". Second, the plaintiff's other source of revenue was the re-deployment of foreign workers to other companies in the Mectrade Group. The continuation of that arrangement was not something within the Shareholders' control.

74 In this light, it is clear that the first and second defendants' failure to produce the plaintiff's financial documents timeously was not what caused the plaintiff's business to fail. CHH claimed she asked for documents in 2012 but received incomplete records. She also alleged that she "kept requesting [the defendants] to provide the documents" through her lawyers, but the defendants kept saying they were not ready. Many of the documents only surfaced in the course of pre-trial discovery (see [54] above). Even so, the plaintiff has not shown how being deprived of these documents had rendered its business inoperable. While these financial documents would likely have been important for audit and/or accounting purposes, I do not see how the failure to hand them over would have precluded the Shareholders from conducting the business of the plaintiff *if they had been familiar with its business and knew what they were doing*. The evidence suggests that they were not.

75 As noted earlier, the first defendant admitted that she had failed to hand over chattels belonging to the plaintiff. However, the failure to do so at that stage was not a breach of fiduciary duties given that, as explained, the first defendant did not owe such duties at that point. The cause of action is in tort which has not been pleaded.

76 That said, the plaintiff has sought an order for delivery up of the chattels that the defendants have retained. In light of the first defendant's concession that she retains possession of the plaintiff's chattels, the plaintiff would ordinarily have been entitled to an order for delivery up of the same. *However*, a prayer for a delivery up of chattels must specifically identify the items that are ordered to be delivered up. A claimant/plaintiff must be able to identify with precision the items over which such an order is sought. The plaintiff has not done so at present, and for this reason I am unable to make the relevant order even though I am sympathetic to the plaintiff's position. I would, nevertheless, strongly encourage the first defendant to deliver up the relevant assets in the interest of reaching closure on this issue.

The claims against the third defendant

The cause of action

77 It has not been made clear, even at the conclusion of the trial, what the cause of action against the third defendant is. The Statement of Claim (Amendment No 2), even after two amendments, does not disclose a cause of action: while expressly asserting that the third defendant was *not* an officer/director of the plaintiff, it states in vague terms that he was in "breach of duty". What that duty specifically is has not been explained. The relevant parts of the Statement of Claim (Amendment No 2) read as follows:

> **Claim against 3rd Defendant**
>
> **The 3rd Defendant's wrongful intervention in the affairs of the Plaintiff**
>
> 40 The 3rd Defendant was *not a Director or officer of the Plaintiff and had no authority to deal in the affairs of the Plaintiff or to represent and act on behalf of the Plaintiff*. However the 3rd Defendant wrongfully held himself out as an officer of the Plaintiff to third parties and

> wrongfully dealt in the affairs of the Plaintiff … The 3rd Defendant is therefore *liable to the Plaintiff for his wrongful intervention* and conduct in dealing in the affairs of the Plaintiff and for causing the Plaintiff to suffer loss and damages …
>
> …
>
> 53 The Plaintiff therefore claims against the Defendants as follows:-
>
> iii) A declaration that the 3rd Defendant is also jointly and/or severally liable for
>
> …
>
> d) or such other sum as the Court thinks fit on the ground of his *breach of duty*
>
> [emphasis added]

78 What is the aforementioned duty? What does "wrongful intervention" mean? When questioned during his opening remarks, counsel for the plaintiff stated that the cause of action was that the third defendant "acted against the company [in] assist[ing] the two directors in causing the damage to the company". This shed no light on what "duty" the third defendant might be said to have breached. On the fourth day of trial, when questioned by the court as to the "legal basis" for the allegation that the third defendant had a duty to pay foreign worker levies, counsel for the plaintiff stated that such a duty comes from "high principles". What that meant as a matter of law was not explained.

79 In written closing submissions, counsel for the plaintiff argued for the first time that the third defendant fell within the meaning of "director" under s 4(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). There are several problems with this. First, and most critically, this has not been pleaded. The plaintiff in fact expressly stated that the third defendant was *not* an officer or director of the plaintiff. In other words, up until closing submissions, it has not been the plaintiff's case that the third defendant was a

director of the plaintiff. Second, it was never put to the third defendant that he was a director or a fiduciary of the plaintiff. Hence, the third defendant did not have the opportunity to challenge the assertion.

80 The related notion of a *shadow* director is a different point. A shadow director is a figure who controls the company from the shadows but is not officially a director of the company. A shadow director could conceivably fall within the meaning of "director" in s 4(1) of the Companies Act (see *OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another v Crest Capital Asia Pte Ltd and others* [2020] SGHC 142 ("*OUE Lippo*") at [101]; *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 ("*Raffles Town Club*") at [47]). However, it is not apparent from the plaintiff's written closing submissions that it was invoking this specific doctrine. Further, it was neither pleaded nor put to the third defendant that he was a shadow director or an *ad hoc* fiduciary (*ie*, one who assumes fiduciary duties by virtue of being able to affect his/her principal's interests).

81 In any event, asserting that the third defendant was a shadow director would contradict the plaintiff's pleaded case. In paragraphs 40 and 53 of the Statement of Claim (Amendment No 2) (reproduced above at [77]), the plaintiff alleged that the third defendant had *no authority* to deal in the affairs of the plaintiff. This is inconsistent with the third defendant being a shadow director. In fact, during cross-examination, CHH played down the role of the third defendant by repeatedly *disagreeing* that he was in charge of procuring projects from Dyna-Mac. A director would clearly have authority to deal with the affairs of the company (see for example *Ong Heng Chuan v Ong Teck Chuan and others* [2020] SGHC 161 at [116]–[117]; *OUE Lippo* at [101]–[102]; *Raffles Town Club* at [45]–[48]).

Conclusion on the claims against the third defendant

82 I therefore find that the claim against the third defendant has not been made out. The claim suffers from a lack of clarity. I would note that, in any case, my observations above with respect to the first and second defendants' alleged breaches of duty (see [23]–[74] above) apply with equal force to the third defendant. In other words, even if the third defendant did owe fiduciary duties to the plaintiff, such duties were not breached, and in any event did not occasion any loss to the plaintiff.

Conclusion

83 For these reasons, I dismiss the plaintiff's claims against the defendants. Parties are to tender their submissions on costs, limited to ten pages each, within two weeks from the date of this Judgment.

Kannan Ramesh
Judge

Lai Swee Fung and Chia Cheok Sien (UniLegal LLC) for the plaintiff;
Choo Ching Yeow Collin and Lin Zhiyi Linus (Tan Peng Chin LLC) for the defendants.