Ang Thiam Swee *v* Low Hian Chor
[2013] SGCA 11

Case Number	: Civil Appeal No 123 of 2011, Summons No 1423 of 2012 and Summons No 2120 of 2012
Decision Date	: 31 January 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Tan Yew Cheng (Leong Partnership) for the appellant; Foo Soon Yien and Diana Seah Kanglin (Bernard & Rada Law Corporation) for the respondent.
Parties	: Ang Thiam Swee — Low Hian Chor

COMPANIES – Oppression – Minority shareholders

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 10.]

31 January 2013 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This appeal arises from a dispute between two residual minority shareholders over the purported misappropriation of company funds. The appellant, Mr Ang Thiam Swee ("Ang"), started his career as a mechanical worker at the age of 17. He met the respondent, Mr Low Hian Chor ("Low"), in the 1970s, while they were operating metal fabrication machines at two previous companies. At the latter of these two companies, Soon Seng Engineering Pte Ltd, they became acquainted with Mr Alfred Gan. In time, Mr Alfred Gan then introduced them to his brother, Mr Gan Oh Boon ("Gan"), and proposed that the three of them start a company to fabricate steel parts for pressure vessels and other industrial uses. [note: 1] Gan proposed that Ang and Low would provide their expertise in operating the company's machines and meeting the technical requirements of customers, while he would take care of the business side of the company. Alfred Gan would, in turn, help to bring in business through his own company. Neither Ang nor Low was asked to provide funds to set up this business. Ang and Low accepted this arrangement in exchange for a 10% shareholding each, and all three (*ie*, Ang, Low and Gan) were to be appointed as directors.

2 The company, Steel Forming & Rolling Specialists Pte Ltd ("the Company"), was incorporated in February 1984 with three initial subscribers holding one ordinary share of S$1 each. [note: 2] By April 1989, the shareholding in the Company had crystallised into the following proportions – Ang and Low each held 10% of the Company's shares and Gan held the rest of the shares as the majority shareholder. The parties are agreed that Gan managed the Company's finances as if they were his own, and never held any meetings to discuss his financial decisions. [note: 3] In effect, while the business was nominally a company, it was, as a matter of fact, run as a sole proprietorship by Gan.

3 Initially, Ang's role was to operate the flanging machine which manufactured the steel disc ends. He also drew up all the quotations for the purchasers of these products. Subsequently, he focused on meeting customers to bring in business and supervising the fabrication process in the

Company's workshop. [note: 4] Low started as the Company's welder and set up the main machines used for the fabrication of its steel products. By the time of these proceedings, he was solely in charge of the Company's manufacturing operations and also trained workers to handle the fabrication machines.

The history of the dispute

4 On 27 October 2009, Gan was convicted of making fraudulent tax claims on alleged expenses of the Company amounting to S$1,620,000, and sentenced to imprisonment for two weeks. He was also statutorily disqualified from his directorship of the Company under s 154 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"). [note: 5] The Company was charged together with Gan and incurred a penalty of S$988,933.58, to be paid in monthly instalments of S$65,928.90. [note: 6]

5 After these events, the Company's board of directors (which then comprised just Ang and Low) engaged Stone Forest Corporate Advisory Pte Ltd ("Stone Forest") to check the Company's accounts. Stone Forest's investigations revealed that Gan had taken loans amounting to S$1,747,776.30 from the Company, and had in total misappropriated sums of up to S$5,383,560. [note: 7] Bankruptcy proceedings [note: 8] were initiated by the Company against Gan on 16 December 2009. In February 2010, Gan attempted to convene an extraordinary general meeting ("EOGM") to remove Low as a director and invalidate the Company's appointment of lawyers to pursue the bankruptcy proceedings against him (Gan). However, the articles of association of the Company required a quorum of two members to be present in person. Ang elected to side with Low and declined Gan's request to attend the meeting. Gan's attempt to stifle the proceedings against him failed. Eventually, he was declared a bankrupt on 6 May 2010. [note: 9]

6 On 15 July 2011, Low filed Originating Summons No 591 of 2011 ("the Application") seeking leave under s 216A of the Companies Act to commence an action in the name of the Company against Ang for breach of director's duties. [note: 10] Low's position in the proceedings below was that Stone Forest's report dated 14 October 2010 (which was one of four reports produced by Stone Forest in respect of the Company's accounts) also revealed that Ang had, as a co-signatory of the Company's account with DBS Bank Ltd ("DBS"), similarly misappropriated the Company's funds.

The decision below

7 The learned judge below ("the Judge") allowed the Application, being satisfied that all three limbs of s 216A of the Companies Act had been met. However, the Judge did not allude to any particular reasons for his conclusion, apart from finding that "*prima facie* ... there was a significant amount of monies that had been misappropriated from the [Company], and ... Ang had committed multiple serious breaches of his duties as a director" (see *Low Hian Chor v Steel Forming & Rolling Specialists Pte Ltd and another* [2012] SGHC 10 ("the Judgment") at [7]). It is also noteworthy that Low was not granted leave to commence a statutory derivative action in relation to instalment payments on Ang's car and director's fees of S$30,000, as both of these had also been available to the other directors of the Company. Leave to bring a statutory derivative action in respect of one very substantial head of claim amounting to S$1,719,200.40 was also rejected as that sum had been paid out to suppliers pursuant to invoices which had been duly issued. The final result of the Judge's decision was that Low had leave to bring a statutory derivative action against Ang on four of the original seven heads of claim pertaining to payments made by the Company to Ang, irregular payments of incentives and secret commissions, as well as a lump sum transfer of S$200,000 into a joint account with Ang's name.

The current claims

8 Before this court, each party, in addition to the appeal proper, also took out an application for leave to adduce further evidence. In Summons No 1423 of 2012 ("SUM 1423/2012"), Ang sought leave to adduce copies of general ledger records and cash disbursement journals showing 19 payments by the Company to Low between 2002 and 2008, as well as payment vouchers to the Company's bookkeeper, Rafidah binte Jumati ("Rafidah"), as "payment of incentive" [note: 11] [emphasis in original omitted]. Low's application (*viz*, Summons No 2120 of 2012 ("SUM 2120/2012")) pertained to the admission of cheque images for 19 of the 24 transactions in dispute. This being an interlocutory appeal, we saw no difficulty in allowing both applications as the evidence in question was material.

Section 216A of the Companies Act

9 The relevant portions of s 216A of the Companies Act are as follows:

> (2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.
>
> (3) 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.

10 Section 216A is modelled on s 239 of the Canada Business Corporations Act (RSC 1985, c C-44), and is also *in pari materia* with s 236 and s 237 of the Australian Corporations Act 2001 (Cth). It will therefore be useful to consider the jurisprudence emanating from these two jurisdictions in determining how our local provision should be applied.

11 We should add that there is no dispute as to Low having fulfilled the procedural requirement of 14 days' notice under s 216A(3)(*a*). [note: 12]

The requirement of good faith in a statutory derivative action

12 The issue of good faith in the context of a statutory derivative action is often obtruded by the qualification that this issue is a matter for the court to determine on the particular facts of each case. Because of the susceptibility of "good faith" to casuistic assessment, a conceptual framework is needed to guide the court's exercise of its discretion. In *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*"), this court began the process by directing 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).* [emphasis added]

13 It is clear from the above passage that the court ought to assess the motivations of the applicant in order to determine whether he is acting in good faith. It ought to be emphasised, however, that the motivations of an applicant will only amount to a lack of good faith in so far as they go to show that "his judgment [has been] clouded by purely personal considerations" (see *Pang Yong Hock* at [20]). This creates a crucial link between the requirement of good faith in s 216A(3)(*b*) and the requirement in s 216A(3)(*c*), in that an applicant whose judgment is clouded by purely personal considerations may not honestly *intend* to serve the company's interests, and also may not be the proper party to *represent* the company's interests. As such, it is not the questionable motivations of the applicant *per se* which amount to bad faith; instead, bad faith may be established where these questionable motivations constitute a personal *purpose* which indicates that the company's interests will not be served, *ie*, that s 216A(3)(*c*) will not be satisfied. This crucial distinction between the applicant's *motivation* or *motive* on the one hand and his *purpose* on the other has been neatly encapsulated in Palmer J's judgment in *Swansson v R A Pratt Properties Pty Ltd and Another* (2002) 42 ACSR 313 ("*Swansson*") at [41] as follows:

> To take another example: a derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue ... On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith.

14 Canadian case law has over time unequivocally established that an applicant who acts out of self-interest need not be lacking in good faith. In *Primex Investments Ltd v Northwest Sports Enterprises Ltd and 453333 BC Ltd* [1996] 4 WWR 54 ("*Primex Investments*"), which concerned s 225 of the British Columbia Company Act (RSBC 1979, c 59) (now repealed and replaced by s 233 of the British Columbia Business Corporations Act (SBC 2002, c 57)), Tysoe J observed at [42] that:

> I have no doubt that the Petitioner is acting out of self-interest in wanting to prosecute the derivative action. The self-interest is to maximize the value of its shares in Northwest by pursuing causes of action which it may have against Mr. Griffiths and the other directors. The Petitioner's self-interest coincides with the interests of Northwest. This does not mean the Petitioner is acting in bad faith: see *Richardson Greenshields of Canada Ltd. v. Kalmacoff* [(1995) 22 OR (3d) 577]. *Anything that benefits a company will indirectly benefit its shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest*

in wanting the company to prosecute an action which is in its interests to prosecute. [emphasis added]

15 In *Richardson Greenshields of Canada Limited v Kalmacoff et al* (1995) 22 OR (3d) 577 ("*Richardson Greenshields*") at 586–587, it was held that:

> … [T]he extent of [the appellant shareholder's] stake, monetary or otherwise, in the outcome of these proceedings is of little weight in deciding whether it has met the good faith test applicable to the present circumstances. ... I think it significant that the appellant has had a long-standing commercial connection with this class of shares and is familiar with the matters in dispute. It acknowledges that it has clients who purchased shares on its recommendation, and, it can be inferred from the shareholders' vote, that it voices the views of a substantial number of the preferred shareholders. *Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming, as I suppose, it is the latter, self-interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution*. ... [emphasis added]

16 The general tenor which emerges from the case law is that good faith is dependent less on the motives which trigger the application for leave to bring a statutory derivative action, and more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests. As this court noted in *Pang Yong Hock* at [20], "there is an interplay of the requirements in s 216A(3)(b) and (c)" (see the passage extracted above at [12]).

17 Often, an applicant will have a number of overlapping motives, which in turn may cloud the identification of his principal purpose in seeking leave to commence a statutory derivative action. The present case involves just such a confluence of factors. Before proceeding to examine Low's motives and purpose, however, it is important to first determine where the burden of proof lies *vis-à-vis* the requirement of good faith – *ie*, whether the onus is on the applicant to establish good faith or on the defendant to demonstrate a *lack of* good faith.

Whether Low should be presumed to be acting in good faith

18 In *Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471 ("*Agus Irawan*"), it was held that in the absence of any factors pointing to the applicant's lack of good faith, the court was entitled to "assume that every party who [came] to Court with a reasonable and legitimate claim [was] acting in good faith" (*per* Choo Han Teck JC, as he then was, at [9]).

19 Such a broad proposition, however, finds no support from Canadian or Australian case law. Indeed, the Australian position is that the applicant bears the burden of showing that he meets the requirement of good faith. This was clearly set out, *inter alia*, by Middleton J in *South Johnstone Mill Ltd (ACN 101 695 575) and Others v Dennis and Scales (ACN 004 044 987) and Another* (2008) 64 ACSR 447 at [67]:

> I accept that ***more than " bald assertion" is required in order to establish an applicant's honest belief*** : *Swansson* at [36] per Palmer J; *Fiduciary v Morningstar* [(2005) 53 ACSR 732] at [22] per Austin J. In fact, in the present case no applicant has deposed that he or she honestly believes that a good cause of action exists and has a reasonable prospect of success. The applicants' solicitor, Mr Maitland, has not sought to give hearsay evidence as to the existence of such an honest belief. [emphasis added in bold italics]

20 It is also the consistent position of the Canadian courts that the onus is on the applicant to establish good faith. This was forcefully established in *Tremblett v SCB Fisheries Ltd* (1993) 116 Nfld & PEIR 139 ("*Tremblett*") at [84], which was also cited with approval in *Primex Investments* (at [38]):

> … [I]n an application such as this there is *a substantial onus on an applicant-complainant himself to positively establish "good faith"*. Unlike the wording under s. 369 [of the Corporations Act (RSN 1990, c C-36)] with respect to the "interests" of the corporation, the requirement here is that the applicant must "satisfy" the court that he "is acting" in good faith. Again, it seems to me that this is a logical and appropriate requirement where the remedy sought is to place in the control of an applicant who is potentially, and indeed perhaps usually, a minority shareholder or single director, the authority to cause the resources of the corporation to be directed towards pursuing a court proceeding which is not willingly pursued by the majority of shareholders or the board. Even though this matter is assessed on an application, as opposed to a trial, in my view there is a substantial onus to be met by any applicant, including the applicant here, with respect to the establishment of good faith. Good faith clearly is, and must be, an essential and separate element, in light of the broad power which would devolve on the granting of the application. [emphasis added]

21 Adopting a textual analysis similar to that undertaken by the Newfoundland Supreme Court in *Tremblett* leads us to a like conclusion, *mutatis mutandis*, in relation to s 216A(3)(*b*). The positive wording of this provision requires the court to be "satisfied" that "the complainant is acting in good faith". This militates against any presumption of good faith in favour of the applicant. We are also mindful that at the second reading of the Companies (Amendment) Bill (Bill 33 of 1992), the Minister for Finance, Dr Richard Hu Tsu Tau ("Dr Richard Hu"), was keen to emphasise that (see *Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at col 231):

> The clause [making provision for statutory derivative actions] would provide more effective remedies for minority shareholders than existed at common law at present. It would have the effect of overriding the obstacles put in the way of such actions by the common law. *To ensure that the remedies that would be open to shareholders are not abused and give rise to unjustified court actions, section 216A contains strict conditions that must be satisfied before any action can be brought against corporations.* [emphasis added]

22 At the third reading of the same Bill, Dr Richard Hu again noted concerns about the potential abuse of s 216A and revealed that the Select Committee had specifically sought to address this (see *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at col 293):

> The Committee recognised that the new sections would provide more effective avenue for minority shareholders to protect their interests and that of the company. Nevertheless, to meet some of the representor's concern [that the new statutory right might be open to abuse by minority shareholders], the statutory derivative action will only be available in respect of unlisted companies. The Committee is of the view that the proceedings and performance of public-listed companies are already monitored by the various regulatory authorities and disgruntled shareholders of such companies have an avenue in that they can sell their shares in the open market. To further deter frivolous applications, the Committee has also decided to give the Court the discretion to order the complainant to furnish security for costs.

23 In the light of the clear language of the statute and Parliament's evident concerns with the potential abuse of s 216A, the irresistible conclusion must be that the subject passage at [9] of *Agus Irawan* requires qualification. Indeed, it should be emphasised that in *Agus Irawan*, Choo JC eventually

held that the assumption of good faith on the applicant's part only arose where the applicant had a "reasonable and legitimate claim" (at [9]). We also note that the subject passage in *Agus Irawan* was cited with approval by this court in *Pang Yong Hock* at [18]–[19], and was followed by the High Court in both *Poondy Radhakrishnan and Another v Sivapiragasam s/o Veerasingam and Another* [2009] SGHC 228 at [21] and *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 ("*Carolyn Fong*") at [72(a)]. In our view, *no* presumption of good faith applies in favour of the applicant where s 216(3)(*b*) of the Companies Act is concerned. Instead, as Judith Prakash J correctly determined in *Tam Tak Chuen v Eden Aesthetics Pte Ltd and another (Khairul bin Abdul Rahman and another, non-parties)* [2010] 2 SLR 667 at [12] (citing the Nova Scotia Court of Appeal case of *L & B Electric Limited v Oickle* [2006] NSCA 41), the onus is on the applicant to establish good faith.

Factors to be considered in establishing good faith

24 A leading Canadian treatise has described the requirement of "good faith" as meaningless (see Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Scribblers Publishing, 3rd Ed, 2006) at p 511). Be that as it may, case law suggests that certain factors can indeed be identified as being constitutive of good faith.

25 The Canadian courts have typically looked to the applicant's *honest belief* in the merits of the proposed statutory derivative action as a strong indicator of good faith. This was summarised by Williams J in *Discovery Enterprises Inc v Ebco Industries Ltd* [1997] BCTC LEXIS 5338 ("*Discovery Enterprises*") at [105]–[106]:

> 105 Discovery's *belief in the merits of the proposed action is central to the court's determination of good faith*. Discovery cites Intercontinental Precious Metals v. Cooke (1993), 10 B.L.R. (2d) 203 (B.C.S.C.). In that case, Tysoe J. held that the fact that the petitioner believed the company had been wronged by its directors was a prima facie indication that the petitioner was acting in good faith. He stated at p. 216:
>
> > The materials disclose that IPM is prima facie acting in good faith in wanting the derivative action to be commenced. IPM believes that Rembrandt has been wronged by, among others, its directors and they have declined to cause Rembrandt to prosecute the action. IPM is prima facie acting in good faith in wanting the wrongs to be redressed for the benefit of Rembrandt.
>
> 106 The same conclusion was reached by Tysoe J. in [*Primex Investments*], at p. 312:
>
> > Mr. Rennison believes that Mr. Griffiths has acted improperly and, if there were no substance behind the belief, one could conclude that he is pursuing a vendetta. However, as I conclude when dealing with the criteria under s. 225(3)(c) [of the British Columbia Company Act (RSBC 1979, c 59)], there is an arguable case that Northwest has a claim against Mr. Griffiths. Mr. Rennison cannot be said to be acting in bad faith because he wants to pursue what he genuinely considers to be a valid claim against Mr. Griffiths.
>
> [emphasis added]

26 In *Discovery Enterprises* at [117], Williams J also noted other factors which would be considered:

> I do not agree with Discovery that the question of an honest belief in the merits of the proposed

action is the determinative factor in a finding of good faith. *It will certainly be strong evidence of the existence of good faith, but the test involves many more factors as earlier alluded to in the authorities, such as existing shareholder disputes and alleged ulterior motives*. *Good faith is a separate pre-requisite under the Company Act [(RSBC 1979, c 59)], and in my opinion must be treated as such.* [emphasis added]

27 In Australia, the test of good faith centres mainly on two factors that have been helpfully set out by Palmer J in *Swansson* at [35]–[36], namely:

> 35 At this early stage in the development of the law on the statutory derivative action created by Pt 2F.1A [of the Corporations Act 2001 (Cth)] it would be unwise to endeavour to state compendiously the considerations to which the courts will have regard in determining whether applicants in all categories defined by s 236(1) are acting in good faith. The law will develop incrementally as different factual circumstances come before the courts.
>
> 36 Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s 237(2)(b) is satisfied. *The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success*. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit *for such a collateral purpose as would amount to an abuse of process*.
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> [emphasis added]

28 On the issue of whether the legal merits of the proposed statutory derivative action should be taken into account in the determination of the applicant's good faith, some Canadian courts appear to have gone further to treat such legal merits as an overarching consideration which underpins all the preconditions for a statutory derivative action. This was the position adopted by Robins JA, delivering judgment on behalf of the Ontario Court of Appeal in *Richardson Greenshields* at 585:

> The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. *Before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one*. The preconditions of s. 339 [of the Trust and Loan Companies Act (SC 1991, c 45)] cannot be considered in isolation. Whether they have been satisfied must be determined in the light of the potential validity of the proposed action. [emphasis added]

29 This can be contrasted with the more subjective investigation into whether the applicant honestly or reasonably believes that a good cause of action exists, which test has been avowed in other Canadian cases (see, *eg*, *Discovery Enterprises*) and also Australian jurisprudence as a key factor in the positive proof of the applicant's good faith. Our courts appear to have added a further gloss to the *Richardson Greenshields* approach apropos the legal merits of the proposed statutory derivative action. This approach was adopted by Lai Kew Chai J in *Teo Gek Luang v Ng Ai Tong and others* [1998] 2 SLR(R) 426 ("*Teo Gek Luang*"), and was followed by Choo JC in *Agus Irawan*, who went one step further to find (at [9]) that the presence of a "reasonable and legitimate claim" would create an assumption of good faith. Both of these cases were then cited with approval in *Pang Yong Hock*, where this court regarded them as "generally beyond reproach" (at [19]). Subsequently, in *Carolyn Fong*, Prakash J held at [72(b)] that "bad faith [was] usually inferred from the lack of an

arguable cause of action or a *prima facie* case". This survey of the case law reveals a piecemeal evolution which has incrementally incepted objective considerations of legal merits into s 216A(3)(*b*) of the Companies Act. It appears to us that this development detracts from both the language and the substance of the provision. While the applicant's good faith and the merits of his application need not be unconnected (for example, as pointed out in *Swansson*, the court may find that the applicant lacks good faith if no reasonable person in his position could believe that a good cause of action existed), they are not necessarily connected. Contrary to Prakash J's view in *Carolyn Fong*, an applicant might – albeit quixotically – seek to bring a statutory derivative action in good faith even where there is no arguable or legitimate case to be advanced (although the proposed action in this scenario would arguably not be *prima facie* in the interests of the company for the purposes of s 216A(3)(*c*) (see [53]–[58] below)). Similarly, an applicant with a legitimate case may be found to be lacking in good faith if he "is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations" (see *Pang Yong Hock* at [20]). As such, the conceptual integrity of the good faith requirement demands that any considerations of legal merits under this head must be yoked to the intents and purposes of the applicant who is seeking to initiate a statutory derivative action, *ie*, to an assessment of whether the applicant honestly or reasonably believes that there is a good cause of action. This is not inconsistent with the decision of this court in *Pang Yong Hock*, particularly in the oft-cited dicta at [20] that "[t]he 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".

30 One consequence of the fixation on the legal merits of the proposed statutory derivative action is that local jurisprudence has been sparse on the substantive relevance of the applicant's motives to the assessment of his good faith. What is nevertheless clear, following *Pang Yong Hock*, is that hostility alone cannot constitute bad faith. However, no test has been articulated as to the point at which an applicant's motives will collaterally impugn his good faith. The Australian position is that the applicant lacks good faith where his collateral purpose amounts to an abuse of process (see *Swansson* at [37]). This test resonates, as abuse of process is one of the grounds for striking out an action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In this context, it is settled law that an action brought for an ulterior or collateral purpose may be struck out as an abuse of the process of the court (see *Gabriel Peters & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22], citing *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489). Given that the statutory derivative action under s 216A of the Companies Act also relates to a similar exercise wherein the court has to evaluate the *bona fides* of the applicant based on affidavit evidence, the "abuse of process" test provides a useful standard by which to decide whether the applicant's collateral purpose amounts to bad faith. In this regard, it should be borne in mind that the purpose of the statutory derivative action is to provide (see *Pang Yong Hock* at [19]):

> … a procedure 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.

31 The onus is upon the applicant to demonstrate that he is or may be "genuinely aggrieved" (see *Pang Yong Hock* at [19]), and that his collateral purpose is sufficiently consistent with the purpose of "doing justice to a company" (see likewise *Pang Yong Hock* at [19]) so that he is not abusing the statute, and, by extension, also the company, as a vehicle for his own aims and interests.

Whether Low is acting in good faith

Motives and collateral purpose

32 The evidence before the court reveals that Low has several motives in seeking leave to commence a statutory derivative action. First, it is clear that there has been for some time no small amount of ill will between the parties. Ang suggests that Low might have begun to plot against him when conflicts began to arise between them. The two clashed primarily over several financial matters, such as payments to one Peter Lim, an advisor to the Company brought on board by Low, increasing the directors' salary from S$8,000 to S$22,000 a month and also the co-signing of cheques for workers' salaries. [note: 13]

33 It also appears that during the investigations into the Company's finances, Low learnt that he had not received his "full remuneration" as a director and was upset. At para 69 of his affidavit filed on 9 September 2011, Low stated: [note: 14]

> (c) … [U]pon receiving Ang's Affidavit and seeing the accounts I made inquiries with the accounts personnel in the Company, Rafidah. I was informed by the accounts personnel Rafidah that Gan did not release some of my dividends to me as he told me that they would be used for the Company Initial Public Offering ("IPO");
>
> (d) As income tax was levied on the dividends due to me, the Company paid for the income tax accruing to the unpaid dividends and this was done on Gan's instructions without my knowledge *and the fact that Ang knew about it shows that Ang had conspired with Gan to keep me from being paid my rightful dividends ...*"
>
> [emphasis added]

34 Low now claims that he only found out about the aforesaid dividends during the investigations by the Inland Revenue Authority of Singapore ("IRAS") into Gan's fraudulent tax claims. [note: 15]

35 A similar situation arises in relation to Low's director's fees – Low appears to be attempting to even the score after discovering that Ang had been paid more director's fees. This can be seen from para 74 of Low's affidavit of 9 September 2011, which states: [note: 16]

> (c) This sum of $525,704.59 included director's fee which Ang received in excess of what I received. Initially I made the decision to treat the excessive director's fee payment as fraudulent and hence allowed it to be in the $525,704.59 computation;
>
> (d) Later I decided that I would instead be paid this excess sum so that the excess payment is treated as a civil claim by me for director's fee due to me as I had not received any director's fees for that year.

36 Further down in the same affidavit (at para 76 thereof), Low added that: [note: 17]

> (d) As I am a fellow director and equal shareholder, whatever Ang had received as director's fees should also be due to me and I therefore will proceed to claim for the sum of S$130,250.49 as director's fees;
>
> (e) However, if Ang is now saying that I am not entitled to S$130,250.49 as director's fees, by logical inference, the sum of S$130,250.49 as director's fees that he received is a defalcation and should be added to the amount that the Company is entitled to claim from him ...

37 It would therefore appear that Low is intent on restoring remunerative parity with Ang, in that

he treats a personal claim for equivalent fees from the Company interchangeably with a derivative action against Ang for the return of those fees. This is a strong indication that Low is motivated as much by spite as by the prospect of gain.

38 Second, there are intimations in the letters sent by Low's solicitors, Bernard & Rada Law Corporation ("B&R"), on his behalf that Low was worried about the prospect of Gan returning to the Company. First, in B&R's letter dated 7 March 2011 to Ang's solicitors, Leong Partnership, it was revealed that Low had caught wind of a potential takeover: [note: 18]

> 6. … [Y[our client [*ie*, Ang] has in the recent past few months publicly announced to Company staff that:–
>
> > 6.1 one of the company's customers, "Technics" (it is unclear whether your client refers to Technics Oil and Gas Limited or its wholly owned subsidiary Technics Offshore Engineering Pte Ltd) ("Technics"), has the resources and would be buying over Gan's 80% shareholding of the Company.
> >
> > 6.2 In this respect, Technics will pump SGD3.5 million into the Company, "kick out" our client, and further pay Gan SGD3,000 every month (for unspecified reasons).

39 Subsequently, in Low's affidavit filed on 9 September 2011, he stated (at para 9) that: [note: 19]

> (d) … [I]t has also come to my attention recently that the employees of the Company were informed by Ang that he intended to re-employ Gan, pay him a remuneration of S$3000.00 per month and oust me as director of the Company.

40 Finally, in Low's written submissions dated 14 September 2011 for the proceedings before the High Court, the allegation was couched as follows: [note: 20]

> 22.2 The employees of [the] Company were informed by Ang that he intended to re-employ Gan, pay him a remuneration of S$3000.00 per month and oust [Low] as director of [the] Company. Further, Ang has in the recent past few months publicly announced to Company staff that:–
>
> > a. [O]ne of the Company's customers, "Technics" ... has the resources and would be buying over Gan's 80% shareholding of the Company.
> >
> > b. In this respect, Technics would pump SGD3.5 million into the Company, "kick out" [Low], and further pay Gan SGD3,000 every month (for unspecified reasons).

41 It is not apparent, however, whether Low was simply relying on this rumoured buy-out as a premise to take action against Ang or whether he was genuinely worried that such a situation might transpire.

42 While it might not be immediately apparent which of the aforesaid motives at [32]–[41] above resonated the most with Low, it is at least evident that he has the burden of showing that these motives do not amount to a collateral purpose unconnected with doing justice to the Company. *The overriding impression is that Low 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*. In this regard, he cannot be taken as having

discharged the burden of establishing that he is acting in good faith.

43 A fuller inquiry into Low's motives raises genuine concerns about whether the Application is an abuse of process. It is significant that Low's letter of demand to Ang for the return of monies allegedly misappropriated by the latter from the Company was sent on 6 January 2011, within a month of the Company being informed by the Official Assignee's office that Gan had found two buyers for his shares. Indeed it appears that there remains an outstanding offer to purchase Gan's shares for S$500,000 from Mr Jonathan Lim of M/s Apphia Investments Pte Ltd. There is also no dispute that Low had previously offered, *ostensibly* along with Ang, to purchase Gan's shares. By a letter dated 21 September 2010 sent to the Official Assignee's office by Low's solicitors, a request was made for Gan's statement of affairs as well as a list of any other debts owed by him. This was so as to enable "[the Company's] remaining shareholders to consider if they should buy over [Gan's] 80% shareholding". [note: 21] On 8 November 2010, the same solicitors wrote to the Official Assignee stating that: [note: 22]

> … [The Company's] remaining shareholders Mr Ang Thiam Swee and Mr Low Hian Chor are willing to consider buying over [Gan's] 80% shareholding of the [C]ompany at the total price of SGD100,000 (that is, SGD50,000 for a 40% shareholding each).

44 In spite of the fact that these letters were sent on behalf of the Company, Ang was only informed much later of the above-mentioned S$100,000 offer to the Official Assignee, [note: 23] and does not appear to have been directly copied in the letters. It is therefore unclear what purpose (other than to secure a personal benefit) was to be achieved by Low's unilateral inquiries and representations to the Official Assignee. There is also a serious question surrounding how the artificially deflated figure of S$100,000 was arrived at when fully 80% of the Company's shares were at stake. Finally, the letters from Low's solicitors to the Official Assignee repeatedly emphasised the urgency of the purchase of Gan's 80% shareholding due to the Company's "imminent collapse", [note: 24] which has not come to pass. Taken as a whole, the irregularity which attends to this entire episode raises serious concerns about Low's underlying motives.

45 Quite apart from any animus between the parties, Low plainly stands to gain, at no personal cost, if the Company brings proceedings against Ang. Should the money be returned to the Company, Low's shareholding would increase in value, and if Ang cannot pay, then Low would assume *de facto* control over the Company. When annealed with the elements of disgruntlement, spite, and self-preservation, the prospect of pure personal gain appears to sharpen the edge of Low's motivations, and raises serious questions about his good faith.

46 We think that the Application has indeed been animated by such a compound of private motives as to amount to a collateral personal purpose. Any justice done for the Company would be, at best, incidental to the advancement of Low's own aims. *In this regard, it is indeed telling that Low has not managed to secure the support of the Official Assignee of Gan for these proceedings.* 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. We are therefore unable to agree with the Judge, who found at [7] of the Judgment that Low was "acting in good faith in seeking to bring this action on behalf of the [Company]". As was pointed out in *Pang Yong Hock*, the *raison d'être* of s 216A of the Companies Act is to protect minority interests and do justice to the company. The present application appears to be a cynical attempt to load the scales against another minority shareholder on the pretence of doing justice to the company, and, as such, fails at the very first hurdle of *bona fides*.

Honest belief in a good cause of action

47 Low's own account of his motives in bringing the Application was that he had initially noticed irregularities concerning Ang arising from Stone Forest's investigation into the misdeeds of Gan, but elected to wait until the completion of the bankruptcy proceedings against Gan before taking further action against Ang. At para 46 of his affidavit filed on 9 September 2011, Low stated: [note: 25]

> (c) Towards the tail end of Stone Forest's investigation, they uncovered several irregularities relating to Ang and informed me about them;
>
> ...
>
> (e) At that time, partly because the Company was in a financially weak position and partly because I did not have the resources nor time to pursue actions against two errant directors, I decided to put aside investigations into Ang's dealings;
>
> (f) *Once the court proceedings against Gan were over, I instructed Rafidah to follow up on what Stone Forest had found, conduct detailed checks into the Company's accounts and check the extent of Ang's defalcations;* and
>
> (g) Ang's defalcations turned out to be so extensive and serious that as the Company's director, I was duty bound to take action against him to recover the monies as it was in the Company's best interests to clear up all wrong doings [*sic*].
>
> [emphasis added]

48 On the one hand, it might be noted that had Low sought to tar Ang with the same brush as Gan from the outset, the latter two might have cooperated to eject Low from the Company via an EOGM. On the other hand, it also appears from the circumstances that Low was keen to assume sole control of the Company by sequentially taking steps against Ang. Indeed, the alleged "improper" payments to Ang may not in fact be improper.

49 Two out of the four reports produced by Stone Forest in respect of the Company's accounts were disclosed in these proceedings. Of the two reports, only the latter, dated 14 October 2010 ("the 14 October 2010 Stone Forest report"), makes any mention of unsubstantiated payments to Ang – and these amounted to only two transactions totalling S$28,000. It is clear, however, that Low contemplated initiating proceedings against Ang even before the 14 October 2010 Stone Forest report was released. This is evident from the report itself, p 8 of which states that "[Low] also furnished us [with] a list of withdrawals by Ang (amounting to S$505,704.59) and mentioned that the Company would reserve its rights to pursue the same in due course". [note: 26] As for the other two Stone Forest reports (issued on 30 April 2010 and 14 May 2010 respectively) which were not furnished as evidence (because Stone Forest was not agreeable to their use in legal proceedings), [note: 27] it is not clear whether any impropriety on the part of Ang was alluded to in these two reports. Low's own position is that they contain no material relevant to the present action.

50 As such, the evidence shows that far from Low having been informed by Stone Forest about irregularities concerning Ang, he had instead volunteered information about such irregularities to Stone Forest prior to the 14 October 2010 Stone Forest report. It is also telling that Low instructed the Company's bookkeeper, Rafidah, to continue looking into the irregularities, instead of relying on Stone Forest's reports. Even as regards his own purported motive in seeking leave to bring a

statutory derivative action, Low has not been entirely forthright in his account of the events which led to the Application.

51 During the hearing, counsel for Low, Ms Foo Soon Yien ("Ms Foo"), was referred to letters from IRAS to Low on 12 May 2010 and to Ang on 22 May 2010. These showed the amount of tax penalties assessed by IRAS for each party to be S$130,510.22 and S$128,276.20 respectively. These tax penalties were imposed for undeclared benefits in kind received by the parties as directors of the Company. The inference to be drawn from this is not just that Low and Ang received approximately an equal amount of benefits in kind, but also that Low was aware that as minority shareholders, both parties were treated equally. Ms Foo belatedly attempted to explain that these penalties were largely related to car allowances, but did not provide any satisfactory supporting evidence in support of this assertion. It is also pertinent to note that of the 24 contested payments made to Ang, 11 were for either travel or entertainment expenses, which constitute benefits in kind. These account for S$168,800 of the total disputed sum of S$386,915.21, so that even if the matching treatment as between Ang and Low were limited to benefits in kind, this would still knock out over 40% of Low's proposed claim. Moreover, many of these payments overlap with those which are the subject matter of SUM 1423/2012, which payments Low has persisted in challenging despite having accepted IRAS's penalties in relation to those transactions.

52 On the totality of the evidence before this court, we are not persuaded that Low has an honest belief in the merits of the Application. Indeed, Low's primary objection to SUM 1423/2012 reveals as much. As mentioned earlier (at [8] above), in SUM 1423/2012, Ang sought leave to adduce (*inter alia*) general ledger records and cash disbursement journals showing 19 payments by the Company to Low between 2002 and 2008. Low objected to the application on the grounds that the documents in question did not in themselves prove that he had actually received the 19 payments as these payments might have been effected via cash cheques, which could have been paid to someone other than him even though they were recorded in the Company's books as having been paid to him. [note: 28] Low contended that cheque images from the Company's bank, DBS, had to be produced first to show that the 19 payments were not made by cash cheques. However, the same evidential deficiency could also apply to the Application, which was supported only by payment vouchers showing alleged improper payments by the Company to Ang. Low did not seem to have had the same reservations about relying on cash cheques when he filed the Application, in that seven of the payments allegedly made to Ang under the first head of claim were made by cash cheques. This further illustrates the difficult questions that arise once the probity of Low's objections to SUM 1423/2012 is tested. On the whole, it is abundantly clear to us that Low cannot have an honest belief in the merits of the proposed statutory derivative action.

The *prima facie* interests of the Company

53 To satisfy the requirement in s 216A(3)(*c*) of the Companies Act that the proposed statutory derivation action appears to be "prima facie in the interests of the company", the applicant must cross the threshold of convincing the court that the company's claim would be legitimate and arguable. This was first accepted in *Teo Gek Luang*, following the Ontario Court of Appeal's decision in *Richardson Greenshields*. In *Agus Irawan*, Choo JC further explained at [8] that:

> … The terms "legitimate" and "arguable" must be given no other meaning other than what is the common and natural one, that is, that the claim must have a reasonable semblance of merit; not that it is bound to succeed or likely to succeed, but that if proved the company will stand to gain substantially in money or money's worth. …

54 The same test was also applied recently in *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 and

Carolyn Fong. In the former, Tay Yong Kwang J opined at [25] that:

> The phrase "*prima facie*" in s 216A(3)(*c*) requires the complainant to show that there is a reasonable basis for the complaint and that the intended action is a legitimate or arguable one, *ie*, it has a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful ...

55 It is plain that at this interlocutory stage, the standard of proof required is low, and only the most obviously unmeritorious claims will be culled. Of particular relevance to the present appeal is that illegitimate actions, whether due to the element of frivolity or vexation, will not be considered to be *prima facie* in the interests of the company. There is an obvious overlap here with the requirement of good faith, in that an applicant with a frivolous or vexatious claim will also typically be unable to demonstrate an honest belief in the merits of the proposed statutory derivative action or the absence of a collateral purpose amounting to an abuse of process. As such, the same considerations which militated against Low's *bona fides* will also undermine the legitimacy of the Application. In our view, the Application is questionable and, if allowed, would disrupt the Company's operations for reasons unconnected with good corporate governance. In reaching this conclusion, we have been especially persuaded by the fact that Low has control over both the financial and the legal apparatus of the Company. This is a far cry from the typical situation, where the applicant seeking leave to bring a statutory derivative action is in a disadvantaged position and has no access to key documents and papers. Indeed, the dynamics of the present appeal are an exact reversal of the standard derivative action – here, it is the applicant who has the upper hand and the defendant who is agitating for access to the company's books.

56 In determining whether the requirement in s 216A(3)(*c*) has been satisfied, apart from a detached assessment of the merits in prosecuting the proposed statutory derivative action, the court may also go further to examine whether it would be in the practical and commercial interests of the company for the action to be brought. In *Pang Yong Hock*, this court also suggested that some consideration be given to alternative remedies (at [21]–[22]):

> 21 ... 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.
>
> 22 In considering the requirement in s 216A(3)(*c*), 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). ...

57 This passage is particularly pertinent to the High Court's concern about the significant amount of money which has been disbursed from the Company's bank account (see [7] of the Judgment). While the Company might have an interest in recovering any misappropriated funds, it is difficult to see what practical gain the Company could obtain from the present matter if it is allowed to proceed further (*ie*, if Low is given leave to bring a statutory derivative action). This is a situation where the parties are pointing accusatory fingers at each other, and neither party appears to be wholly without blame. It is not clear how the proposed statutory derivative action would resolve rather than actuate this. Moreover, the Official Assignee has reserved his position on the matter, so that there is no positive affirmation from the majority shareholder that the Company views the action as worthwhile. Although it is self-evident that each application for leave to bring a statutory derivative action should turn on its own merits rather than on the view of the majority shareholder(s), the silence of the

Official Assignee in the present appeal does suggest that the Application is *outside of* the Company's interest. This brings us back to the recurring theme that Low is seeking to use s 216A of the Companies Act as a means of perpetuating his own peripheral agenda. At the end of the day, the Company appears to be coping well and neither of the two Stone Forest reports disclosed in these proceedings raised any red flags. It is therefore our view that the Application offers no practical or commercial merit for the Company. We are thus unable to agree with the Judge below that the mere prospect of recovering allegedly misappropriated funds would be *prima facie* in the interests of the Company in the circumstances of this case, especially when the majority shareholder appears unsupportive.

58 It only remains for us to add that as a matter of pleading, considerations of *objective* legal merit may be more appropriately dealt with under s 216(A)(3)(*c*). There 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. Given that this is an issue that has already been examined earlier (see [28]–[29] above), we do not propose to rehearse the same arguments.

Conclusion

59 On the totality of the above considerations, the present appeal is allowed with costs here and below to Ang and the usual consequential orders. As for the costs of SUM 1423/2012 and SUM 2120/2012, which we reserved at the hearing of this appeal, we award these costs to Ang, given the usual rule that costs should normally follow the event.

[note: 1] See Ang's 1st affidavit at para 15 (at Core Bundle ("CB") Vol 2, p 53).

[note: 2] See Low's 1st affidavit at para 6 (at CB Vol 2, p 28).

[note: 3] See Ang's 1st affidavit at para 25 (at CB Vol 2, p 55).

[note: 4] See Ang's 1st affidavit at para 27 (at CB Vol 2, p 55).

[note: 5] See Low's 1st affidavit at para 8 (at CB Vol 2, p 28).

[note: 6] *Id* at para 9 (at CB Vol 2, p 29).

[note: 7] *Id* at para 10 (at CB Vol 2, p 29).

[note: 8] See Originating Summons (Bankruptcy) No 41 of 2010/P (at CB Vol 2, pp 131–133).

[note: 9] See Ang's 1st affidavit at para 49 (at CB Vol 2, pp 58–59).

[note: 10] See CB Vol 2, pp 4–6.

[note: 11] See prayer 1(b) of SUM 1423/2012.

[note: 12] See Record of Appeal ("ROA") Vol 3 Part A, pp 268–273.

[note: 13] See ROA Vol 3 Part B, pp 86–89.

[note: 14] See ROA Vol 3 Part C, pp 96–97.

[note: 15] See ROA Vol 4 Part B, p 176.

[note: 16] See ROA Vol 3 Part C, p 99.

[note: 17] See ROA Vol 3 Part C, p 101.

[note: 18] See ROA Vol 3 Part A, p 278.

[note: 19] See ROA Vol 3 Part C, p 72.

[note: 20] See ROA Vol 3 Part C, p 260.

[note: 21] See ROA Vol 3 Part C, p 147.

[note: 22] See CB Vol 2, p 104.

[note: 23] See Ang's 1st Affidavit at para 154 (at CB Vol 2, p 79).

[note: 24] See CB Vol 2, p 105.

[note: 25] See ROA Vol 3 Part C, p 85.

[note: 26] See CB Vol 2, p 83.

[note: 27] See ROA Vol 3 Part C, pp 92–93.

[note: 28] See Low's affidavit filed on 27 April 2012 at para 56.