

Lew Kiat Beng v Hiap Seng & Co Pte Ltd and another appeal  
[2011] SGCA 61

**Case Number** : Civil Appeals Nos 223 of 2010 and 225 of 2010  
**Decision Date** : 21 November 2011  
**Tribunal/Court** : Court of Appeal  
**Coram** : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA  
**Counsel Name(s)** : Foo Soon Yien, Faizal Shah and Petrina Lee (Bernard & Rada Law Corporation) for the appellant in Civil Appeal No 223 of 2010; Michael Kuah, Jiang Ke-Yue and Esther Yee (Lee & Lee) for the appellants in Civil Appeal No 225 of 2010; Lok Vi Ming SC, Audrey Chiang, Calvin Lim, Daryl Ong and Chu Hua Yi (Rodyk & Davidson LLP) for the respondent in both appeals.  
**Parties** : Lew Kiat Beng — Hiap Seng & Co Pte Ltd

*Civil Procedure*

*Companies*

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 143.]

21 November 2011

**Chan Sek Keong CJ (delivering the grounds of decision of the court):**

**Introduction**

1 These were two appeals against the decision of the High Court judge (“the Judge”) in *Hiap Seng & Co Pte Ltd v Lau Chin Hu and others* [2011] SGHC 143 (“the GD”). The respondent in both appeals was Hiap Seng & Co Pte Ltd (“the Company”). The appellant in Civil Appeal No 223 of 2010 was Lew Kiat Beng (“LKB”), and the appellants in Civil Appeal No 225 of 2010 were Lau Chin Hu (“LCH”) and Law Chin Chai (“LCC”). All three appellants are collectively referred to as “the Appellants” in these grounds of decision.

2 The Appellants were shareholders and directors of the Company and were also the defendants in Suit No 133 of 2010 (“the Derivative Action”), which was a derivative action brought pursuant to leave granted under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) (“CA”). These appeals arose from an interlocutory application made by the Company in the Derivative Action.

**Background**

3 On 20 March 2008, two other shareholders and directors of the Company, Law Chin Eng and Lau Chin Whatt (collectively, “LCE & LCW”), filed Originating Summons No 372 of 2008 (“OS 372/2008”) to apply for leave under s 216A of the CA to bring a derivative action in the name of the Company against the Appellants. LCE & LCW alleged that the Appellants had breached their fiduciary duties to the Company.

4 On 30 September 2009, LCE & LCW were granted leave to commence a derivative action against the Appellants for some alleged breaches of fiduciary duties. LCE & LCW were authorised to

control the conduct of the action and any execution proceedings thereafter (see *Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)* [2009] SGHC 223 at [42]). An appeal against the order granting leave was dismissed. Subsequently, LCE & LCW commenced the Derivative Action by filing a Writ of Summons and Statement of Claim on behalf of the Company.

### ***Events leading to the making of the Judge's order on discovery***

5 After the close of pleadings, an Assistant Registrar directed on 26 August 2010 that the parties were to file and exchange their respective Lists of Documents and affidavits verifying the same by 16 September 2010 under O 24 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). Despite being directors of the Company, LCE & LCW had no access to its office premises as they were not involved in its operations. Hence, their solicitors wrote to the Appellants on 27 August 2010 and asked the Appellants to procure documents of the Company which were relevant to matters in the Derivative Action for LCE & LCW to inspect at the Company's premises, so that LCE & LCW could file a List of Documents on behalf of the Company. LKB's solicitors responded on 30 August 2010, stating that LKB would not accede to LCE & LCW's request. LCW affirmed that when LCW & LCE turned up at the Company's office on 31 August 2010, they were refused entry.

6 On 1 September 2010, LCE & LCW filed Summons No 4129 of 2010 ("the Application") in the Derivative Action. In his affidavit filed for the purposes of the Application, LCW stated that it was necessary for LCE & LCW to have access to and to inspect the Company's documents that were relevant to the Derivative Action in order for them to fulfil the Company's discovery obligations. In his affidavit, LCW also relied on his right as a director to inspect the accounting and other records of the Company under s 199(3) of the CA.

7 The Assistant Registrar dismissed the Application on 23 September 2010. The Company's appeal was heard and allowed by the Judge on 10 November 2010. The order that was made by the Judge ("the Order") obliged the Appellants to:

(a) give LCE & LCW and their solicitors and/or other representatives access to the Company's premises or such other place where the Company's records might be kept for them to inspect and take copies of: (i) the Company's documents which explained the transactions and financial position of the Company, and (ii) the Company's documents which were relevant to matters raised in the Statement of Claim; and

(b) release and/or give LCE & LCW access to "such documents which [the Appellants] ha[d] within their possession, custody or power, which [were] documents belonging to [the Company] or which ought to be documents within the possession, custody or power of [the Company]" in relation to matters raised in the Statement of Claim.

The documents described in the Order are henceforth referred to as "the Requested Documents".

### ***Events after the Order was made***

8 Pursuant to the Order, LCE & LCW inspected the Requested Documents at the premises of LKB's solicitors on 23 November 2010. LKB's solicitors then wrote to LCE & LCW's solicitors on 26 November 2010 enclosing a list of the documents which were inspected by LCE & LCW. In that letter, LKB also sought confirmation of whether LCE & LCW required any other documents in relation to the Order. LCH and LCC took positions similar to LKB's.

9 LCE & LCW's solicitors replied by letter on 2 December 2010, claiming that the Appellants had

been deficient in complying with the Order, and alleging that there were numerous documents which fell within the scope of the Order but which were not produced during the inspection on 23 November 2010. LCE & LCW's solicitors listed examples of documents which they alleged the Appellants had "suppressed", "deliberately withheld", "unilaterally filtered", "selectively extracted" and "deliberately sanitised". The letter of 2 December 2010 from LCE & LCW's solicitors concluded sternly with a "demand that [LKB] comply with the Order and furnish all other documents that have not been furnished but which ought to have been so furnished under the Order forthwith" [underlining in original].

10 The Appellants were initially willing to proceed to conduct discovery in the Derivative Action and to forgo these appeals on the correctness of the Order. However, they were aggrieved by what they saw as unwarranted allegations made against them and the spectre of contempt proceedings since LCE & LCW refused to confirm that the Order had been fully complied with. Hence, they filed these appeals on 10 December 2010 to set aside the Order. That was insufficient to prevent LCE & LCW's solicitors from persisting in their threats and allegations, resulting in the Appellants having to apply for a stay of execution on the Order, which stay they obtained on 6 January 2011.

11 The parties eventually filed their respective Lists of Documents and affidavits verifying the same on 15 April 2011. But, they continued their acrimonious exchanges from 20 April 2011 to 17 June 2011, which created much heat but no light. The letters issuing from LCE & LCW's solicitors were consistently impolite and created unnecessary acrimony even at the interlocutory stage.

12 Against the backdrop of the discovery process which had begun and the Order (the execution of which had been stayed), the parties' solicitors continued to dispute: (a) whether the Appellants had provided all of the Requested Documents to LCE & LCW; (b) the proper treatment of the documents that were discovered pursuant to the Order; and (c) whether the Order, which had not specified any timelines for its completion, was still in force.

13 Because the Lists of Documents had already been filed in general discovery, it should have been apparent to the solicitors for LCE & LCW that the quickest and simplest step to take was to seek specific discovery under O 24 r 5 of the ROC if they considered that certain documents that ought to have been disclosed by the Appellants, pursuant to the Appellants' discovery obligations, had not been disclosed. However, no application for specific discovery was taken out by LCE & LCW. The Appellants' solicitors, on the other hand, became confused about LCE & LCW's legal basis for making continual demands on the Appellants for production of the allegedly suppressed documents.

14 The correspondence exchanged between the parties after general discovery reflected three points. First, it demonstrated that the nature and scope of the Order produced an inefficient and unsatisfactory discovery process. The parties were compelled to deal with two criss-crossing procedural tracks aimed at surfacing the same relevant documents. One track originated from the Order, which did not provide any means to determine whether it had been complied with or had ceased to have effect. The second track sprang from the usual discovery process under O 24 of the ROC and required the Appellants, as the Company's directors, to disclose the very same documents. Secondly, the correspondence between the parties revealed that it was undisputed that it was the Appellants who had possession, custody or power over the Requested Documents. Thirdly, the said correspondence confirmed that the Application was, from the outset, not necessary for the proper conduct of the Derivative Action because all that LCE & LCW had to do, after filing their List of Documents, was to avail themselves of the specific discovery mechanism to seek from the Appellants any documents allegedly missing from the Requested Documents, which missing documents the Appellants would then have to include in a supplementary List of Documents. This point was also established at the hearing of the present appeals, where counsel for the parties were asked whether

they needed any consequential orders to be made if the Order was set aside, and none of them thought that was necessary.

### **The decision below**

15 The Judge considered the two grounds which LCE & LCW had relied on to make the Application – first, that it was necessary for LCE & LCW to have access to and to inspect the Requested Documents in order for the Company to fulfil its discovery obligations in the Derivative Action; and secondly, that LCE & LCW were entitled, *qua* directors of the Company, to inspect the Requested Documents under s 199(3) of the CA because they were also company documents (see the GD at [5]).

16 The Order was granted on neither of these grounds. The Judge disposed of the latter ground swiftly, stating that LCE & LCW's reliance on s 199(3) of the CA was misplaced since they were not seeking access to the Requested Documents "for themselves *qua* directors" (see the GD at [10]). The Judge was right, and we affirmed this decision. We should add that the Application was also procedurally wrong in so far as it was based on s 199(3) of the CA. An application under s 199(3) of the CA falls within the ambit of O 88 r 2(1) of the ROC, and must be brought by way of an originating summons.

### ***The Judge's reasons for making the Order***

17 To decide whether or not to grant the Order, the Judge formulated the issues as follows (at [1] of the GD):

- (a) what was the right of a party having control of the conduct of a derivative action to the company's documents; and
- (b) what was the duty of the parties having possession and control of the relevant company documents in terms of giving the party having control of the conduct of the derivative action access to those documents.

The Judge provided two grounds for making the Order.

#### *Right of LCE & LCW as the parties conducting the Derivative Action*

18 First, the Judge considered that because LCE & LCW controlled the conduct of the Derivative Action, they also owed a duty to ensure that the Derivative Action was prosecuted properly and diligently. He explained what such a duty entailed (at [11] of the GD):

... Towards that end, it is necessary for [LCE & LCW] to review all the documents relevant to the action so that the best case can be pleaded and presented on behalf of [the Company]. The duty is not confined to reviewing documents in [LCE & LCW's] possession, and extends to [the Company's] documents which are not in their possession. [LCE & LCW] would be in dereliction of their duty if they neglected to have access to such documents and to review them.

19 In our view, whilst it was true that LCE & LCW needed the Requested Documents in order to prosecute the Derivative Action properly and diligently, they did not need to have access to the Requested Documents at that point in time. LCE & LCW was already in possession of sufficient evidence to establish a *prima facie* case for the purposes of OS 372/2008 (*viz*, the application for leave to commence a derivative action) and then to file a particularised Statement of Claim in the

Derivative Action. If the right to have access to the Requested Documents was intended to enable them to “plead and present” a case, that was not required. If the right was meant to allow them to plead and present the “*best case*” [emphasis added], that was also not needed. LCE & LCW could simply amend the Statement of Claim after discovery to take into account any evidence disclosed by the Appellants which they had yet to consider. No prejudice would be suffered by the Company because the documents which the Appellants would have to disclose in the course of discovery would necessarily include the Requested Documents as defined by the Application and the Order.

#### *Duty of the Appellants as directors of the Company*

20 Secondly, the Judge held that the Appellants, as directors of the Company, were under a particular duty to act in the interests of the Company, and, to that end, must allow LCE & LCW to have access to the Company’s documents. The duty was described in this way (at [12] of the GD):

... [The Appellants] must recognise [LCE & LCW’s] right to pursue the action on behalf of [the Company]. If there are such documents in their possession and control as directors of [the Company], then [the Appellants] must allow [LCE & LCW] to have access to the documents. ... [The Appellants] cannot withhold the relevant documents of [the Company] from [LCE & LCW] who have control of the case on behalf of [the Company], and their refusal to give access was, *prima facie*, a breach of their directors’ duties to act in the interests of [the Company], and that includes giving assistance to [the Company] to prosecute the action effectively, and not to hinder its efforts.

21 We disagreed that such a duty existed *at that stage of the proceedings*. With respect, the Judge’s reasoning overlooked the fact that while the Appellants were the Company’s directors, they were also defendants who were being sued as directors of the Company. Hence, their conduct at the interlocutory stage was already and should continue to be governed by what ordinary civil procedure required a defendant to do at the pre-trial stage.

22 As defendants to the Derivative Action, the Appellants were under no obligation to provide any documents to the plaintiff (*viz*, the Company) until general discovery was ordered. Since it was undisputed that the Appellants had possession, custody or power over the Requested Documents, it should have been understood by all parties that the Appellants would disclose them in the course of the discovery process. In fact, the Appellants did disclose the Requested Documents on 15 April 2011 and 14 June 2011 in their respective Lists of Documents and affirmed affidavits verifying the same.

23 To require the Appellants to provide LCE & LCW with relevant company documents prior to discovery by virtue of their directorships was not only onerous, but also unfair in the context of the suit against them (*viz*, the Derivative Action) for alleged breaches of their duties as directors. Therefore, we did not accept either of the Judge’s reasons for granting the Application. The GD did not evaluate the issue of whether the Order was required to enable LCE & LCW to fulfil the Company’s discovery obligations. We considered that a relevant issue and we will address it below.

#### ***Regularity of the Application***

24 Apart from the two grounds stated by the Judge for making the Order, in relation to the regularity of the Application, the Judge emphasised that the Application was made in the context of or pursuant to the leave granted in OS 372/2008 to institute the Derivative Action, and that the right of access to the relevant documents of the Company flowed from the authority to institute the Derivative Action (see the GD at [13] and [18]). Thus, he was of the view that it was procedurally proper that the Application was made by a summons as part of the Derivative Action, which was

ongoing, and that the court had the power to grant the Application. This reasoning assumed that the outcome of an application for leave to commence a derivative action would continue to control or influence how the subsequent derivative action was conducted. However, the nature and extent of this control or influence was not articulated by the Judge.

### **The issues on appeal**

25 In view of the foregoing, there were two issues that this court had to consider in these appeals: whether the court had the power to grant the Application in the Derivative Action; and whether the Order was necessary to enable LCE & LCW to satisfy the Company's discovery obligations.

### **Did the court have the power to grant the Application in the Derivative Action?**

26 In our view, whether the court had the power to grant the Application in the Derivative Action depended on the relationship between a leave application under s 216A of the CA and the ensuing derivative suit. In Canada, the courts have heard applications under the relevant Canadian legislation made by a derivative plaintiff, who has been granted control of the conduct of a derivative action, for access to the plaintiff company's documents or other information. Those applications were also made as part of the derivative action (see *Discovery Enterprises Inc v Ebco Industries Ltd* (2001) 86 BCLR (3d) 120 ("*Discovery Enterprises*") and *345457 BC Ltd v Brian A Tieszen and others* [2001] BCSC 26 ("*Tieszen*"). Counsel for LCE & LCW relied on these two Canadian authorities to justify the correctness of the Order (discussed below at [34]–[36]).

27 However, the relevant provisions in the applicable companies legislation of Canada and Singapore are different. Section 233(3)(a) of the Business Corporations Act 2002 (c 57) (BC) ("s 233(3)(a) BCBCA") (which is identical in wording to its predecessor legislation, s 201(4) of the Company Act 1996 (c 62) (BC) ("Company Act 1996"), the applicable statute in *Discovery Enterprises* and *Tieszen*) provides:

- (3) While an action brought or defended under this section is pending, the Court may,
  - (a) on the application of a member or director, authorize any person to control the conduct of the action or give any other directions for the conduct of the action ...

On the other hand, s 216A(5) of the CA provides:

In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interests of justice, including (but not limited to) the following:

- (a) an order authorising the complainant or any other person to control the conduct of the action;
- (b) an order giving directions for the conduct of the action;

...

There is a material difference between the two provisions. Under s 216A(5) of the CA, our courts are limited to making an order giving directions for the conduct of the action "[i]n granting leave" under s 216A. The plain wording of the statute means that after leave has been granted, the Singapore courts can no longer give such directions. On the other hand, s 233(3)(a) BCBCA provides for greater

flexibility and the Canadian courts are able to continue giving directions for the conduct of a derivative action while the derivative action is “pending”, that is, after leave has been granted. The interlocutory applications that were made in the substantive actions themselves in the Canadian authorities cited by LCE & LCW were therefore unexceptional in the context of Canadian legislation.

28 In the present case, what LCE & LCW sought in the Application were arguably “directions for the conduct of the action”, which fell under s 216A(5)(b) of the CA. The court, “[i]n granting leave” in OS 372/2008, could have directed the intended defendants in the prospective derivative action to hand over the Requested Documents to the successful complainants (if they had known what those documents were). Here, the court did not give any such directions because LCE & LCW did not ask for them.

29 However, the failure to seek the court’s directions concerning the Requested Documents at that stage of the proceedings (assuming that directions were needed) would not be fatal because the phrase “control [of] the conduct of the action” in s 216A(5)(a) of the CA should be construed purposively. Hence, a derivative plaintiff, armed with a leave order, would nevertheless be entitled to do whatever was necessary for the derivative action to be brought in a fair manner for adjudication by the court at a trial, whether or not there were specific directions in the leave order to that effect. The threshold must be one of “necessity” because any less stringent standard would render s 216A(5)(b) of the CA otiose. Hence, the court below had the power to hear the Application and grant it since it was properly brought by LCE & LCW, as empowered by the court’s leave order in OS 372/2008 (see above at [\[4\]](#)), in relation to the conduct of the Derivative Action. However, the Application should have been granted only if it was necessary in order for LCE & LCW to conduct the Derivative Action in a fair manner.

### **Was the Order needed to enable LCE & LCW to satisfy the Company’s discovery obligations?**

30 For LCE & LCW to conduct the Derivative Action fairly, they must satisfy the Company’s pre-trial obligations, one of which was its discovery obligations *vis-à-vis* the Appellants. Accordingly, LCE & LCW contended that the Order was needed so that the Company could fulfil its discovery obligations. The validity of their argument depended on the scope of the Company’s discovery obligations. We held that the Company’s discovery obligations did not extend to disclosing the Requested Documents which were not in the possession, custody or power of LCE & LCW. The irony in cases of this nature is that only the defendant director (in this case, the Appellants) would have full knowledge of the documents or other information relevant to the derivative action. Therefore, until the court was made aware of what documents the Appellants had in their possession, it could not and should not have made the Order in the form and the substance which it did. As a result, the Judge made an Order which was not only unnecessary, but also couched in such wide terms that it created the serious problems which we have outlined above at [\[8\]](#)-[\[14\]](#).

### ***The scope of a plaintiff company’s discovery obligations***

31 Order 24 r 1(1) of the ROC provides:

Subject to this Rule and Rules 2 and 7, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list to serve a copy thereof on the other party.

There is no provision in the ROC which applies specifically to the conduct of derivative actions. The

terms “any party”, “any other party” and “the other party” in the context of a derivative action would appear to contemplate only the plaintiff company and the defendants. However, there is nothing in the ROC to preclude the court from taking into consideration the status of the person who has control of the conduct of the derivative action (the *de facto* (derivative) plaintiff, who will hereafter be referred to as the “*de facto* plaintiff”) when delineating the scope of the discovery obligations of the plaintiff company (the “*de jure* plaintiff”).

32 Indeed, it is our view that the scope of the plaintiff company’s discovery obligations in a derivative action should be determined by two factors. First, the litigation status of both the *de facto* plaintiff and the defendant should be taken into account. Secondly, any directions made by the court under s 216A(5)(b) of the CA in granting leave to commence the derivative action must be considered. Since no relevant directions were given at the leave stage in this case, only the first factor will be discussed.

### ***The relevance of the status of the de facto plaintiff and the defendant***

33 In Canada, the nature of a derivative action has been considered by the courts. The cases cited to us show that the Canadian judges have regard to the status of the *de facto* plaintiff and the defendant in determining the rights and obligations of the various parties during the pre-trial phase.

3 4 *Discovery Enterprises* (see above at [26]) was a case which considered the rights of a *de facto* plaintiff in the pre-trial context. A shareholder (“Discovery”) had obtained leave to sue the company’s directors (“the Eppiches”) on behalf of the company (“Ebco”). In the derivative action, Discovery applied, in the name of and on behalf of Ebco, for orders permitting it to conduct examinations for discovery of, amongst others, a representative of Ebco under r 27(3) of the then-existing Supreme Court Rules 1990 (Reg 221/90) (BC) (“Supreme Court Rules”). The Eppiches opposed Discovery’s application to examine a representative of Ebco. Rule 27(3) of the Supreme Court Rules stated:

A party to an action may examine for discovery any party adverse in interest.

In that case (at [35]), Pitfield J agreed with the Eppiches that r 27(3) did not entitle Discovery, the *de facto* plaintiff, to examine anyone because it was not “a party to the action”. However, Pitfield J also asked himself whether such a result promoted the ends of justice, or whether some other result was permitted, having regard to other provisions of the Company Act 1996 (see above at [27]). He overcame any disadvantage to Discovery by allowing counsel for Discovery, who was acting in Ebco’s name, to examine the Eppiches for the purpose of the derivative action, and by also allowing the Eppiches to examine Ebco’s representatives for the purpose of defending the derivative action. Such directions ensured that Discovery would suffer little disadvantage in the derivative action from Discovery not being allowed to examine the Eppiches. The interpretation in *Discovery Enterprises* could not be applied here because it concerned a very different provision, and because that case was about the right of a *de facto* plaintiff, whereas in the present appeals, we were concerned with the obligation of a *de jure* plaintiff. In our view, the importance of *Discovery Enterprises* lay, instead, in the pragmatic approach which Pitfield J took in resolving the issue. The overriding concern there was that the pre-trial procedures must be performed in a way which promoted the ends of civil justice, that is, they must enable the parties to prosecute and defend the claim fairly.

3 5 *Discovery Enterprises* was also different from the present case because there, the board of directors of the *de jure* plaintiff had a disinterested segment which could represent the *de jure* plaintiff’s distinct interests in the litigation. In the subsequent case of *Tieszen* (see above at [26]), there were only two opposing camps because the dissolved plaintiff company (“Sunrich”) was

restored to the register of companies only for the purpose of enabling one of its shareholders ("Shinil Park") to bring a derivative action against another shareholder ("BT Foods"). Shinil Park applied for the discovery of Sunrich's files which were held by BT Foods' solicitors. BT Foods resisted the application on the basis that the said files were protected by solicitor-client privilege. The judge held that Shinil Park was entitled to review Sunrich's files on behalf of Sunrich.

3 6 *Tieszen* must be distinguished, however, as it was concerned with the different issue of whether Shinil Park could have access to the relevant documents of Sunrich at all, and not when or why he should have them. The purpose of Shinil Park seeking access was not about fulfilling any discovery obligations on behalf of Sunrich. BT Foods resisted the application not because they were willing to provide the documents to Shinil Park at a later time via discovery, but because the documents were allegedly privileged. The judge held that: (a) Sunrich's solicitor-client privilege was not for BT Foods, a shareholder, to exercise; and (b) given that Sunrich had been restored to the register purely for Shinil Park to bring a derivative action in its name, Shinil Park must be entitled to the documents of Sunrich.

### ***The Company's discovery obligations in the present case***

37 In the present appeals, we adopted the pragmatic approach applied by the Canadian courts in delineating a company's pre-trial obligations in a derivative action. In the context of discovery, this approach meant that although the Company was the *de jure* plaintiff in the Derivative Action and was *prima facie* "a party to a cause" under O 24 of the ROC, its discovery obligations must reflect the fact that there were only two sets of antagonistic shareholder-directors in the Company – LCE & LCW on the one hand, and the Appellants on the other. There were no disinterested shareholders or directors involved. Hence, it was only commonsensical that the Requested Documents must be in the possession, custody or power of either one or both camps. Naturally, since LCE & LCW did not have the Requested Documents, they must be with the Appellants.

38 Therefore, the Company, acting through LCE & LCW, should not and was not obliged to disclose the Requested Documents in the Derivative Action, even though they might belong to the Company. It was held by the English Court of Appeal in *Re Tecnion Investments Ltd* [1985] BCLC 434 that even a director with dominant control and a majority shareholding may not *per se* have power over some company documents and therefore need not disclose them in discovery in an action against him. LCE & LCW were in an even less important position than the directors in *Re Tecnion Investments Ltd* because they were neither directors involved in the Company's operations nor its majority shareholders. To require LCE & LCW to disclose the Requested Documents as part of the Company's discovery obligations would be excessive and unnecessary for the fair conduct of the Derivative Action.

39 The fact that LCE & LCW were acting on behalf of the Company instead of in their personal capacities did not bring about a material difference to their discovery obligations. A situation where the company itself (despite being the *de jure* plaintiff) does not have relevant documents of its own in its possession, custody or power for the purposes of disclosing them as a party to a derivative action is not uncommon. In those situations, third-party discovery can be sought if the company documents are necessary for the fair disposal of the derivative action. Alternatively, the company can file an affidavit stating what has happened to those documents. In the present case, LCE & LCW simply needed to state, either at the time when the court gave orders for discovery or in their List of Documents filed on behalf of the Company, that the Requested Documents were in the Appellants' possession, custody or power, and wait for the Appellants to disclose them.

### **Observations on the right of a *de facto* plaintiff to disclosure of company documents**

### ***Such right should not be over-extensive***

40 The *de facto* plaintiff who has control of the conduct of the derivative action must have access to the relevant company documents to prosecute the action. But, this right of access must not be over-extensive; otherwise, confusion and excesses resulting in inefficiency will result, as happened in this case. The civil justice system already has in place a mechanism for the *de facto* plaintiff to receive relevant company documents at an appropriate time and forum, regardless of: (a) whether or not the documents are owned by the *de jure* plaintiff, and (b) whether or not they are in the possession of the defendants. It comes in the form of O 24 of the ROC. We further agreed with the observation of Collins MR in *James Nelson & Sons, Limited v Nelson Line (Liverpool), Limited* [1906] 2 KB 217 (at 222) that the whole matter of discovery has been the subject of special legislation, *viz*, the ROC, and we are limited by its express provisions. On a purposive reading of those provisions, there was no lacuna in the law which had to be filled in order to promote the ends of civil justice in the present case.

41 A court order made pursuant to s 216A of the CA that certain complainants are to have control of the conduct of a derivative action does not and ought not, without more, entitle the *de facto* plaintiffs to have, for the purposes of filing a List of Documents on behalf of the company, access to relevant company documents which they do not already have. It is neither necessary nor desirable to imply that *de facto* plaintiffs, who are usually shareholders, have to disclose, on behalf of the *de jure* plaintiff, relevant company documents which are not in their possession, custody or power when the very same documents have to be disclosed by the defendant directors pursuant to their discovery obligations. The *de jure* plaintiff's discovery obligation should correspond, as far as practicable, to relevant company documents which are already in the *de facto* plaintiff's existing possession, custody or power. This division of burdens in the discovery context is fair, efficient and clear to apply.

### ***The de facto plaintiff does not own the company's documents***

42 Lastly, we would add, for completeness, that a *de facto* plaintiff's right of access to company documents which are relevant to a derivative action cannot be based on his ownership of those documents because he does not own them. When granted the right to conduct a derivative action, the *de facto* plaintiff, who is usually a shareholder, does not become the owner of the company's documents. Even in the usual course of business where a director manages a company, he does not own any of the company's documents, but merely has access to them for the purpose of managing the company. If such a director is denied access to company documents for that purpose, he must rely on his separate statutory right to seek access to those documents, and cannot do so by claiming to exercise any ownership right of the company. There is no justification to identify a *de facto* plaintiff as the company, and therefore capable of exercising its ownership rights over its documents, when he is merely acting on behalf of the company for a particular purpose, similar to how a director ordinarily acts on behalf of a company.

43 Conversely, there are good commercial and legal reasons why a right of access to company documents should not be elevated to the right of ownership in a derivative action. The typical *de facto* plaintiff is a shareholder who usually has no right of access to the company's documents. The court should therefore be wary of granting such access to the *de facto* plaintiff by making an order on such extensive terms as the Order (see above at [71]), which appeared to be premised on identifying the *de facto* plaintiffs (*viz*, LCE & LCW) as or equating them with the Company. The safeguards provided in the Order were also not feasible. Although the Order limited LCE & LCW to having access to documents that were relevant to the matters raised in the Derivative Action, this stipulation was insufficient to prevent the execution of the Order from morphing into a search order in practical terms. It cannot be doubted that the right of access to relevant company documents is

essential for a *de facto* plaintiff to conduct a derivative action, but such right can be adequately effectuated through the existing discovery mechanism provided by the ROC.

## **Conclusion**

44 In the light of the above reasons, we allowed both appeals with the usual consequential orders. The costs here and below were awarded to the Appellants in any event.

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