Wong Kai Wah *v* Wong Kai Yuan and another
[2014] SGHC 147

Case Number : Originating Summons No 1132 of 2013

Decision Date : 22 July 2014

Tribunal/Court : High Court

Coram : Lee Kim Shin JC

Counsel Name(s) : Lim Joo Toon (Joo Toon LLC) for the Plaintiff; Lai Swee Fung (Unilegal LLC) for the 1st Defendant.

Parties : Wong Kai Wah — Wong Kai Yuan and another

Companies – directors – accounts

22 July 2014

Lee Kim Shin JC:

Introduction

1 The application in Originating Summons No 1132 of 2013 ("OS 1132") was for leave for the plaintiff ("the Plaintiff") to bring a derivative action in the name and on behalf of the second defendant company ("Sing Huat") against the first defendant ("the 1st Defendant") under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act").

2 The Plaintiff and the 1st Defendant are brothers. They are, and were at all material times, shareholders and the only two directors of Sing Huat. For reasons that will be elaborated below at [35], Sing Huat is essentially a "deadlocked" company as neither board resolutions nor resolutions in general meeting can be passed unless both the Plaintiff and the 1st Defendant vote in favour.

3 The underlying complaint against the 1st Defendant was that the latter had wilfully and without justification refused to approve and sign Sing Huat's audited accounts in his capacity as a director. Pursuant to ss 201(5) and 201(15) of the Companies Act respectively, directors are required to provide a report ("the directors' report") as well as a statement ("the directors' statement") accompanying the audited accounts which purpose generally are to confirm that the audited accounts present a true and fair view of the state of affairs of the company. This statutory requirement is to be complied with annually for each financial year of the company. For convenience, I shall simply refer to this procedure as signing the audited accounts. The 1st Defendant's refusal to sign Sing Huat's audited accounts has allegedly caused Sing Huat to incur additional taxes, fines and potential criminal liability.

4 The issue before me was whether the Plaintiff had met the requirements for commencing a derivative action under s 216A of the Companies Act ("a s 216A action"). Three requirements are prescribed in s 216A(3) of the Companies Act:

(a) the Plaintiff has given 14 days' notice to the directors of Sing Huat of his intentions to apply to court if the directors do not bring or diligently prosecute the action ("the first requirement");

(b) the Plaintiff was acting in good faith ("the second requirement"); and

(c) it was *prima facie* in the interests of Sing Huat that the action be brought or prosecuted ("the third requirement").

5 The parties' submissions were focused on the second and third requirements. At the end of oral arguments, I decided that all three requirements had been established and therefore granted leave to the Plaintiff. As the 1st Defendant has appealed against my decision, I shall now provide the reasons for my decision.

Background

Sing Huat's early years

6 Sing Huat was incorporated in 1971 as a private company limited by shares and may be described as a family company. It is a wholesaler of general hardware such as locks and hinges. Its shareholders are family members, and its two founding directors were the parents of the Plaintiff and the 1st Defendant. For ease of reference, I will refer to the parents as "the Father" and "the Mother" respectively.

7 The Plaintiff was appointed a director of Sing Huat in 1987 by the Father. He was a director of two other private limited companies, which are also businesses owned by the family, namely Tapmatic (S.E.A) Industries Pte Ltd ("Tapmatic") and World-Wide Machine Tools Pte Ltd ("World-Wide").

8 When the Father passed away in 1999, the Plaintiff and the Mother assumed the day to day running of Sing Huat. The 1st Defendant was appointed a director of Sing Huat and took charge of its personnel department. At this point, the shareholding of Sing Huat was held in the following proportions — 58% by the Mother, 21% by the Plaintiff and 21% by the 1st Defendant. The Plaintiff was appointed managing director of Sing Huat in September 2004. As at the date of my decision, the 1st Defendant was also a director of Tapmatic and World-Wide.

9 Sadly, in 2007, the Mother was declared to be of unsound mind and a Committee of Person and Estate ("the COP") was formed on 24 October 2007. The Mother, as a consequence, ceased to be a director of Sing Huat and the Plaintiff and 1st Defendant have been the only two directors of Sing Huat since. The Mother passed away on 9 April 2012 and the COP was dissolved. Her shares in Sing Huat passed into, and are still held by, her estate. To date, no application for grant of probate has been taken out.

The beginning of the dispute

Sing Huat's audited accounts for the financial year ended 2009

10 Sometime in 2010 (the exact date is unknown), Sing Huat's independent auditors, Lo Hock Ling & Co ("LHL"), presented to Sing Huat the audited accounts for the financial year ended 30 June 2009 ("FY 2009"). Pursuant to s 62(1) of the Income Tax Act (Cap 134, 2014 Rev Ed) ("the Income Tax Act"), a company has to file its audited accounts together with what is known as Form C, annually with the Inland Revenue Authority of Singapore ("IRAS"). The audited accounts for FY 2009 had to be submitted by 30 November 2010 in order for IRAS to assess the income tax payable by Sing Huat for the Year of Assessment ("YA") 2010.

11 As directors of Sing Huat, both the Plaintiff and the 1st Defendant were required to sign the

audited accounts before the audited accounts may be laid before the shareholders of Sing Huat at its Annual General Meeting ("AGM") for FY 2009. The Plaintiff and the 1st Defendant had signed Sing Huat's audited accounts for the previous financial years ended 30 June 2004, 2006, 2007 and 2008 without any issue. It is unclear what happened to the audited accounts for 2005 but there was no suggestion by either side that this was a material consideration.

12 However, the 1st Defendant has since November 2010 refused to sign, not just Sing Huat's audited accounts for FY 2009, but also the audited accounts of Tapmatic (for its financial year ended 31 December 2009) and World-Wide (for its financial year ended 30 September 2009).

13 As the issues concerning the other two companies are the subject of similar but separate s 216A leave applications taken out by the Plaintiff, I will not delve into them any more than is necessary for the present application.

14 As a result of the 1st Defendant's refusal to sign the audited accounts for FY 2009, Sing Huat was unable to file the necessary documents with IRAS for YA 2010, which is an offence under the Income Tax Act. On 18 January 2011, the Comptroller of Income Tax ("the Comptroller") imposed a composition fine of $200 for this offence.

15 Three consecutive board meetings were scheduled on 3 March 2011 to discuss the audited accounts and other matters relating to Sing Haut, Tapmatic and World-Wide (collectively "the Family Companies"). After about an hour into Tapmatic's board meeting, the 1st Defendant left suddenly and did not return even after the Plaintiff and the company secretary had waited for an hour. As the quorum for the board meeting was two, the meeting had to be called off in the 1st Defendant's absence. The board meetings for World-Wide and Sing Huat, which had been scheduled to take place after the Tapmatic board meeting, were also called off.

16 Attempts were made to re-schedule the board meetings but the 1st Defendant intimated that he was not prepared to discuss the audited accounts further and instead he called for extraordinary general meetings of the Family Companies and a fourth company, ShengFa.

17 The extraordinary general meetings of the Family Companies were held together on 19 May 2011 ("the Family Companies EGM") and attended by the Plaintiff, the 1st Defendant and members of the COP. The first item on the agenda was the 1st Defendant's refusal to approve and sign the audited accounts of each of the Family Companies for their respective 2009 financial year.

Reason for the 1st Defendant's refusal to sign

18 At the Family Companies EGM, the 1st Defendant explained why he had refused to sign Sing Huat's audited accounts. He "strongly objected" to Tapmatic holding stocks in the same warehouse as Sing Huat and wanted the two companies to revert to past practice, that is, Tapmatic would not hold any stocks and Sing Huat would sell stock to Tapmatic on a back-to-back basis. At the heart of the 1st Defendant's concern was the accuracy of the accounting of the stocks of the Family Companies which were all held in Sing Huat's warehouse. The 1st Defendant also emphasised that he had requested an independent audit of the stocks but as it had not yet been carried out, he "was not in a position to sign the audited accounts".

19 The Plaintiff responded to the 1st Defendant's concerns with the following points:

(a) first, there was no company resolution which stated that Tapmatic could not hold stocks. In fact, Tapmatic had been holding stock at the same warehouse at Sing Huat since 2004.

However, the 1st Defendant had no issue signing the audited accounts of the Family Companies for financial years prior to 2009;

(b) secondly, the Plaintiff had invited the auditors of both Tapmatic and World-Wide, SK Cheong & Co. ("SKC"), to brief the directors on SKC's stock-taking procedures; and

(c) thirdly, if the 1st Defendant wanted an independent professional to audit the accounts which were already audited by Sing Huat's auditors, he would have to bear the cost personally.

20 Representatives from SKC were then invited to join the Family Companies EGM, and fielded questions from the 1st Defendant and another member of the COP on the stock-taking procedures. However, the 1st Defendant remained unpersuaded and refused to sign the audited accounts of Sing Huat for FY 2009. Unable to resolve the impasse, the Plaintiff moved on to the second item on the agenda which was to decide how to move forward with the audited accounts of Sing Huat that remained unsigned by the 1st Defendant.

21 After further discussion, the Plaintiff proposed, and the members of the COP present at the meeting agreed, that a special independent stock audit would be conducted by SKC and LHL, which would be paid for by Sing Huat. However, the 1st Defendant appeared to continue to take issue with the Family Companies each holding its own separate stocks. He intimated that he would not sign the audited accounts, regardless of the outcome of the special independent stock audit, unless it was resolved that Tapmatic and World-Wide would no longer hold stock. The Plaintiff and other COP members present were not prepared to accept this and the Family Companies EGM ended without agreement.

Summons from IRAS

22 On 7 June 2011, Sing Huat received a further summons from IRAS requiring its attendance at court on 26 August 2011 to answer a charge for failing to file the audited accounts for FY 2009. The Plaintiff's solicitors then wrote to the 1st Defendant's solicitors on 6 July 2011 informing the latter of the IRAS summons and urging the 1st Defendant to sign the audited accounts so that it could be filed by 22 August 2011, the Comptroller having offered to compound the offence if the audited accounts were filed by the aforesaid date.

23 Following a reminder letter from the Plaintiff's solicitors, the 1st Defendant responded by email to the Plaintiff's solicitors on 4 August 2011, stating that the Plaintiff had withdrawn monies (see [25]–[29] below) from Sing Huat's accounts in July 2009 and that the Plaintiff had not provided proof of his claims to the money. In an email dated 12 August 2011, the Plaintiff's solicitors asked the 1st Defendant for the relevance of the allegation in relation to the signing of the audited accounts for FY 2009. No further response was received from the 1st Defendant or his solicitors.

24 After two adjournments of the hearing of the IRAS summons, Sing Huat was fined $400. The fine was paid on 23 December 2011.

Related proceedings by the 1st Defendant – the $445,540.54 allegation

25 On 1 December 2011, the 1st Defendant took out an application, OS 1043/2011 ("OS 1043"), for leave to commence a s 216A action in the name and on behalf of Sing Huat against the Plaintiff. The underlying complaint was that the Plaintiff had breached his director's duties to Sing Huat by failing to account for the sum of $445,540.54 allegedly owed by him to Sing Huat.

26 According to the 1st Defendant, the Father's practice (whilst he was still alive) had been to inject approximately $800,000 into Sing Huat at the beginning of each financial year, that is, 1 July, for cash flow purposes. This injection would be recorded as a "loan" by the director. At the end of the financial year, Sing Huat would return the amount to the Father, whereupon it would be injected by him into Sing Huat and the process would be repeated annually.

27 Following the Father's demise, the practice had continued and after the Mother had ceased to be a director of Sing Huat, the "loans" had been made by the Plaintiff and the 1st Defendant. However, the 1st Defendant alleged that this practice was unilaterally altered by the Plaintiff in 2009. Both the Plaintiff and the 1st Defendant had "loaned", in equal proportions, $891,081.07 in total to Sing Huat in July 2008, but when Sing Huat returned them half of the "loan" amount each in June 2009, being $445,540.54 to the Plaintiff and $445,540.53 to the 1st Defendant, only the 1st Defendant cancelled the cashier's order for his share. He did this, he claimed, to "return" the monies to Sing Huat. The Plaintiff did not "return" his share. The 1st Defendant claimed that the Plaintiff's action caused Sing Huat's accounts for FY 2009 to be irregular and inaccurate.

28 The Plaintiff did not deny that the loans at the start of each financial year were meant to finance Sing Huat's operations for that year; and that these loans were repaid to the directors at the end of the financial year. This had also been the practice for the immediately preceding financial year ended 30 June 2008. The Plaintiff said that he did not re-extend the loan to Sing Huat for FY 2009 because he had agreed, under a settlement agreement with the 1st Defendant and the COP in relation to another dispute, to purchase the shares held by the 1st Defendant and the Mother in Sing Huat. The Plaintiff asked for the application to be dismissed on the ground that it was not in the interests of Sing Huat to pursue the claim for the $445,540.54, and that the action was only commenced because of the 1st Defendant's resentment of, and grudge against, the Plaintiff.

29 OS 1043 was heard by Quentin Loh J who dismissed the application on 15 February 2012. However, this issue of the $445,540.54 has resurfaced in the present application, with the 1st Defendant using it as *another* reason why he has refused to sign Sing Huat's audited accounts for FY 2009.

Subsequent attempts to persuade the 1st Defendant to sign

30 On 13 January 2012, IRAS issued a notice to each of the Family Companies, informing them that they were required to furnish the Comptroller with audited accounts for the purpose of YA 2010, and that a failure to comply with the notice was an offence under the Income Tax Act, punishable with a fine not exceeding $1,000. The Plaintiff's solicitors wrote to the 1st Defendant's solicitors on 17 February 2012 to inform them of IRAS' latest notice. No response was given by either the 1st Defendant or his solicitors.

31 Mr Lo, one of the partners of Sing Huat's auditors, LHL, also wrote to the Plaintiff and 1st Defendant on 4 June 2012, reminding them that Sing Huat's audited accounts for FY 2009 had not been approved, and further, that Sing Huat has not held its AGM to approve these audited accounts. In his letter, Mr Lo also reminded the Plaintiff and the 1st Defendant that, as directors, they were obliged under the Companies Act to prepare and present annual financial statements to shareholders, hold timely AGMs, and lodge the annual returns of Sing Huat. He cautioned that as of 4 June 2012, Sing Huat was already in breach of the statutory deadline for holding the AGM to approve the audited accounts for FY 2009 and the filing of the annual returns, and may also face penalties imposed by the Accounting and Corporate Regulatory Authority ("ACRA"). The Plaintiff claimed that to his knowledge, the 1st Defendant did not respond to Mr Lo's letter.

32 Apart from discussions at the Family Companies EGM (see [17]–[21] above), the 1st Defendant did not appear to have taken any other steps to engage with the Plaintiff or Sing Huat's auditors to resolve the issues relating to the audited accounts for FY 2009. He failed to appreciate that, as a director, he had as much responsibility as the 1st Plaintiff to ensure that Sing Huat did not breach its statutory obligations.

33 In summary, up until OS 1132 was commenced, the 1st Defendant had continued to refuse to sign Sing Huat's audited accounts for FY 2009 despite the Plaintiff's efforts.

The present proceedings

34 The Plaintiff therefore commenced OS 1132 to seek the following orders:

(a) leave to bring an action in the name and on behalf of Sing Huat against the 1st Defendant for breach of his duties to Sing Huat by refusing, without reasonable cause, to approve and sign the audited accounts for FY 2009;

(b) the Plaintiff have control of the conduct of the s 216A action described above; and

(c) Sing Huat shall pay the costs incurred by the Plaintiff in connection with the s 216A action, including the costs of this application.

35 The Plaintiff made the point indicated at [2] above that Sing Huat was deadlocked not just at the board level, but also at the shareholder level, as the COP had been dissolved but no personal representative had been appointed for the Mother's estate. Therefore, the votes attached to the Mother's shares representing 58% of Sing Huat's share capital cannot be exercised. The court's intervention was therefore needed to prevent the 1st Defendant from continuing to hold Sing Huat hostage to his demands (or concerns).

Issue

36 The question before me was straightforward: has the Plaintiff satisfied the three requirements under s 216A(3) of the Companies Act (see [4] above)?

My decision

37 The main dispute, as I have indicated at [5] above, was on the second and third requirements. Nevertheless, I had to be, and was, satisfied that the Plaintiff had met the first requirement of giving 14 days' notice to the 1st Defendant. The 1st Defendant was informed of the Plaintiff's intention to commence a s 216A action by way of letter from the Plaintiff's solicitors dated 5 November 2013, some 16 days (excluding 5 November 2013 itself) before OS 1132 was commenced on 22 November 2013.

The second requirement – good faith

The law

38 The determination as to whether the Plaintiff was acting in good faith was a finding of fact that could only be made following an assessment of multiple factors.

39 A convenient (but obviously not conclusive) factor that the court looks at in the first instance

is whether the underlying complaint for which the s 216A action is sought has a reasonable basis and is legitimate or arguable: *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426 ("*Teo Gek Luang*") at [14]. What this means, as explained by Choo Han Teck JC (as he then was) in *Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471 ("*Agus Irawan*") at [8], is that the underlying claim must have a "reasonable semblance of merit"; it does not have to be one that is bound to succeed or likely to succeed. The court at the leave stage is not called upon to descend into the thicket of disputed facts and inferences. This factor therefore focuses on the strength of the underlying complaint. Both cases were cited with approval by the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [16]–[19].

40 However, the merits of the underlying claim obviously cannot be the only consideration. This was explained by the Court of Appeal in its recent decision in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [29]. Citing *Pang Yong Hock*, the court stated that a plaintiff with a legitimate case, that is, a case that has reasonable semblance of merit, may nevertheless be found to be lacking in good faith if the plaintiff was "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations".

41 An assessment of good faith is therefore incomplete if there is no consideration of the plaintiff's subjective intents and purposes in commencing the s 216A action. It is for that reason that the Court of Appeal concluded in *Ang Thiam Swee* (at [29]) that to satisfy the requirement of good faith, the plaintiff must "*honestly* or *reasonably [believe]* that there is a good cause of action" [emphasis added].

42 Even though the apex court stressed (at [29]) that the merits of the underlying complaint must be "yoked to the intents and purposes of the [plaintiff]", it remains the case that there must, in the first place, be an assessment of the merits of the underlying claim against which the intents and purposes of the plaintiff may be referenced. The assessment of whether the underlying complaint has a reasonable semblance of merit is therefore still relevant and indeed a useful starting point.

Reasonable semblance of merit

(1) The stocks and inventory issue

43 I had no difficulty in finding, even on the basis of the affidavit evidence alone, that the Plaintiff's complaint was one that had a reasonable semblance of merit.

44 The first factor which weighed heavily on my mind was that the Plaintiff had no *direct* personal gain to be made in commencing a s 216A action in the name and on behalf of Sing Huat against the 1st Defendant. There may be some *indirect* personal gain that the Plaintiff may derive from agitating the 1st Defendant given their prior animosity but this has to be viewed against the direct benefit to Sing Huat which, in my view, was the Plaintiff's primary motivation (see [73]–[81] below).

45 The Plaintiff simply wanted the audited accounts for FY 2009 to be signed by the 1st Defendant, so that Sing Huat will cease to be the subject of IRAS and ACRA summonses, and that Sing Huat can be assessed for income tax based on the audited accounts. It was not disputed by the 1st Defendant that it was his refusal to sign the audit accounts (at all costs) since November 2010 that was placing Sing Huat in direct conflict with the authorities.

46 In these circumstances, where one of the two directors of a deadlocked company has effectively held the company hostage by refusing to sign the audited accounts, there would inevitably be a strong justification for the other director to have the matter adjudicated by the court by

commencing a s 216A action on behalf of the company, for a breach of director's duties by the director in question.

47 This, however, was insufficient on its own to support a finding that the underlying complaint was legitimate and had a reasonable semblance of merit. This is because the director who has withheld assent may have good grounds to do so such that his withholding of assent cannot be said to be a breach of his duties as a director. For that reason, it was just as important to examine the 1st Defendant's grounds for refusing to sign the audited accounts for FY 2009.

48 Granted, the 1st Defendant cannot be obliged to sign the audited accounts if he had serious misgivings about the accuracy of its contents. I gave him the benefit of the doubt and accepted, for the purposes of this leave application, his affidavit evidence that he was troubled by the problems that the common warehousing of stocks could pose to the audit process.

49 However, this belief, even if genuine at the outset in 2010 and perhaps even through to 2011, could not or ought not to have persisted till this date, *more than three and a half years later*. There must be limits on the 1st Defendant's beliefs. In the face of (at that time) contemporaneous, objective and independent evidence that contradicted the 1st Defendant's bare assertions, it was at least reasonable and *arguable* for the Plaintiff to construe the 1st Defendant's obstinacy as improper in his capacity as a director of Sing Huat.

50 Both LHL and SKC had performed stock checks annually and neither had reported any discrepancies in the stocks. Moreover, during the Family Companies EGM, representatives from SKC had fielded questions from the 1st Defendant (see [20] above). Although an SKC representative accepted that the audit process was not 100% accurate, he explained how audit procedures had been put in place to enhance the reliability of the stock counting. The only alternative to that was a special audit count entailing a "100% special stock" which would have been costly and time consuming.

51 The SKC representatives had not stated that Sing Huat's stocks were impossible to count, or at any rate, difficult to count accurately to such an extent that the audited accounts for FY 2009 contained irregularities. The 1st Defendant's unyielding stance against this backdrop was perplexing. Coupled with the minutes of the Family Companies EGM which, as a whole, suggests that the 1st Defendant was not so much concerned about the accuracy of the stock-taking (and by extension the accuracy of Sing Huat's audited accounts for FY 2009), as he was concerned about ensuring that Tapmatic and World-Wide should no longer hold stocks (as a matter of business practice), there was, in my view, a ring of truth to the Plaintiff's suggestion that the 1st Defendant was using Sing Huat's audited accounts as a tool of ransom to further his own broader objectives.

52 Further, this was not a case where the 1st Defendant's seemingly self-interested conduct caused no prejudice to Sing Huat. As emphasised above, Sing Huat was and remains in breach of a number of statutory obligations and had been issued notices and summonses by both IRAS and ACRA. Sing Huat's auditors, LHL, have also been unable to prepare the audited accounts for tax purposes for YA 2011 and YA 2012 as a result of the 1st Defendant's refusal to sign the audited accounts for FY 2009. This cannot go on indefinitely. As this is also a factor under the third requirement, I shall address it more comprehensively later (see [85]–[91] below).

53 The 1st Defendant lamented that this was an internal family dispute that the court should not be burdened with. That may well be desirable in many situations but I could not see how this dispute could be resolved internally. The board of Sing Huat was plainly deadlocked. Sing Huat has not filed its audited accounts for tax purposes since YA 2010. This is not a minor matter. Since the 1st

Defendant insisted that he had not breached any director's duties in refusing to sign the audited accounts, I did not see the prejudice in having this matter finally resolved at trial. Perhaps the 1st Defendant is right and the court will vindicate his position. However, until that decision is made by the court, Sing Huat could not move forward as the situation stood.

(2) The $445,540.54 issue

54 There is the other issue of the $445,540.54 which the 1st Defendant had said was another reason for his refusal to sign the audited accounts (see [25]–[29] above). I did not think very much of this argument. Whether the Plaintiff ought to have "re-extended" the loan to Sing Huat is an issue that is *independent* of the accuracy of the audited accounts. Put another way, the contents of the audited accounts do not confer any rights on the Plaintiff, nor do they absolve the Plaintiff of any obligation, on this particular issue.

55 Therefore, if the 1st Defendant is of the view that the Plaintiff had breached some kind of "agreement" with Sing Huat to "loan" or "return" the said sum to Sing Huat at the start of each financial year, this is a matter that he, on behalf of Sing Huat, can take up with the Plaintiff irrespective of whether he has signed Sing Huat's audited accounts for FY 2009.

56 In that regard, I had earlier noted that the 1st Defendant had tried unsuccessfully to commence a s 216A action in OS 1043 based on the above allegation. The 1st Defendant claimed that Loh J did not decide that the Plaintiff does not have to return the sum. That may well be a worthwhile argument to make before a judge who has to determine the merits of *that* claim, but not in the present application before me. The only conclusion that I could draw from Loh J's decision in *this* application was that no s 216A action can be taken against the Plaintiff in respect of the allegation that the Plaintiff had breached an obligation to "return" the $445,540.54 to Sing Huat. That was the premise upon which I had to, and did assess, the 1st Defendant's continued refusal to sign Sing Huat's audited accounts for FY 2009.

57 If anything, the fact that the 1st Defendant brought this issue up in his affidavit for this application, nearly two years after OS 1043 had been dismissed, strengthened my view that the 1st Defendant was using all means possible to frustrate the Plaintiff – his alleged grounds for refusing to sign Sing Huat's audited accounts for FY 2009 were stalking horses for agendas that really had nothing to do with the accuracy of the accounts.

58 The 1st Defendant's reference to the $445,540.54 backfired in another way. In his affidavit, he sought to paint a picture of the Plaintiff as the unreasonable aggressor. The 1st Defendant said that notwithstanding his disagreement with the state of the accounts, he recently offered, by way of a letter from his solicitors dated 12 December 2013, to sign the audited accounts for Tapmatic and World-Wide, which, as I had mentioned briefly above at [13], were the subject of separate s 216A proceedings. Labelling the Plaintiff's response "intransigent" and "my way or nothing else", the 1st Defendant asserted that the Plaintiff's antagonism and refusal to act sensibly had clouded the Plaintiff's judgment as to what was in the best interests of the Family Companies.

59 Initially, the 1st Defendant's willingness to resolve their differences amicably found some currency with me. However, that currency dissolved upon closer examination of his solicitors' offer to the Plaintiff's solicitors. The relevant portion that deserves reproduction reads:

> 2 Nonetheless, with a view toward [sic] resolving the impasse thereby avoiding the escalation of costs, our client has instructed us that he is prepared to sign the draft audited accounts. In doing so, he is relying on your client's representations and assertions to him that the accounts

are fair and accurate. His willingness to sign the accounts is also not to be regarded as an admission that his previous reluctance to sign the accounts constitutes a breach of his duties or that it was an unreasonable stand to adopt.

3 In light of our client's position now, we suggest that your client withdraws the OS [*in relation to Tapmatic*] with the issue of costs incurred to-date to be decided by the court.

4 Our client's offer to sign the draft audited accounts extends to World-Wide, for which we have not received any originating process – as such, no issue of costs arises on that. However, our client's offer does not extend to Sing Huat *as our client intends to question the accuracy of the draft audited accounts* ***on grounds unrelated to the inventories*** . Our client's stand on Sing Huat should not impede the resolution of the separate issues of the audited accounts of Tapmatic and World-Wide.

[emphasis added in italics and bold italics]

60 The reference to the grounds unrelated to the inventories was to the allegation pertaining to the sum of $445,540.54. The 1st Defendant was, in effect, saying that the inventories issue was *now* a non-issue (subject to the qualification that his assent was conditional upon the Plaintiff's representation that the accounts are "fair and accurate" (*sic*)), but that there was a remaining obstacle in the form of the Plaintiff's refusal to "return", or re-extend, the $445,540.54 loan to Sing Huat.

61 This revealed two things. The first was that the 1st Defendant held out from signing the Tapmatic and World-Wide audited accounts for over three years when all he wanted was to qualify his assent to the audited accounts. It was not suggested at all by either counsel that a director *could not under any circumstance* sign audited accounts that the director feels may not present a true and fair view of the state of affairs of the company.

62 While it may not be common practice, there is nothing to prevent a director from highlighting or explaining either in the directors' report or in the directors' statement accompanying the audited accounts any issue which, in that director's view, ought to be brought to the shareholders' attention. Why the 1st Defendant did not explore this option, or seek advice from the auditors on how to do so, was, to me, an equal mixture of him not wanting to show weakness to the Plaintiff, and, him being genuinely concerned that he would be deemed later to have agreed that the Plaintiff was not obliged to "return" the $445,540.54 to Sing Huat.

63 The second revealing inference was that by this time, the 1st Defendant's own application to commence a s 216A action against the Plaintiff in respect of this $445,540.54 issue had been dismissed by Loh J. He had not taken out any other proceedings against the Plaintiff to make good his allegation that the Plaintiff was liable to return that amount to Sing Huat. Despite this, the 1st Defendant used this very reason to justify his continued refusal to sign Sing Huat's audited accounts for FY 2009. As I saw it, the only option open to the Plaintiff at the time the 1st Defendant made his offer to move matters forward was to submit to the demands of the 1st Defendant. I therefore found it slightly ironic that the 1st Defendant characterised the Plaintiff's rejection of his offer as "my way or nothing else" when the 1st Defendant's offer was, to my mind, exactly the same.

64 In the premises, the Plaintiff's complaint of the 1st Defendant's breach of director's duties could not be said to be shorn of any reasonable semblance of merit. However, as mentioned at [41] above, this was not the end of the inquiry. If there was evidence that the Plaintiff's subjective intents and purposes in commencing the s 216A action supported an inference of a lack of good faith, the court

would not grant the leave sought.

The Plaintiff's subjective intents and purposes

65 Whether there is a lack of good faith depends, always, on the facts of each case. However, given that the case law is replete with examples of when a complainant lacks good faith in the context of applications for leave to commence s 216A actions, it would be helpful to examine the Plaintiff's conduct against those cases.

(1) Candour and honesty

66 First and foremost, a plaintiff must come to court with utmost candour and honesty. Hints of lack of candour may justify an inference of a lack of good faith. In *Agus Irawan*, the plaintiff's underlying complaint was that certain rebates ought to have been paid to the company instead of a third party. However, the documentary evidence showed that the rebates were not owing to the company, but to a fourth party which was owned by the plaintiff.

67 Good faith, Choo JC held (at [9]), required the plaintiff to "set out the story in full from the beginning", but as the plaintiff in that case did not do so, and his subsequent explanations for his omissions were incredible, the court was not satisfied that the requirement of good faith had been fulfilled. The application for leave to commence a s 216A action was therefore dismissed. It should also be apparent that since the evidence suggested that the company had no right to be the rebates, the plaintiff's application was also on shaky ground as regards the merits of the underlying complaint.

68 In the present case, while there were disputes on certain facts between the Plaintiff and the 1st Defendant, I was satisfied that the relevant objective evidence in relation to the main underlying complaint (which was the 1st Defendant's refusal to sign Sing Huat's audited accounts for FY 2009) had been disclosed to the court. There was none of the misunderstanding (or misstatements) that took place in *Agus Irawan*. I do not read the cases as saying that *all* evidence must be in affidavit; indeed that would be quite impractical at the leave stage.

69 The emails, letters, notices, summonses, minutes and other correspondence exhibited by the Plaintiff were, in my view, sufficient to establish that his underlying complaint had a reasonable semblance of merit.

(2) Intention to damage the company

70 A plaintiff who has demonstrated a desire to undermine, injure or damage the company is also unlikely to be viewed as coming to court in good faith. In *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 ("*Urs Meisterhans*"), Tay Yong Kwang J found against the plaintiff on the good faith requirement. The plaintiff there had alleged that two of the defendant company's directors had breached their fiduciary duties as they had wrongfully removed him as a director, wrongfully withheld information from investors, and had mismanaged the private energy fund which was the defendant company's sole business.

71 Tay J found (at [37] and [38]) that the plaintiff did not commence the proceedings in good faith as the plaintiff had attempted to divert the defendant company's business of managing the fund to another company of which the plaintiff was a director and shareholder. Additionally, the plaintiff had been making unsupported allegations against the defendant company and its management to the fund's investors and trustees. It would appear that Tay J did not look too kindly on the plaintiff's

conduct which evinced an intention to damage or destroy the defendant company out of sheer spite (see *Urs Meisterhans* at [26] citing *Pang Yong Hock* at [20]).

72 This factor was not present in the facts that were before me. The Plaintiff's intention was in fact quite the opposite. He was hoping to obtain an order compelling the 1st Defendant to sign the audited accounts for FY 2009 to prevent Sing Huat from incurring more penalties and fines for failing to file the audited accounts with the relevant authorities as prescribed by legislation. Indeed, it was rather telling to me that, despite the occasional smattering of vitriol in his affidavit towards the Plaintiff, the 1st Defendant never contended that the Plaintiff's intention in commencing the s 216A action was to damage or injure Sing Huat.

(3) Personal purpose

73 It is also clear from *Urs Meisterhans* that the purpose for which the plaintiff is seeking to bring a s 216A action is highly relevant. In that case, whilst the personal motivations of the plaintiff were important considerations on their own, it was ultimately the coupling of the personal motivations to the plaintiff's purpose of bringing the action, that is, putting personal interests ahead of the company's interests, that militated against a finding of good faith on the part of the plaintiff.

74 This important difference between *personal motivations* and *personal purpose* was clarified by the Court of Appeal in *Ang Thiam Swee* at [12]–[17]. The court noted (at [16]) that good faith is "dependent less on the motives which trigger the application … and more on the *purpose* of the proposed derivative action, which must have an obvious *nexus* with the company's benefit or interests" [emphasis added]. In other words, the court is most likely to find that a plaintiff is lacking in good faith where the plaintiff displays personal motivation to seek leave to bring a s 216A action to achieve a personal purpose (as opposed to a corporate purpose).

75 In *Ang Thiam Swee*, the court was clearly unimpressed by the personal motives of the plaintiff which seemed unconnected with doing justice to the company. The language used by the court left no doubt that it saw the plaintiff's judgment as having been coloured by his personal interests. Some examples include (at [37], [42] and [46]):

> … [The plaintiff] is intent on restoring remunerative parity with [the defendant], in that he treats a personal claim for equivalent fees from the Company interchangeably with a derivative action against [the defendant] for the return of those fees. This is a strong indication that [the plaintiff] is motivated as much by spite as by the prospect of gain.
>
> *[The plaintiff] feels he either has been or will be wronged, and is using the statutory derivative action not as a means of pursuing the interests of the Company, but to secure and/or advance his own interests within the Company*. …
>
> ... [T]he Application [for leave] has indeed been animated by such a compound of private motives [of the plaintiff] as to amount to a collateral personal purpose. Any justice done for the Company would be, at best, incidental to the advancement of [the plaintiff's] own aims. … ***Given the absence of any clear coincidence between the Company's interests and Low's apparent collateral personal purpose of securing sole control of the Company, it would be a patent abuse of process to allow him to use the Company as a vehicle for his own private objects .***
>
> [emphasis in original in italics; emphasis added in bold italics and bold italics underlined]

76 The 1st Defendant insinuated that the *real* purpose of the Plaintiff's commencement of OS 1132 was to exert "unlawful pressure" on the 1st Defendant to withdraw a related suit which was supposed to be heard in four months' time. I was not persuaded that such an inference ought reasonably to be drawn. It was, in my view, just as likely that the commencement of OS 1132 would deepen the 1st Defendant's conviction to pursue, not withdraw, the related suit.

77 Although the animus between the parties was rather evident, I did not think that there was such a collateral purpose that justified construing the Plaintiff's application as an "abuse of process" (see *Ang Thiam Swee* at [30]). It must be remembered that subjective intentions such as personal animosity or even malice *per se* do not preclude a plaintiff from seeking to commence a s 216A action. As the New South Wales Supreme Court pointed out in *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583 at [41] (which was cited with approval in *Ang Thiam Swee* at [13]), it is not the law that only a plaintiff who feels goodwill towards the defendant is entitled to sue (see also *Dowling v Colonial Mutual Life Assurance Society* (1915) 20 CLR 509 at 521–522).

78 Even if there may be some truth in the 1st Defendant's allegation, I considered the present circumstances to be far more innocuous in comparison to that in *Ang Thiam Swee*. I did not, for one, think that Sing Huat's interest was subordinate to any private interests of the Plaintiff. In fact, I thought that the party which would benefit the most from the s 216A action, irrespective of how the court decides on the merits of the underlying complaint, was Sing Huat.

79 Looking at the disputes between the brothers that had been going on for some time, I could see no other practical alternative that would finally resolve *this* particular battle. Another reason which militated against my finding of a collateral or improper purpose on the part of the Plaintiff was the fact that he had not taken out this current application immediately or even shortly after the 1st Defendant had refused to sign Sing Huat's audited accounts for FY 2009. The threat of litigation was not some weapon which the Plaintiff had used to exploit the situation or to take advantage of the 1st Defendant. Conversely, as mentioned above at [56], the first salvo was fired by the 1st Defendant in OS 1043.

80 The Plaintiff had held his hand and waited a number of years. He had, in that intervening period, tried different ways to persuade the 1st Defendant to sign the audited accounts. It was only after those efforts had also failed and the parties – and, importantly, Sing Huat – had hit an iron curtain in their discussions that the Plaintiff took out this application. This drastic option was, in my view, a measure of last resort, one that was taken after all other seemingly available options had been exhausted.

81 In summary, to mirror the language used in *Ang Thiam Swee*, there was *no* "absence of clear coincidence" between the Plaintiff's alleged purpose and the benefit that would accrue to Sing Huat if the s 216A action was allowed to commence.

82 The above reasoning palpably shades into the question of whether the s 216A action is in the interests of Sing Huat, but this is unsurprising as the two issues cannot be divorced neatly from each other (see *Ang Thiam Swee* at [16]). If the s 216A action is clearly not in the interests of Sing Huat but the Plaintiff persists in pushing through with the application for leave to commence those proceedings, reservations over the Plaintiff's motivation are likely to be heightened (see also *Talisman Technologies Inc v Queensland Electronic Switching Pty Limited* [2001] QSC 324 at [29]–[35]).

83 Before I address the third requirement, it would help to summarise where the Plaintiff stood based on my consideration of the merits of the Plaintiff's underlying complaint together with the Plaintiff's subjective intents and purposes. In short, I was satisfied that the Plaintiff was pursuing a

legitimate, arguable complaint of breach of director's duties against the 1st Defendant, not for the Plaintiff's own personal interests, but in the interest of Sing Huat. For that reason, and to adopt the language of the Court of Appeal in *Ang Thiam Swee* (at [29]), I was convinced that the Plaintiff *honestly* believed that his underlying complaint against the 1st Defendant had a reasonable semblance of merit.

84 The Plaintiff had therefore discharged his burden of showing that he was acting in good faith.

The third requirement – prima facie in the interests of Sing Huat

85 The last issue then, leaving aside the Plaintiff's subjective intents and purposes and the merits of the underlying complaint, was whether the underlying complaint the s 216A action was in the interests of Sing Huat. I thought so.

86 The rationale for this requirement is that a company might well have reasonable business reasons for not pursuing a cause of action, even if that cause of action is legitimate and has a reasonable semblance of merit: Andrew Keay and Leslie Kosmin, *Directors' Duties* (Jordans, 2009) at para 14.83. Reasonable business reasons why the company may prefer to forgo a cause of action include preserving a good, long-term profitable relationship; a paltry monetary reward as the best outcome such that it would be inexpedient to proceed with litigation; or that the company wants to steer clear of any negative publicity (see *Pang Yong Hock* at [21]).

87 Essentially, the focus here is on the company and the effects of the proposed litigation on the proper conduct of the company's business.

88 Thus, it has been said that where the company is insolvent or close to being insolvent, the issue of the best interests of the company involves deciding whether the claim would be in the interests of the creditors (see for *eg*, *Charlton v Baber and others* (2003) 47 ACSR 31 at [53]; *Promaco Conventions Pty Ltd and others v Dedline Printing Pty Ltd and another* [2007] FCA 586 at [41]). On that note, I respectfully note the observations of Andrew Ang J in *Lee Seng Eder v Wee Kim Chwee and others* [2014] 2 SLR 56 at [15] that it was not in the interest of the defendant company there to expend considerable sums of money to proceed with a s 216A action when it was facing imminent liquidation.

89 There was no evidence before me that the prosecution of the s 216A action would undermine Sing Huat's business. In terms of affidavit evidence, the Plaintiff stated that he did not believe that the action would have a negative effect on customers or suppliers. This aspect of his evidence has not been controverted by the 1st Defendant, and neither were there other reasons for me to suspect that Sing Huat's business or commercial interests would be undermined by the proposed s 216A action.

90 Last but not least, it was plain to me that the proposed s 216A action was in the interest of Sing Huat because it was a solution to the differences between the Plaintiff and the 1st Defendant which had until now deadlocked Sing Huat, and had caused Sing Huat to be in breach of its obligations under s 62(1) of the Income Tax Act (to file a return of income) as well as s 197(1) of the Companies Act (to lodge annual returns). This, in turn, had resulted in damage to Sing Huat in the form of summonses having been issued by IRAS and ACRA respectively against Sing Huat (and in some cases, personally against the Plaintiff in his capacity as a director of Sing Huat), and will continue to damage Sing Huat unless resolved once and for all. As matters stood then, the 1st Defendant was unlikely to sign the audited accounts for FY 2009 until the issues concerning these accounts were ventilated before and adjudicated by the court. The s 216A action was necessary to break this

impasse (but see [93] below).

91 Having considered the various circumstances in the round, I took the view that the Plaintiff had crossed the low threshold required (in this regard, see *Ang Thiam Swee* at [55]) to show that it was *prima facie* in the interest of Sing Huat for the proposed s 216A action to proceed.

Conclusion

92 For the foregoing reasons, I ordered the prayers as stated in [34(a)] and [34(b)] above in terms. I also awarded the Plaintiff costs of $3,000 (excluding reasonable disbursements) for this s 216A leave application. As for the prayer in [34(c)] above concerning the costs of the s 216A action, I ordered that the Plaintiff shall have costs for the main action on an indemnity basis, *subject* to the court hearing the main action deciding otherwise.

Postscript

93 On 7 July 2014, the parties came back before me, this time to make submissions on Summons No 2442 of 2014 which was the 1st Defendant's application for a stay of the s 216A action that had already been commenced by the Plaintiff following my decision to grant leave. In the course of the hearing, the 1st Defendant's counsel informed counsel for the Plaintiff and me that the 1st Defendant had intimated that he was now willing to sign Sing Huat's audited accounts for FY 2009. All that was required was for LHL, the auditor, to make some final post-balance sheet adjustments.

94 I viewed this as a step in the right direction for Sing Huat. I therefore adjourned the stay application for four weeks to give LHL sufficient time to complete their post-balance sheet adjustments to the audited accounts for FY 2009 before presenting them to the Plaintiff and 1st Defendant for their approval.

Copyright © Government of Singapore.