IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHCR 11

Originating Summons No 788 of 2016 (Summons No 4103 of 2016)

Between

Actis Excalibur Limited

… *Plaintiff*

And

1. **KS Distribution Pte Ltd**
2. **Aqua-Terra Oilfield Equipment & Services Pte Ltd**
3. **SSH Corporation Ltd**

… *Defendants*

And

1. **Kris Taenar Wiluan**
2. **Richard James Wiluan**

… *Proposed Interveners*

JUDGMENT

[Courts and Jurisdiction]–[High Court]–[Judicial Precedent]
[Civil Procedure]–[Joinder of Parties]

Actis Excalibur Ltd
v
KS Distribution Pte Ltd and others

[2016] SGHCR 11

High Court — Originating Summons No 788 of 2016 (Summons No 4103 of 2016)
Colin Seow AR
20 September 2016

31 October 2016 Judgment Reserved.

Colin Seow AR:

Introduction

1 This judgment relates to Summons No 4103 of 2016 ("the Application"), which is an application taken out by one Kris Taenar Wiluan and one Richard James Wiluan ("the 1st Putative Defendant" and "the 2nd Putative Defendant" respectively) seeking leave to intervene in Originating Summons No 788 of 2016 ("OS 788/2016").

2 OS 788/2016 is an application taken out by Actis Excalibur Limited ("the Plaintiff") seeking, *inter alia*, leave of court under section 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") to "bring actions in the name and on behalf of" KS Distribution Pte Ltd ("KS Distribution"), Aqua-Terra Oilfield Equipment & Services Pte Ltd ("ATOES") and SSH Corporation Ltd ("SSH") (collectively "the Companies") against the Putative

Defendants for "breaches of fiduciary and directors' duties" owed to the Companies.

Brief background of the dispute

3 The Plaintiff is a 44.65% shareholder of KS Distribution, which is a joint venture company set up by the Plaintiff and another company known as KS Energy Ltd ("KS Energy"). Both the 1st and 2nd Putative Defendants are, in among other capacities, KS Energy's nominee directors in KS Distribution.

4 According to the Plaintiff, ATOES and SSH are companies which are effectively wholly owned by KS Distribution. It has also been alleged by the Plaintiff in its supporting affidavit filed under OS 788/2016 that (a) both the 1st and 2nd Putative Defendants are the *de facto* directors of ATOES, (b) the 1st Putative Defendant is a *de facto* director of SSH, and (c) the 2nd Putative Defendant is a director of SSH.

5 Very broadly as can be gleaned from its supporting affidavit filed under OS 788/2016, the Plaintiff appears to be contending, *inter alia*, that KS Distribution, ATOES and SSH have, under the 1st and 2nd Putative Defendants' management and control, been entering into undeclared and illegitimate "related party transactions" with entities related to the 1st and 2nd Putative Defendants. In this regard, the Plaintiff alleges that its contentions are backed by a public accountant's preliminary report issued on 15 July 2016 ("KordaMentha Preliminary Report") and which "reveals numerous breaches of fiduciary duties" by the 1st and 2nd Putative Defendants.

6 In OS 788/2016, the Plaintiff thus seeks, *inter alia*, leave to commence an action against the 1st and 2nd Putative Defendants under section 216A of the Act, the material parts of which read as follows:

> **Derivative or representative actions**
>
> **216A.**—(1) In this section and section 216B —
>
> "complainant" means —
>
> (a) any member of a company;
>
> (b) the Minister, in the case of a declared company under Part IX; or
>
> (c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.

> (2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action or arbitration in the name and on behalf of the company or intervene in an action or arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the action or arbitration on behalf of the company.
>
> (3) No action or arbitration may be brought and no intervention in an action or arbitration 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 or arbitration;
> >
> > (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 or arbitration be brought, prosecuted, defended or discontinued.
>
> […]

7 For completeness, it should be mentioned that, as at the date of this judgment, OS 788/2016 is still pending fixing before a High Court Judge for determination.

The parties' arguments in the Application

8 As mentioned earlier, the Application before me relates to the 1st and 2nd Putative Defendants seeking leave to intervene in OS 788/2016. In their affidavits filed in support of the Application, the 1st and 2nd Putative Defendants argue, *inter alia*, that they "should be given a timeous opportunity to respond to the Plaintiff's allegations" against them, and that denying them an opportunity to respond to those allegations at this juncture would be unfair and prejudicial to them. In particular, they highlighted that the intended

purpose of their intervention at this stage of the proceedings is so that they could adduce evidence in OS 788/2016 to demonstrate the following:

(a) that many of the Plaintiff's allegations against the 1st and 2nd Putative Defendants, including allegations arising from the KordaMentha Preliminary Report, are baseless and unsustainable;

(b) that it is plainly not in the interest of KS Distribution, ATOES and SSH to commence the Plaintiff's intended action against the 1st and 2nd Putative Defendants, not least because OS 788/2016 has prayed, among other things, for an order that the Companies "pay the legal fees and disbursements incurred by the Plaintiff in connection with the [proposed actions] on an indemnity basis" ; and

(c) that the Plaintiff's application in OS 788/2016 is not taken out in good faith.

9 In submissions, counsel for the 1st and 2nd Putative Defendants put forth several legal arguments which may be broadly summarised into the following:

(a) the Application is taken out pursuant to O 15 r 6(2)(b)(ii) of the Rules of Court (Cap 322, R 5, 2007 Rev Ed) ("the ROC") where the applicable test, as elucidated by the Court of Appeal in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 ("*AG v AHPETC*"), is that of (i) the question or issue between one of the parties and the proposed intervener must be linked, factually or otherwise, to the relief or remedy claimed in the cause or matter, and (ii) it would be "just and convenient" to permit an intervention;

(b) there is a preponderance of past High Court decisions demonstrating the readiness of the High Court in allowing putative defendants to intervene or appear in applications taken out pursuant to section 216A of the Act. Several decisions of High Court Judges were cited by counsel in this regard: see *Chan Tong Fan and another v Chiam Heng Luan Realty Pte Ltd (Chiam Toon Tau and another, non-parties)* [2013] SGHC 192 at [17], *Chan Tong Fan v Sloan Court Hotel Pte Ltd (Chiam Toon Tau and another, non-parties)* [2013] SGHC 193 at [9], *Tak Chuen v Eden Aesthetics Pte Ltd and another (Khairul bin Abdul Rahman and another, non-parties)* [2010] 2 SLR 667 at [8], *Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)* [2009] SGHC 223 at [6], and *Low Hian Chor v Steel Forming & Rolling Specialists Pte Ltd and another* [2012] SGHC 10 at [11]. (At this juncture, I should also mention that counsel also cited the cases of *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980, *Kwee Lee Fung Ivon v Gordon Lim Clinic Pte Ltd and another* [2013] SGHC 65, *Lee Seng Eder v Wee Kim Chwee and others* [2014] 2 SLR 56, *Wong Lee Vui Willie v Li Qingyun and another* [2015] 1 SLR 696 and *Yeo Sing San v Sanmugam Murali and another* [2016] SGHC 14 for support in this regard. However, these latter cases do not, in my view, give much mileage to counsel because in all those cases, the directors in question were right from the outset already joined by the plaintiffs as co-defendants with the companies involved when applications under section 216A of the Act were taken out);

(c) although an Assistant Registrar ("AR") is not bound by decisions of High Court Judges, an AR should not depart from such

decisions unless there are strong and compelling reasons for the AR to do so; and

(d) in any event, this court should alternatively allow the Application under O 92 r 4 of the ROC in the exercise of its inherent powers.

10 On the other hand, the key legal arguments advanced by counsel for the Plaintiff can be broadly summarised as follows:

(a) the proper test to be applied in respect of O 15 r 6(2)(b)(ii) of the ROC is that of whether the 1st and 2nd Putative Defendants are "necessary" or "proper" parties to the proceedings in OS 788/2016, as supported by the Court of Appeal's decision in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 and the High Court's decision in *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881;

(b) the framework and rationale underpinning section 216A of the Act would be undermined if the 1st and 2nd Putative Defendants were to be allowed to intervene at the leave stage and make the hearing of OS 788/2016 a rehearsal of their arguments in opposition to the proposed substantive derivative action;

(c) the string of High Court decisions relied upon by the 1st and 2nd Putative Defendants do not demonstrate any reasoning or grounds as to why leave allowing putative defendants to intervene or appear in applications taken out pursuant to section 216A of the Act were granted in those instances. There is therefore no *ratio decidendi* of any past High Court judgments which compels this court to grant leave

allowing the 1st and 2nd Putative Defendants to intervene in OS 788/2016. In any case, as a matter of principle, an AR is not bound by decisions of High Court Judges; and

(d) in any event, this court should not allow the Application on the alternative basis of O 92 r 4 of the ROC given that the touchstone of "need" has not been met on the facts of the case.

Primary issues of law to be determined in the Application

11 Given the parties' legal arguments above, the primary issues of law for determination in the Application are as follows:

(a) What precedential status, if any, should be accorded by an AR to decisions of High Court Judges in respect of a matter to be determined by the AR?

(b) What is the appropriate test to be applied under O 15 r 6(2)(b)(ii) of the ROC?

12 I will address these issues of law in the paragraphs that follow before applying the principles arrived at to the facts of the Application.

The decision

Precedential status to be accorded by an AR to decisions of High Court Judges

13 On this first issue, a recent decision comes to mind. In *Chan Yat Chun v Sng Jin Chye and another* [2016] SGHCR 4 at [10]-[11] ("*Chan Yat Chun*"), an AR essentially made two observations in the course of his decision as follows:

(a) ARs are not bound by decisions of High Court Judges given that the doctrine of horizontal *stare decisis* does not prevail in Singapore and given that O 32 r 9 of the ROC confers on ARs the same powers and jurisdiction that a Judge in chambers can exercise; and

(b) even if ARs are generally considered to be bound by decisions of High Court Judges, an AR is not bound to follow a decision of a High Court Judge where another conflicting decision of another High Court Judge exists.

14 For the record, I should mention that counsel for the Plaintiff as well as counsel for the 1st and 2nd Putative Defendants have before me expressed no qualms with the correctness of these observations – particularly the first – made in *Chan Yat Chin* (see [9(c)] and [10(c)] above).

15 With the greatest of respect, this court is unable to agree with the first observation as a matter of principle. First, while it is true that the doctrine of horizontal *stare decisis* does not prevail in Singapore, this proposition was articulated only in the context of decisions made by High Court *Judges* (see, *eg*, *Attorney-General v Shadrake Alan* [2010] SGHC 327 at [4], cited in *Chan Yat Chin* at [11]). Nothing in the case authorities cited in *Chan Yat Chin* at [11] dealt specifically with the proper treatment to be given by *ARs* to decisions made by High Court Judges. Indeed, the only other case authority cited in *Chan Yat Chin* at [11] (*ie*, *Attorney-General v Chee Soon Juan* [2006] 2 SLR(R) 650 at [12]) was concerned with a wholly distinct question, namely whether an AR sitting in chambers is equivalent to being a "court" in reference to which contempt *in facie curiae* proceedings can be taken out.

16 Second, an important distinction must be drawn between powers, authority and jurisdiction of ARs on the one hand, and the principle of judicial hierarchy that ARs ought to abide by in the discharge of their judicial functions on the other hand. The legislative authorities cited in *Chan Yat Chin* at [11] (*ie*, section 62 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 32 r 9 of the ROC) deal eminently with the former. With regard to the latter, the High Court's decision of *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] 2 SLR(R) 685 ("*Herbs and Spices*") is instructive.

17 In *Herbs and Spices*, the High Court had to deal with the question of judicial hierarchy between district judges and deputy registrars at the District Court. Chan Sek Keong J (as he then was) in resolving the question made the following pertinent remarks in his decision (at [11]-[12]):

> 11 The nature of the jurisdiction of the district judge in hearing appeals from the registrar under O 55 is not the same as that in an appeal from the District Court to the High Court or from the High Court to the Court of Appeal. *Order 55 merely gives effect to the internal organisation of judicial work whereby the Senior District Judge in permitting the registrar to exercise the jurisdiction and powers of the District Court reserves to the district judges the power to hear "appeals" from the registrar. It is, in substance, a form of confirmatory jurisdiction.* In theory, the Senior District Judge has allowed the jurisdiction and powers of the District Court to be exercised in two stages, one at the level of the registrar and the other at the level of the district judge. Section 69 of Cap 321 read with O 55 appears to permit this bifurcation. In principle, there is nothing wrong with this scheme so long as it is not treated as two separate and distinct jurisdictions. This means that there can be an appeal from the registrar direct to the High Court (as in O 14 r 12) or from the registrar to the district judge (as in O 55) and then to the High Court. Both arrangements are consistent with the principle that the jurisdiction and powers of the District Court are the same whether they are exercised by the district judge or the registrar as a substitute for the district judge.

> 12 *The situation in O 55 is analogous to "appeals" from the decisions of the Registrar of the High Court to the judge-in-chambers. In such appeals, the judge-in-chambers is not exercising "appellate" jurisdiction in the same sense when it [he] hears appeals from the District Court. This view is consistent with the rule that an appeal from the Registrar of the High Court to the judge-in-chambers is by way of an actual rehearing of the application and the judge treats the matter afresh as though it came before him the first time, and the practice of allowing fresh affidavit evidence in such appeals.*
>
> [emphasis added]

18 The key fundamental proposition that can be drawn from *Herbs and Spices* is this: High Court Judges enjoy in substance a "confirmatory jurisdiction" over the Registrar of the High Court and, by extension, ARs. The corollary to this is ARs, whilst as a matter of "internal organisation of judicial work" are conferred with powers, authority and jurisdiction to carry out certain judicial functions on behalf of High Court Judges, are necessarily obliged in the discharge of such functions not to overreach the very premise upon which such powers, authority and jurisdiction are derived. In a functional and hierarchically organised judicial system such as ours, a judicial officer such as an AR simply has no option in his or her administration of justice to freely disregard judicial precedents established by those to whose functions he or she is juridically ancillary. That, in my view, is and remains to be a rule of judicial hierarchy that is of key fundamental importance to our system at the High Court.

19 That is, however, not to say that there are absolutely no permissible exceptions to the rule just described above. In a rare situation, for example, where conflicting decisions of High Court Judges exist, it would in my opinion stand to good reason that an AR may not find himself or herself necessarily bound to follow any one or another decision which is in conflict.

Another rare but conceivable situation, just for illustration purposes, could be where a decision of a High Court Judge, although not having been expressly overruled, is directly and patently contradicted by an existing decision of the Court of Appeal, to such extent that the only irresistible conclusion to be drawn by the AR is that the decision of the High Court Judge cannot be considered to be the prevailing law of the land.

20 At risk of stating the obvious, it would also follow from the foregoing analysis that ARs are not bound by decisions of fellow ARs, given that ARs are not juridical ancillaries of each other. Neither should anything in the foregoing analysis be taken to mean that judicial decisions of ARs may thus be freely disregarded by litigants and counsel, or tribunals and any other court that are obliged to follow decisions emanating from the High Court. In my opinion, a judicial decision of an AR, unless and until overruled by a High Court Judge (or any person qualified under the Constitution of the Republic of Singapore (1999 Rev Ed) to discharge the functions of a High Court Judge), must certainly stand as a good and binding decision of the High Court. Otherwise, the clear legislative premise upon which ARs are conferred the powers, authority and jurisdiction to carry out certain judicial functions on behalf of High Court Judges would be gravely undermined.

The appropriate test under O 15 r 6(2)(b)(ii) of the ROC

21 I come now to the second issue of law in the Application. For completeness, O 15 r 6(2) of the ROC is reproduced herein below:

> **Misjoinder and nonjoinder of parties (O. 15, r. 6)**
>
> **6.**—(1) […]
>
> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such

> terms as it thinks just and either of its own motion or on application —
>
> > (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party; or
> >
> > (b) order any of the following persons to be added as a party, namely:
> >
> > > (i) any person who ought to have been joined as a party or whose presence before the Court is *necessary* to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon.
> > >
> > > (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be *just and convenient* to determine as between him and that party as well as between the parties to the cause or matter.
>
> [emphasis added]

22 In my judgment, I fail to see how the Plaintiff's contention that the test to be applied under O 15 r 6(2)(b)(ii) of the ROC is that of whether the 1st and 2nd Putative Defendants are "necessary" or "proper" parties to the proceedings in OS 788/2016 (see [10(a)] above) is supported by the Court of Appeal's decision in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 ("*Wee Soon Kim Anthony*").

23 In *Wee Soon Kim Anthony*, two solicitors had sought leave to intervene in a court application taken out by a complainant who was dissatisfied with a decision of the Council of the Law Society that no case existed for an investigation to be taken out under the Legal Profession Act (Cap 161, 2001 Rev Ed) by a Disciplinary Committee against the two solicitors. In reversing

the High Court's decision allowing the intervention, the Court of Appeal held, *inter alia*, that O 15 rr 6(2)(b)(i) and (ii) were inapplicable. Nowhere in the dispositive paragraphs of the Court of Appeal's judgment in this regard (*ie*, at [17]-[19]) did the Court of Appeal suggest that the express term "just and convenient" found in O 15 r 6(2)(b)(ii) should be given any stricter or more onerous meaning than what a plain and ordinary reading would suggest.

24 It is further noted that the Plaintiff has also cited the High Court's decision in *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 ("*Tan Yow Kon*") to support the same argument that the 1st and 2nd Putative Defendants must be shown to be "necessary" or "proper" parties to the proceedings in OS 788/2016 before leave to intervene may be granted pursuant to O 15 r 6(2)(b)(ii) of the ROC.

25 In *Tan Yow Kon*, the High Court had to deal with a question relating to O 15 r 6(2)(a) which arose from a striking out application. To put it simply, the 2nd to 5th defendants in that case had argued, *inter alia*, that the plaintiff's claim against them ought to be struck out entirely for the reason that they were in the circumstances of the case neither "necessary" nor "proper" parties under O 15 r 6(2)(a) of the ROC. Sundaresh Menon JC (as he then was) in his decision made the following useful observations (at [49]-[51]):

> 49 In my view, having regard to the objects of O 15 r 6, r 6(2)(a):
>
> > (a) should be construed in the light of r 6(2)(b) especially since the terms "proper" and "necessary" are not defined and the two provisions stand metaphorically on either side of the one door in the sense that one governs entry into the proceedings, while the other governs exit; and

> (b) should not be construed in a way that treats the words "proper" and "necessary" as two disjunctive concepts.
>
> 50 Elaborating on the first point, *the terms "proper" and "necessary" are not defined.* However, the overall scheme of O 15 r 6 is to enable the court in its discretion to make such order as would ensure that parties who are necessary or proper *(presumably even if they are not strictly necessary)* are before it. Rule 6(2)(b) identifies the parties who could be ordered to be added as parties and it seems reasonable to infer that such parties at least would fall within the ambit of those *considered* necessary or proper to be parties to the action. *I note that r 6(2)(b) is itself broken into two limbs. The first limb repeats the terms of the former r 6(2)(b) but the second limb,* ie*, r 6(2)(b)(ii) has been held in* Tetra Molectric Limited v Japan Imports Limited *[1976] RPC 541 at 544 to have widened the court's discretion to join parties to an action "to a great extent".*
>
> 51 *It would seem logical in my view to hold that a party who could be joined including under the wider r 6(2)(b)(ii) should be considered a "necessary" or "proper" party to the action and hence not liable to an order of cessation under r 6(2)(a). A broad correspondence between the scope and ambit of r 6(2)(a) on the one hand and r 6(2)(b) on the other is to be expected since otherwise, one would encounter a situation of an unwilling party being joined under the latter rule and then applying to be released under the former. The notion that the Rule should be construed in a way that conjures the image of a revolving door spinning somewhat out of control is not one to which I am drawn.*
>
> [all emphasis added]

26 At [53] and [58], His Honour further held, *inter alia*, that "[i]t is plain that an applicant seeking to have a party joined needs only to come within any one of the categories identified in r 6(2)(b) to warrant invoking the court's consideration […] [i]t would be illogical to hold for instance that a party joined as a proper party could apply to be released on the ground that he was not a necessary party for some reason", and that "the court's power under O 15 r 6(2) *to bring and keep* the appropriate parties before it is broad indeed" (emphasis in original).

27 Evidently, the High Court in *Tan Yow Kon* clearly espoused the proposition that the question of whether to allow the joining of a party under O 15 r 6(2)(b)(ii) of the ROC is a matter for the court's discretion, which is a relatively wide and broad one. And once a party has come within the category of O 15 r 6(2)(b)(ii) (*ie*, once the party has been determined to qualify as "any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter"), such party should thereby be joined and be *considered* – for the purposes of O 15 r 6(2)(a) – to be a "necessary" or "proper" party to the proceedings, so much so that he or she could not later be simply removed from the same proceedings on the ground that he or she was not a necessary party.

28 This reading of *Tan Yow Kon* is consistent with the primary case authority relied upon by the 1st and 2nd Putative Defendants, namely *AG v AHPETC* (see [9(a)] above). In *AG v AHPETC*, the Housing and Development Board ("HDB") had sought to be joined as a party to proceedings relating to an ongoing dispute relating to certain management affairs of the Aljunied-Hougang-Punggol East Town Council. In granting HDB's application pursuant to O 15 r 6(2)(b)(ii) of the ROC, the Court of Appeal held, *inter alia*, the following (at [39]):

> 39 As mentioned earlier, the HDB also relied on the inherent powers of the court in seeking to be joined as a party. However, there is no need for us to consider whether the court's inherent powers should be invoked because we consider that the HDB can be joined as a party under O 15 r 6(2)(b)(ii) of the ROC. *An applicant relying on that provision would have to first establish that the question or issue between one of the parties and the proposed new party is linked,*

> *factually or otherwise, to the relief or remedy claimed in the cause or matter* (see *Lim Meng-Eu Judy v RSP Investments (S) Pte Ltd* [1998] 2 SLR(R) 525 ("*Lim Meng-Eu Judy*") at [13]). As to this, it is difficult to argue otherwise. The claims arise out of the same set of facts and the reliefs sought by the new party, the HDB, against AHPETC are substantially the same as those sought by the MND. *However, that is not the end of the matter because this is subject to the overriding consideration that it must be "just and convenient" to order a joinder* (*Lim Meng-Eu Judy* at [13]). This requires the court to take into account the interests of the existing parties to the action (*Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 ("*Chan Kern Miang*") at [24]) as well as that of the party to be joined (*Tan Yow Kon v Tan Swat Ping* [2006] 3 SLR(R) 881 at [44(a)]; *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2007] 2 SLR(R) 869 at [67]). The lateness of the application would go towards the assessment of whether it is "just and convenient" to order a joinder (*Chan Kern Miang* at [23]-[29]). [emphasis added]

29 In sum, I am satisfied on the authorities considered above that the appropriate test to be applied for the purposes of O 15 r 6(2)(b)(ii) is that put forth by counsel for the 1st and 2nd Putative Defendants, namely (i) the question or issue between one of the parties and the proposed intervener must be linked, factually or otherwise, to the relief or remedy claimed in the cause or matter, and (ii) it would be "just and convenient" to permit an intervention (see also [27] above).

Application of principles to the facts

30 As mentioned earlier, counsel for the 1st and 2nd Putative Defendants rely on several past decisions of High Court Judges in support of the Application (see [9(b)] above). In this regard, counsel for the Plaintiff's response is, *inter alia*, that these decisions do not evince any reasoning or grounds for allowing the putative defendants to intervene in those cases, and accordingly there is effectively no *ratio decidendi* to compel this court to

necessarily determine the Application in favour of the 1st and 2nd Putative Defendants (see [10(c)] above).

31 The fact of the matter as I see it is as an AR sitting in chambers is that the High Court decisions cited by counsel for the 1st and 2nd Putative Defendants clearly demonstrate that leave allowing putative defendants to intervene or appear in applications taken out pursuant to section 216A of the Act has been readily granted by High Court Judges in no less than five reported decisions. That, to me, is a material and overwhelming factor which I cannot simply ignore in my determination of this Application. Accordingly, and in line with my analysis at [13]-[20] above, I find that the preponderance of the consistent and undisturbed precedents cited to me is sufficient to compel me to follow in the present Application what would ordinarily have been done as a matter of course by a High Court Judge if such an application for intervention were to be taken out before him or her.

32 Even if for some reason I am mistaken in holding the view that the High Court decisions cited to me in this regard are binding enough for me to grant the Application, I would have in any event arrived independently at the same result having regard to the appropriate test under O 15 r 6(2)(b)(ii) which I have analysed at [21]-[29] above.

33 First, the questions or issues between the Plaintiff and the Putative Defendants are clearly and directly linked to the relief or remedy claimed in the cause or matter under OS 788/2016. In OS 788/2016, the Plaintiff is seeking leave to commence statutory derivative action against the 1st and 2nd Putative Defendants on personal allegations which are denied by the Putative

Defendants – *ie*, "breaches of fiduciary and directors' duties" owed to KS Distribution, ATOES and SSH (see [2]-[5] and [8] above).

34 Second, it is not objectionable under the framework of section 216A of the Act for putative defendants to be allowed to resist leave applications on, *inter alia*, grounds relating to the legal merits of the underlying claims in the proposed statutory derivative action. As provided by section 216A(3) of the Act (see [6] above), no statutory derivative action may be brought unless the court is satisfied, *inter alia*, that:

(a) the complainant is acting in good faith; and

(b) it appears to be *prima facie* in the interests of the company that the action be brought or prosecuted.

35 With regard to the first limb above, the 1st and 2nd Putative Defendants have clearly indicated their intention to contend that the Plaintiff's application in OS 788/2016 is not taken out in good faith (see [8(c)] above). With regard to the second limb above, it is apposite to note that the Court of Appeal has clarified in its decision in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [58] that "[t]here is a natural affinity between the interests of the company in prosecuting a statutory derivative action and the *legal merits of that action*, in that it cannot conceivably be *prima facie* within the interests of the company to bring an action which is wholly without any *legitimate or arguable basis*" (emphasis added). In the present case, the 1st and 2nd Putative Defendants have also expressed their intention to challenge the personal allegations made against them as well as the costs relief sought by the Plaintiff in OS 788/2016 (see [8(a)]-[8(b)] above). These are clearly in my opinion

matters what fall within the remit of considerations that the court could and would take into account in deciding the Plaintiff's application in OS 788/2016.

36 Third and finally, it is worth mentioning that KS Distribution, ATOES and SSH have attended the hearing of the Application before me via their own independent set of solicitors, and their solicitors have put on record, *inter alia*, the Companies' position that the 1st and 2nd Putative Defendants, as opposed to the Companies as separate legal entities, "are the ones best placed to deal with the personal allegations" raised by the Plaintiff in OS 788/2016. Considering the relatively wide and broad discretion that the court could exercise under O 15 r 6(2)(b)(ii) of the ROC (see [27] above), and having regard to the combination of all the factors mentioned above, I am of the view that it would be "just and convenient" to allow the 1st and 2nd Putative Defendants to intervene in OS 788/2016 for the purposes which they have expressed.

Conclusion

37 For all the foregoing reasons which I consider to be sufficiently dispositive of the Application, the following orders prayed for are made:

(a) leave be granted for the 1st and 2nd Putative Defendants to intervene in OS 788/2016; and

(b) the 1st and 2nd Putative Defendants shall be at liberty to file affidavits in relation to OS 788/2016 and appear and be heard through counsel at the hearing of OS 788/2016.

38 As for the timelines relating to the filing of the 1st and 2nd Putative Defendants' affidavits in OS 788/2016, as well as the appointed date for the

hearing of OS 788/2016, the parties are to seek the appropriate directions from the AR at the next available pre-trial conference scheduled for the matter.

39 I will hear the parties on the issue of costs.

Colin Seow
Assistant Registrar

Thio Shen Yi *SC*, Kelvin Koh and Niklas Wong (TSMP Law Corporation) for the Plaintiff;
Mahesh Rai and Jeremy Yeap (Drew and Napier LLC) for the 1st and 2nd Putative Defendants.
Bryan Tan (Advocatus Law LLP) for the Companies.