Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants) [2009] SGHC 223

Case Number : OS 372/2008

Decision Date : 30 September 2009

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Daryl Ong Hock Chye and Chu Hua Yi (Rodyk & Davidson LLP) for the plaintiffs; Foo Soon Yien and Daniel Tay (Bernard & Rada Law Corporation) for Lew Kiat Beng; Jiang Ke Yue and Esther Yee (Lee & Lee) for Lau Chin Hu and Law Chin Chai

Parties : Law Chin Eng; Lau Chin Whatt — Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)

Companies

30 September 2009 Judgment reserved.

Kan Ting Chiu J:

1 The plaintiffs are two directors/shareholders of a company, Hiap Seng & Co Pte Ltd ("the company"). They are applying for leave under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) to bring an action in the name of the company against three other directors/shareholders of the company.

2 All the individual parties are members of the same family, although the family name is spelt variously as Law, Lau and Lew. The patriarch of the family, Lew Huat Leng, set up a business with the name of Hiap Seng & Co in the 1940s. The company was incorporated in 1976 and it eventually took over and expanded on the business of Hiap Seng & Co. The patriarch died in 1980.

3 The plaintiffs are Law Chin Eng ("LCE") and Lau Chin Whatt ("LCW"). I shall refer to them individually as the first plaintiff and second plaintiff respectively. The three directors/shareholders who are the proposed defendants are Lau Chin Hu ("LCH"), Lew Kiat Beng ("LKB") and Law Chin Chai ("LCC"), and they have been directors of the company since 1979. I shall refer to them individually as the first to third proposed defendants respectively.

4 The plaintiffs, the first proposed defendant and the third proposed defendant are the sons of Lew Huat Leng. LKB, the second proposed defendant, is their nephew and the son of the patriarch's deceased eldest son, Lim Chin Hwa. Lim Chin Hwa managed the company up to his death in 2001, when his son LKB took over. Each of the four surviving sons, as well as the estate of Lew Chin Hwa holds 16.82% of the shares of the company, while LKB holds 15.9%. The company is a family company with the shareholders split into two camps in this application.

5 The proposed action is founded on the proposed defendants' breach of fiduciary duties to the company as its directors. In para 8 of the draft statement of claim, six heads of complaints of breaches of fiduciary duties were set out:

a. The Defendants had caused the Plaintiff to enter into fictitious transactions with one Hawker Enterprise Ltd ("Hawker").

i. Sometime in 2001, the Plaintiff obtained various credit facilities totalling $5,400,000 from United Overseas Bank Ltd. Of these facilities, $3,900,000 was in the form of an overdraft (the "OD Facility"). Properties of the Plaintiff were mortgaged to the Bank to obtain the said facilities. Each of the directors, including Law Chin Eng and Lau Chin Whatt, had also given personal guarantees as security.

ii. Sometime in December 2001, the Defendants used money drawn from the OD Facility to procure payment by the Plaintiff of a sum of $4,406,589.23 (by way of a cash cheque drawn on ICB Bank – cheque number 085878) to Hawker. No approval was sought nor received from the other directors and shareholders of the Plaintiff in respect of the use of the OD Facility in this manner or of the payment of this sum to Hawker. This payment was not part of the ordinary business of the Plaintiff.

iii. Sometime in January 2002, the 1st and 2nd Defendants caused to be recorded in the Plaintiff's books that each of them had lent the Plaintiff $2,000,000 purportedly to enable the Plaintiff to repay the OD Facility.

iv. In December 2002, the Defendants procured the Plaintiff to pay the 1st Defendant and 2nd Defendant each the sum of $2,000,000, in purported repayment of the said 'loans' (by way of cheque numbers UOB 567482, 220841 and 220842). No consent or approval was sought from the other directors and shareholders.

v. These transactions and payments were only discovered much later during the inspection of accounts which was conducted by Lau Chin Whatt between 7 September 2005 and 27 September 2005.

vi. On or about 30 November 2005, the 2nd Defendant verbally informed Lau Chin Whatt that the transaction with Hawker was used for accounting purposes as a form of tax avoidance. In a letter dated 23 December 2006, the 2nd Defendant admitted that Hawker was a fictitious entity invented for the purposes of tax evasion.

b. The Defendants caused irregular and/or unauthorized payments and/or withdrawals of monies to be made from the Plaintiff's bank accounts.

i. Sometime in December 2001, the Defendants procured the withdrawal of the sum of $487,405.99 from the Plaintiff's account. The accounts show that out of this sum of $487,405.99, $63,051.92 was paid to the 1st Defendant, $268,187.32 was paid to the 2nd Defendant and $98,000.00 was paid to the 3rd Defendant. Law Chin Eng was to receive $53,166.75 out of this alleged payment of $487,405.99. However, Law Chin Eng never received this payment. There was no explanation on record of the purpose of these payments. Further, the balance sum of $5000 from the withdrawn amount of $487,405.99 appeared to be completely unaccounted for.

ii. As with the fictitious transaction with Hawker mentioned above, these payments and/or withdrawals were only discovered much later during the inspection of accounts which was conducted by Lau Chin Whatt between 7 September 2005 and 27 September 2005.

iii. The 2nd Defendant used $2 million of the Plaintiff's monies to purchase a property in Marsiling, Singapore, without any proper valuation. No approval was sought and none was received from the other directors and/or shareholders of the Plaintiff in respect of the said purchase. Sometime in the second half of 2004, the 2nd Defendant verbally admitted to Lau Chin Whatt that he had unilaterally withdrawn the sum of $2 million from the Plaintiff's account for this purpose. The property was transferred on 30 December 2003 into the name of Winstant & Co Pte Ltd, a company whose shareholders and directors were the 2nd Defendant and the 2nd Defendant's brother, although part of the purchase price in the sum of S$2 million came from the Plaintiff. This property was subsequently sold on 9 March 2007 to one HSBC Institutional Trust Services (Singapore) Limited at the price of $18,008,800. Sometime in about 2005, the 2nd Defendant informed Lau Chin Whatt that this property did not belong to the Plaintiff, notwithstanding the fact that S$2 million was taken from the Plaintiff as aforesaid.

iv. The 2nd Defendant had procured the purchase by the Plaintiff of a property in Shenzhen without any proper valuation. No approval was sought and none was received from the other directors and/or shareholders of the Plaintiff in respect of the said purchase.

c. The Defendants generated fraudulent and/or fictitious transactions with one Drilbo World Trade Sdn Bhd ("Drilbo")

i. On various occasions in 1994, 1995, 1996, 1998, 2000, 2001 and 2002, the Defendants had generated fictitious trades between the Plaintiff and Drilbo. Drilbo is a company in which Lau Chin Whatt and his son, Lau Kiat Boon, are directors. At all material times, Lau Chin Whatt and his son, Lau Kiat Boon, were not involved in any of the affairs or day to day running of Drilbo, which was managed and run by the 2nd Defendant since 1985. The fictitious trades were conducted without the knowledge and/or approval of Lau Chin Whatt and his son, Lau Kiat Boon.

ii. These fictitious trades were only discovered during the inspection of the Plaintiff's accounts by Lau Chin Whatt in September 2005 and subsequently discovered by the Inland Revenue Authority of Singapore.

iii. On or about 30 November 2005, Lau Chin Whatt, confronted the 2nd Defendant with respect to the fictitious trades between the Plaintiff and Drilbo. On or about 17 December 2005, Lau Chin Whatt confronted all the Defendants with respect to the fictitious trades between the Plaintiff and Drilbo. The Defendants gave a vague explanation that Drilbo was used to "facilitate various things" when confronted with this issue.

iv. The 2nd Defendant also verbally admitted during the Plaintiff's board of directors meeting held on 17 December 2005 that Drilbo was intended to be used "as a decoy".

v. The 2nd Defendant had also caused one Ms Stella Tai (one of the Plaintiff's employees), to forge Lau Chin Whatt's signature on documents purporting to support the fictitious transactions with Drilbo. These fictitious transactions were then booked into the accounts of the Plaintiff to create an appearance of genuine commercial sales. The 2nd Defendant then procured invoices to be issued by Drilbo and payment to be made by the Plaintiff in respect of these invoices. The 2nd and 3rd Defendants then procured that payments by the Plaintiff were in the form of cash cheques which were subsequently cashed by the 2nd Defendant himself. These actions were done without Lau Chin Whatt's knowledge or consent.

vi. On or about 30 November 2005, the 2nd Defendant verbally admitted to Lau Chin Whatt that he knew about Ms Stella Tai's forging of Lau Chin Whatt's signature.

d. The 1st and 2nd Defendants had generated fictitious trades between the Plaintiff and one Manfield Company ("Manfield"), a company incorporated in Hong Kong and having its registered address at Rm 2 Block B, 8/F, Honour Building, 78K, Tokwawan Road, Kowloon Hong Kong. This was admitted by all three Defendants during the aforesaid meeting on 17 December 2005.

e. The 1st and 2nd Defendants had also generated fictitious trades between the Plaintiff and one Aichi & Co Pte Ltd ("Aichi") whose directors are Wong Ngok Kiew Magdalene (the wife of the 1st Defendant), Lee Aik (the mother of 2nd Defendant), the 1st Defendant and Law Chin Eng. At all times, Law Chin Eng was not involved in any of the affairs or day to day running of Aichi, which was also managed and run by the 1st and 2nd Defendants. The fictitious trades were generated without the knowledge or consent of Law Chin Eng or Lau Chin Whatt.

f. There were numerous other improper and/or irregular transactions, acts and/or accounting of the Plaintiff's assets carried out by the Defendants in the course of managing and/or operating the Plaintiff's business or affairs.

i. The 2nd Defendant forged Lau Chin Whatt's signature on some of the Plaintiff's corporate resolutions and documents without his consent and/or approval. On or about 7 September 2005 the 2nd Defendant verbally admitted this to Lau Chin Whatt.

ii. In December 2004, when the Plaintiff declared and paid out dividends, Lau Chin Whatt did not receive his share of the dividends despite it being recorded in the Plaintiff's books that he had. Lau Chin Whatt only received his share of the dividends in late May 2005 after making repeated demands for the same.

iii. The 1st and 2nd Defendants have ignored repeated demands to produce the accounts of the Plaintiff company and its statutory records for inspection by Lau Chin Whatt until sometime in September 2005 after he threatened to take legal action.

iv. From 2002 up to late December 2006, the 1st and 2nd Defendants had consistently failed to notify Law Chin Eng and Lau Chin Whatt of several board or shareholders' meetings of the Plaintiff company.

v. The 1st and 2nd Defendants had used the Plaintiff's funds to purchase a property known as 94 Tokwawan Road #03-12, Hong Kong. However, notwithstanding that the Plaintiff's money was used to purchase this property, the Defendants have, despite numerous requests by Lau Chin Whatt, failed, neglected and/or refused to give an account of this property (including but not limited to the value thereof) and/or any income which may have been derived from this property to the Plaintiff and/or its other directors.

vi. Sometime in early 2006, the Defendants caused the Plaintiff to file the annual returns for year 2002 without having laid the accounts therein before the Plaintiff and the full board of directors at the Annual General Meeting. The 2nd Defendant had persuaded the company secretary of the Plaintiff at the material time to file the annual returns on the Plaintiff's behalf for the year 2002 although the requisite signature of the directors of the Plaintiff had not been obtained. The 2nd Defendant assured the Plaintiff's company secretary that the 2nd Defendant would obtain the requisite signatures from all the Plaintiff's directors after the returns had been filed.

vii. The Plaintiff's accounts were not properly audited as the Defendants wanted to evade tax. This was verbally admitted by the 1st Defendant at a meeting of the Plaintiff's board of directors held sometime in late December 2005 or early 2006.

g. There 2nd Defendant had procured the Plaintiff to commit tax evasion in breach of various provisions of the Income Tax Act.

i. By reason of the matters stated above in paragraphs 8(a) to (c), the Plaintiff has been and is currently subject to investigation by the Inland Revenue Authority of Singapore ("IRAS") and is exposed to sanctions under the Income Tax Act.

The second plaintiff filed an affidavit which set out the circumstances in which the alleged breaches were committed and discovered. In the affidavit, the second plaintiff revealed that the IRAS investigations related to the company's fictional transactions with Drilbo had resulted in the company having to make payment of $2,562,614.85 in unpaid taxes and $4,573,167.33 as a composition fine.

6 All three proposed defendants opposed the application. The first and third proposed defendants are represented by one firm of solicitors while the second proposed defendant is represented by another firm.

7 The plaintiffs' and the proposed defendants' arguments on the application are centred around the requirements of s 216A(3), that:

> No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —
>
> (a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
>
> (b) the complainant is acting in good faith; and
>
> (c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

8 The proposed defendants resisted the plaintiffs' application on the ground that it was another chapter in the longstanding feud between the plaintiffs and the proposed defendants, which had already resulted in a pending action in Suit No 839 of 2006 ("S 839"). They contended firstly that this application was not made in good faith; secondly, that the proposed action was not in the interests of the company; and thirdly, that winding up the company was an appropriate remedy to the plaintiffs' grievances.

9 S 839 was taken out by the same plaintiffs as in this action. The defendants are LCH, LCC, LKB, the company, and a company named Winstant Holding Pte Ltd. In the suit, the plaintiffs alleged that there was an undocumented "Lau Family Trust" set up for the benefit of the members of the family, which covered a range of assets the plaintiffs alleged were acquired from the assets of the family which they call the "Family Assets". They claim to be beneficiaries under the trust.

10 S 839 in its original form also included a claim that LCH, LCC and LKB had breached their fiduciary duties as directors of the company. Tan Lee Meng J struck out those claims on the grounds that: the wrongs pleaded were done to the company; the resultant loses were suffered by the company; and the company had a cause of action in respect of these alleged wrongs. Thus, under "the proper claimant rule" otherwise known as the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, the proper plaintiff was the company and not LCE and LCW as shareholders and directors of the company. The appeal from Tan J's judgment was dismissed by the Court of Appeal.

Section 216A

11 Section 216A received the attention of the Court of Appeal in *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1 ("*Pang Yong Hock*"). The Court referred to earlier decisions of the High Court in *Teo Gek Luang v Ng Ai Tiong* [1999] 1 SLR 434 ("*Teo Gek Luang*") and *Agus Irawan v Toh Teck Chye* [2002] 2 SLR 198 ("*Agus Irawan*") with approval. In *Teo Gek Luang*, Lai Kew Chai J held at [15] that when an application under s 216A was made:

> [T]he court at the leave stage was not called upon to adjudicate on the disputes of facts and inferences, relying merely on affidavit evidence. Those matters would be for trial. The court had to see if there was prima facie merit to it.

Similarly, in *Agus Irawan*, where the question was where the burden to prove good faith lay, Choo Han Teck JC held that it was for the party opposing the s 216A application to show that it was not made in good faith.

12 The Court of Appeal explained at [19] of *Pang Yong Hock* that s 216A was enacted:

> for the protection of genuinely aggrieved minority interests and for doing justice to a company while ensuring that the company's directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat.

13 Regarding the "good faith" requirement in ss (3)(b), the Court held at [20] that:

> The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing a s 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s 216A(3)(b) and (c).

14 It went on at [21] to state that in deciding on the "interests of the company" requirement in ss (3)(c), a court must:

> weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands "to gain substantially in money or in money's worth" (*per* Choo JC in *Agus Irawan*) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

The interests of a company are, of course, not to be measured only in monetary terms. A company may engage in litigation over matters with no monetary implication, e.g. its employment policy.

15 The Court added at [22] that in deciding whether to approve an application for leave to commence a derivative action:

> the court should also consider whether there is another adequate remedy available, such as the winding up of the company (*Barrett v Duckett* [1995] 1 BCLC 243).

Good faith

16 The first proposed defendant averred in his affidavit that the proposed derivative action was motivated by the second plaintiff's personal vendetta against the proposed defendants. The first proposed defendant then went on to set out a history of the alleged acrimony going back to the mid-1990s.

17 The second proposed defendant in his affidavit deposed that the second plaintiff had, in 2004, wanted the proposed defendants to buy him out of the company on his terms. The proposed defendants found his terms unreasonable and rejected them. The second proposed defendant contended that the sole motivating factor in this application was to coerce the proposed defendants to accept those terms.

18 There is no doubt that there had been serious disagreements between the plaintiffs (particularly the second plaintiff) and the proposed defendants (particularly the second proposed defendant) for more than a decade. There is still a strong degree of distrust and personal hostility between them. But such sentiments, however deep, do not constitute bad faith. As the Court of Appeal had explained in *Pang Yong Hock* at [20]:

> Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part.

19 The good faith requirement for making an application for leave to bring an action in the name of a company is satisfied when the applicant is shown to be acting in the interests of the company. As the purpose of derivative actions is to promote the interests of the company, a personal dislike for the proposed defendants will not defeat such an application unless the application is merely an

extension of that animosity and is not made with the intention to promote or protect the company's interests.

20 The derivative action provisions in our Companies Act are modelled on the provisions in the Canada Business Corporations Act R.S.C. 1985, c. C–44. Section 216A(2) and (3) of our Act are similar to s 239(1) and (2) of the Canadian act. For this reason, decisions on the relevant Canadian provisions are useful guides to the construction of our provisions. In *Intercontinental Precious Metals Inc. v Cooke* [1994] 4 WWR 66, a decision of the British Columbia Supreme Court, Tysoe J ruled that the fact that there is a shareholder battle does not lead to the inference that an application is motivated by bad faith. In *Primex Investments Ltd v Northwest Sports Enterprises Ltd* [1996] 4 WWR 54, another decision of the British Columbia Supreme Court, Tysoe J held that in a situation where an applicant was acting out of self-interest in wanting to prosecute a derivative action in the name of a company, and the applicant's self-interest coincided with the interests of the company, the applicant's self-interest did not mean that his application was made in bad faith.

21 A derivative action can be struck out if it is not prosecuted in good faith. In *Barrett v Duckett & Ors* [1995] 1 BCLC 243 ("Barrett"), the English Court of Appeal struck out a derivative action brought by a shareholder of a company against her former son-in-law and his wife by a subsequent marriage. Peter Gibson LJ found, at 245, that:

> On its face it is an action brought by a shareholder to right grievous wrongs done to the company of which she is a shareholder. But unfortunately the circumstances in which the action is brought and pursued include a bitter matrimonial dispute between the plaintiff's daughter and the primary defendant. That bitterness appears to have infected decisions taken in relation to these proceedings, added to which there has been a notable lack of realism on the part of the plaintiff and her advisers. The litigation, even though it has not progressed beyond certain interlocutory steps, appears to have exhausted the finances of the plaintiff and, while the amounts claimed for the company are large, to an objective observer the likelihood of significant recoveries seems very small indeed. The two individual defendants who have been served with the proceedings are on legal aid. The result so far is that this litigation has been ruinous to the plaintiff and has caused heavy costs to be incurred by the public purse.

22 The learned judge found that personal rather than financial considerations appeared to be impelling the plaintiff to pursue the action, and he was convinced that the plaintiff was not pursuing the action bona fide on behalf of the company. He struck out the action with the concurrence of Beldam LJ and Russell LJ.

23 In the present case, there is a history of hostility between the plaintiffs and the proposed defendants. However, the plaintiffs cannot be said to be motivated by personal rather than financial considerations in pursuing their disputes with the proposed defendants and the company.

24 If the proposed action succeeds, there will be benefits to the company, and to them as shareholders of the company. Their good faith in making the application cannot be impugned by their grievances over the proposed defendants' rejection of their claims in respect of the Lau Family Trust and the Family Assets.

The interests of the company

25 A derivative action is in the interests of the company when it is prosecuted for the benefit of the company. The benefit should be real – in monetary or other terms – in order to justify the costs

and effort of pursuing the action when the company itself had not proceeded with the action. Towards this end, an applicant should not only identify causes of action and allege breach of fiduciary duties, breach of contract, negligence, etc, but also show that the company had sustained or may sustain real loss or damage as a result of these failures and that there are some prospects of obtaining relief or redress through the proposed action.

26 It is therefore necessary to look at each complaint set out in [5], and ascertain if it is in the company's interests to have it litigated. I will refer to each complaint as it is enumerated in para 8 of the draft statement of claim.

Complaint (a)

27 This concerns a payment of $4,406,589.23 from the company's overdraft account to the fictitious Hawker Enterprise Ltd which the company should not have made. This is a claim in the interests of the company.

Complaint (b)(i)

28 The complaint is that out of a sum of $487,405.99 withdrawn in 2001 for payments to the first plaintiff and the three proposed defendants, the first plaintiff did not receive his share of $53,166.75. The complaint is also that $5,000 of the sum withdrawn was unaccounted for. The first plaintiff has not deposed any affidavit or made any complaint to the company that he did not receive the payment. Neither plaintiff referred to the $5,000 allegedly unaccounted for in their respective affidavits. It is not in the interests of the company to make a claim so bereft of substance.

Complaint (b)(iii)

29 This involves the use of $2 million of the company's monies to purchase a property in Marsiling. The property was transferred to a company, the shareholders of which were the second proposed defendant and his brother. The property was subsequently sold for more than $18 million. It is in the company's interests to pursue this claim.

Complaint (b)(iv)

30 The plaintiffs are unhappy that the company purchased a property in Shenzhen without a proper valuation or the company's approval. There is no allegation that the company sustained loss as a result of the purchase. The plaintiffs have not shown that it is in the interests of the company to pursue this matter.

Complaint (c)

31 This complaint relates to false trades between the company and Drilbo, whereby the company made payments to Drilbo's invoices for these transactions. It is in the company's interests to sue the proposed defendants over these payments.

Complaints (d) and (e)

32 These complaints relate to false transactions with two other companies, Manfield and Aichi. However, there are no allegations that the company had made payments or incurred any liabilities in these transactions. For this reason, the plaintiffs have not shown that it is in the company's interests to sue the proposed defendants over these transactions.

Complaints (f) (i) (ii) (iii) (iv) (vi) and (vii)

33 These were complaints concerning the forgery of the second plaintiff's signature on company documents, the late payment of dividends to the second plaintiff, the failure to notify the plaintiffs of company meetings, the filing of the company's annual returns before the company's accounts were approved by the company and the failure to have the company's accounts properly audited. The plaintiffs made no assertion that these acts and omissions had placed the company in a position where it would be in its interests to sue the proposed defendants over these matters.

Complaint (f) (v)

34 Complaint (f) (v) differs from complaints (i), (ii), (iii), (iv), (vi) and (vii). It relates to the first and second proposed defendants' use of company funds to purchase a property in Hong Kong and the proposed defendants' failure to account for this property and the income generated from it. A derivative action on this matter is in the interests of the company.

Complaint (g)

35 This arises out of the company's involvement in tax evasion which resulted in the company having to pay a composition fine of $4,573,167.33. Since the company incurred loss, this claim which may result in recovery of the loss from the proposed defendants is in the company's interests.

Alternative remedy of winding up

36 In *Pang Yong Hock*, the Court of Appeal did not authorise a derivative action and upheld the trial court's ruling that the company should be wound up instead. In its decision, the Court of Appeal referred to and agreed with Peter Gibson LJ's statement in *Barrett* (at 250) that:

> if another adequate remedy is available, the court will not allow the derivative action to proceed.

37 In *Barrett*, a winding up petition had been filed before the derivative action. In *Pang Yong Hock*, the winding up petition had not been filed when the trial judge had dismissed the application. However, it was filed by the time the appeal came before the Court of Appeal.

38 The company in *Barrett* was in a deadlock because of disagreements between the two parties, each of whom held 50% of the company's shares. The company had ceased trading and was probably insolvent. In *Pang Yong Hock*, there was a deadlock in the company because two factions of shareholders were unable to co-exist. The company had not filed its statutory accounts or held the statutory meetings.

39 In the present case, no petition has been filed. In December 2006, the second proposed defendant gave notice for the directors of the company to resolve that the company be wound up voluntarily so that "all shareholders get their share in the company fairly", but the proposal was not taken up and no further action was taken. The second proposed defendant did not allude to this proposal in his affidavit, and the notice came up in these proceedings only as an exhibit in the second plaintiff's affidavit. The proposed defendants have not stated in their affidavits that they intend to wind up the company, nor have they stated that winding up is an appropriate solution to the disputes between the parties. None of the parties in the present case has asserted that the company is in deadlock or insolvent; nor have they deposed that it has ceased to trade or that it may not be able to continue to trade.

40 While the winding up of a company may be preferable to the prosecution of derivative actions in *Barrett* and *Pang Yong Hock*, this does not apply to the present case.

Conclusion

41 Leave is granted to the plaintiffs to bring an action on behalf of the company against the proposed defendants on the complaints that I found are in the interests of the company to pursue. Each party is to pay its own costs in this application.

42 The plaintiffs are to have conduct of the action including any execution proceedings. I will not make any order on the plaintiffs' prayer that the company pay the plaintiffs' costs in the action on an indemnity basis. I will leave that to the trial judge, as the appropriate costs order will have to take into account the manner in which the action is prosecuted.