Chua Swee Kheng *v* E3 Holdings Ltd and another
[2015] SGHC 22

Case Number : Originating Summons No 263 of 2014 (Civil Appeal No 197 of 2014)

Decision Date : 29 January 2015

Tribunal/Court : High Court

Coram : Hoo Sheau Peng JC

Counsel Name(s) : Nicholas Jeyaraj s/o Narayanan (Nicholas & Tan Partnership LLP LLC) for the Plaintiff; Surenthiraraj s/o Sauntharajah and Farrah Joelle Issac (Harry Elias Partnership LLP) for the Defendants.

Parties : Chua Swee Kheng — E3 Holdings Ltd and another

Companies – Statutory derivative action – Whether to grant leave to bring action – Whether applicant acting in good faith – Whether application prima facie in interests of company – Section 216A Companies Act (Cap 50, 2006 Rev Ed)

29 January 2015

Hoo Sheau Peng JC:

Introduction

1 This is an application by the plaintiff ("the Plaintiff") pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for leave to bring a derivative action in the name and on behalf of the defendants ("Defendants") against one Sieh Li Huan ("Ms Sieh") for alleged breaches of fiduciary duties. After the hearing, I dismissed the application. The Plaintiff has appealed against the decision. I now furnish my reasons.

Facts

Parties

2 The first defendant, E3 Holdings Limited ("E3"), is an investment holding company. The second defendant, Englo Real Estate Development Pte Ltd ("ERE"), is E3's wholly-owned subsidiary. On 31 May 2011, E3 was delisted from the Singapore Exchange ("SGX"), following the failure of certain investments in the People's Republic of China which resulted in significant losses to the Defendants ("the Failed Investments"). The Plaintiff is a minor shareholder of E3, owning approximately 0.19% of E3's shares. His grievances relate to Ms Sieh's role in the Failed Investments.

3 An accountant by profession, Ms Sieh joined E3 in January 2008 as the Chief Financial Officer ("CFO"), a position she held until 11 June 2010. From 6 May 2008 to 11 June 2010, she was an executive director of E3, and from 5 May 2008 to 14 June 2010, she was a director of ERE.

4 At or around the material time, other than Ms Sieh, E3's board of directors ("E3's Board") comprised:

(a) Peter Ngo Gim Kang ("Mr Peter Ngo"), the Chairman who passed away in 2012;

(b) Liau Beng Chye ("Mr Liau"), the Deputy Executive Chairman;

(c) Anthony Soh Guan Cheow ("Dr Soh"), the Group President and a substantial shareholder of E3;

(d) Jonathan Ow ("Mr Ow"), the Chief Executive Officer ("CEO");

(e) Chong Hon Leong ("Mr Chong"), the Deputy Group President; and

(f) Anthony Ang ("Mr Ang"), Mr Hans Gutsch and Mr Chandra Mohan ("Mr Mohan"), the independent directors who formed the Audit Committee.

5 As for ERE, the board of directors ("ERE's Board") included all the persons on E3's Board, except for the three independent directors. In addition, one Kenneth Ngo Chin Chow ("Mr Kenneth Ngo") was also a director of ERE. He is Mr Peter Ngo's brother, and played a major role in the Failed Investments.

6 To complete the picture, presently, E3's Board comprises one Samuel Poon Hon Thang ("Mr Poon"), appointed on 25 November 2009, one Seow Soon Hee ("Mr Seow"), appointed 17 July 2009, and two out of the three independent directors, Mr Ang and Mr Mohan. ERE's Board comprises Mr Poon and another person. Both were appointed in 2010.

Failed Investments

7 Entered into by ERE, the Failed Investments were:

(a) The acquisition of an oil refinery from a Chinese company, known as Song Yuan Petrochemical Co Ltd ("SYPC") for RMB95.25m (about $19m). The agreement with SYPC dated 15 January 2008 is referred to as the Enterprise Acquisition Agreement ("EAA"), and was signed by Mr Kenneth Ngo.

(b) In the EAA, ERE agreed to lend SYPC a sum of RMB30m (about $6m) as working capital secured on a guarantee to be provided by Jilin Province, Songyuan City, Ning Jiang District People's Government ("Jilin Local Authority"), and repayable upon demand upon giving the requisite notice. A loan agreement was signed on 2 February 2008 ("SYPC Loan Agreement") by Mr Peter Ngo.

(c) The acquisition of an interest in a real estate development project in Jilin Province for RMB60m (about $12m). The agreement with the Jilin Local Authority dated 15 January 2008 is referred to as the Land Acquisition Agreement ("LAA"), and was signed by Dr Soh.

(d) A property development project in Jing Yue, Changchun through a joint venture vehicle called Changchun City Development Limited ("CCDL"), formed by ERE and Jing Yue Economic Development Zone Construction and Development Company ("the CCDL project").

8 From January to May 2008, a total sum of $22.2m was invested pursuant to the EAA, SYPC Loan Agreement and the LAA. I will refer to these three connected agreements collectively as the SYPC project. Meanwhile, the Defendants invested another $4m in the CCDL project.

SYPC project

Joint venture agreements and arrangements for fund transfers

9 Before me, the Plaintiff's allegations against Ms Sieh centred on the SYPC project, with passing references to losses due to the CCDL project. I shall not be saying more of the latter. The SYPC project has had a rather chequered course. Initially, the Defendants undertook it as a joint venture with Jade Technologies Holdings Ltd ("JTH") through its subsidiary Jade Commodities & Resources Pte Ltd ("JCR"). Apart from financing the SYPC project, JTH and JCR were to provide the expertise to run the oil refinery. The intention was for E3/ERE and JTH/JCR to cumulatively own a 49% stake in SYPC. They would have the right to nominate their own local Chinese parties to hold the remaining 51% stake in SYPC. On behalf of ERE, Mr Kenneth Ngo signed the two co-investment agreements with JTH/JCR.

10 As for funds from the Defendants and JTH, the somewhat unusual arrangement was for transfers to be made to a Chinese company known as Orientus (Jilin) Enterprise Development Co Ltd ("OJ"), controlled by a Singapore company Orientus (Asia) Holdings Ltd ("OAH"). The sole director and shareholder of OAH was Mr Kenneth Ngo. According to Mr Kenneth Ngo, foreign currency controls meant that monies could only be remitted directly from abroad to certain qualifying Chinese entities. He proposed that the monies be paid through OJ which met the quota requirements to receive foreign funds. Apparently, other subsidiaries of E3/ERE, such as CCDL, did not qualify. This arrangement was accepted by E3 and JTH.

11 Subsequently, three transfers took place from E3/JTH to OJ totalling $19.2m (RMB96m), being:

(a) a transfer of $6m (RMB30m) on 30 January 2008 ("the first payment"), authorised by Mr Peter Ngo and Mr Liau;

(b) a transfer of $4m (RMB20m) on 19 February 2008 ("the second payment"), also authorised by Mr Peter Ngo and Mr Liau; and

(c) a transfer of $9.2m (RMB46m) on 20 March 2008 ("the third payment"), authorised by Mr Chong and Ms Sieh.

12 The funds were remitted into OJ's bank account in Changchun ("OJ's Changchun account"), which was operated jointly by Mr Kenneth Ngo and Mr G P Soh, the brother of Dr Soh and who was also JTH's representative for the SYPC project. The first payment was released by OJ to SYPC pursuant to the SYPC Loan Agreement on 2 February 2008, while the second payment was released by OJ pursuant to the LAA on 19 February 2008.

Withdrawal of joint venture partner and efforts to continue with the SYPC project

13 On or around 10 April 2008, JTH/JCR withdrew from the joint venture. The Defendants did not have the financial resources, experience or expertise to proceed with the SYPC project. Eventually, the Defendants decided to divest their interest. On 21 May 2008, the Defendants agreed with JTH/JCR to repay the amounts invested by JTH/JCR, amounting to around $8,122,045, once the Defendants have successfully sold their interest in the SYPC project.

14 In the meantime, under the terms of the EAA, completion had been scheduled for 15 March 2008. There was already a delay because of the due diligence process. In order not to breach its obligations under the EAA, and to keep the EAA alive, ERE signed three supplementary agreements with SYPC.

15 Under the first supplementary agreement dated 14 April 2008, ERE was to open a bank account in Songyuan City, Jilin Province, before 25 April 2008, and to deposit the purchase monies into this

account before 1 May 2008. Completion was scheduled 30 days from 30 May 2008. The second supplementary agreement, also signed on 14 April 2008, dealt with verification of SYPC's debts to be assumed by ERE upon the acquisition. These two supplementary agreements were signed by Mr Ow. The third supplementary agreement of 9 May 2008 was signed by Ms Sieh. It involved divesting ERE's 49% interest in SYPC to OJ/OAH, and the remaining 51% interest in SYPC to a Chinese company known as Hong Kong Duty Free Commerce Ltd ("HKDF").

16 In mid April 2008, pursuant to the first supplementary agreement, the third payment comprising $9.2m (RMB46m) was transferred from OJ's Changchun account to OJ's new bank account in Songyuan City ("OJ's Songyuan account"). On 21 May 2008, pursuant to a request by SYPC, a further sum of about $3m (RMB15m) was transferred by the Defendants to OJ's Songyuan account ("the fourth payment"). This was authorised by Mr Peter Ngo and Ms Sieh. Mr Kenneth Ngo and Ms Sieh were the co-signatories of OJ's Songyuan account.

Divesting the Defendants' interest and securing the assets

17 The third and fourth payments totalling $12.2m (RMB61m) for the EAA were supposed to remain with OJ. To secure these amounts, on 21 May 2008, a deed of trust was entered into with OAH for OAH to hold the amounts on trust for ERE ("the first trust deed"). Mr Ow signed the first trust deed.

18 On 2 June 2008, apparently in another attempt to keep the EAA alive, one Englo Energy Pte Ltd ("EE"), another wholly owned subsidiary of E3, entered into a sale and purchase agreement with OAH to purchase its 49% interest in SYPC for RMB95.25m ($19m) ("SPA"). This SPA was again signed by Mr Ow. This SPA became redundant after the Defendants found a potential purchaser, being a Hong Kong company known as GTL Holdings Ltd ("GTL").

19 Sometime in June 2008, GTL agreed to purchase the interest in SYPC at RMB102m (about $20.5m). On 9 July 2008, Mr Ow executed a transfer agreement with GTL, after obtaining the approval of E3's Board on 30 June 2008 ("the GTL transfer agreement").

20 On 14 July 2008, another deed of trust was entered between ERE and OAH ("second trust deed"), to document that the SYPC shares transferred to OAH under the third supplementary agreement would be held on trust for ERE, and for OAH to account to ERE for the sale proceeds upon the completion of the sale to GTL. Mr Ow also signed the second trust deed.

Failure of SYPC project and loss of funds

21 At a meeting of the Audit Committee on 28 August 2008, Mr Ow and Ms Sieh gave assurances that the monies with OJ were safe. Ms Sieh said that "[w]e have control over the funds", and Mr Ow said that "[OJ] can't release the money without our signature". However, it appeared that by August 2008, substantial sums had been transferred out of OJ to third party or parties. Subsequently, GTL failed to complete the acquisition of the interest in SYPC. The Defendants were unable to proceed with the SYPC project, and it eventually ended in failure by 2010.

Investigations and recovery efforts

Special Audit and SGX reprimand

22 In October 2008, E3's Audit Committee appointed Deloitte & Touche Financial Advisory Services Pte Ltd to conduct a special audit of the Failed Investments. On 25 January 2010, a report was prepared ("the Special Audit Report"). E3 released an executive summary on 9 February 2010, and the

Special Audit Report was released to selected shareholders on 7 November 2013. In the Special Audit Report, it was observed that there was a lack of due process in the transactions, beginning with a failure by the Defendants to properly consider the rationale and basis for the investments. Other unsatisfactory aspects relating to the documentation, approval process, transfers of funds to OJ and protection of the Defendants' interests were also noted. After a review of the matters, on 10 June 2010, SGX issued a reprimand against Mr Peter Ngo, Dr Soh, Mr Kenneth Ngo, Mr Chong, Mr Liau and Ms Sieh ("the SGX reprimand").

Suit No 363 of 2010

23 Meanwhile, the Defendants sought the return of the first payment of $6m (RMB30m) under the SYPC Loan Agreement and the second payment of $4m (RMB20m) under the LAA from SYPC and the Jilin Local Authority, and the third and fourth payments of $12.2m (RMB61m) from OAH/OJ. After various steps proved unsuccessful, on 19 May 2010, the Defendants commenced Suit No 363 of 2010 ("Suit 363") against seven parties, being Mr Kenneth Ngo, Mr Peter Ngo, Dr Soh, OAH, OJ, SYPC and the Jilin Local Authority. Ms Sieh was a material witness for the Defendants, and filed a substantial affidavit of evidence-in-chief on 6 October 2012 ("6 October 2012 AEIC").

24 The Defendants were unable to proceed against SYPC and the Jilin Local Authority. Mr Kenneth Ngo, in his affidavit dated 26 September 2011 ("26 September 2011 affidavit"), admitted to certain transfers of sums out of OJ, but alleged that these were authorised by Mr Ow. After two days of hearing before the court, the action ended with judgment entered on 8 November 2012 against Mr Kenneth Ngo and OAH, declaring both as trustees for $12.2m (RMB61m) remitted to OJ, and for them to pay these monies to the Defendants. The action was withdrawn against Mr Peter Ngo and Dr Soh, in relation to breaches of fiduciary duties.

Suit No 805 of 2012

25 On 26 September 2012, JCR commenced an action against the Defendants and Mr Kenneth Ngo for the recovery of JTH/JCR's monies invested in the SYPC project in Suit No 805 of 2012 ("Suit 805"), being the return of $8,122,045 and due diligence expenses of $337,384, along with damages to be assessed. The proceedings are pending. The Defendants dispute JCR's claim, and rely on Ms Sieh as a witness. As for allegations of misconduct by Ms Sieh made by JTH/JCR, these are also denied by the Defendants.

Allegations against Ms Sieh

26 Against this largely undisputed backdrop, the Plaintiff alleged specific breaches of fiduciary duties by Ms Sieh. It was further alleged that such breaches caused the losses to the Defendants. The allegations are set out in a draft statement of claim attached to the application, with details in the two affidavits filed by the Plaintiff to support the application. Broadly, the allegations fell into three categories.

27 First, the Plaintiff claimed that Ms Sieh wrongfully diverted the Defendants' interest to other parties, and procured the Defendants to enter into various agreements with other parties without due diligence. The particulars provided were as follows:

(a) In signing the third supplementary agreement, Ms Sieh wrongfully diverted the Defendants' interest in SYPC to OJ and HKDF without the approval of the board of directors and or shareholders of the Defendants, and without adequate protection for the Defendants.

(b) The two trust deeds were inadequate to protect the Defendants' interest. The first trust deed did not safeguard the Defendants' shares in SYPC and the amount provided to SYPC under the SYPC Loan Agreement, but merely sought to impose a trust over the monies with OJ. The second trust deed only dealt with the 49% interest in SYPC transferred to OJ, and not the 51% interest in SYPC transferred to HKDF. Again, the second trust deed did not deal with the amount provided to SYPC under the SYPC Loan Agreement. Further, both trust deeds were signed with OAH, instead of OJ. As such, recovery of the funds from OAH/OJ proved difficult. The Plaintiff held Ms Sieh responsible for the inadequacies.

(c) The SPA on 2 June 2008 was a sham transaction, procured by Ms Sieh. There was no reason to arrange for EE to purchase OAH's purported shares in SYPC.

(d) Ms Sieh procured the Defendants to enter into another sham transaction with the non-existent GTL to purportedly divest the Defendants' interest in SYPC to GTL.

28 Secondly, according to the Plaintiffs, Ms Sieh wrongfully diverted the Defendants' funds with OJ to third party or parties, in that she was deliberate or reckless in approving substantial remittances of the monies to third party or parties without the approval of the Boards and or shareholders from April to August 2008. Alternatively, the Plaintiff alleged that she did not diligently check, monitor or secure the funds with OJ.

29 Thirdly, the Plaintiff complained that Ms Sieh misrepresented crucial information. On 28 August 2008, Ms Sieh informed the Audit Committee that the monies held by OJ on trust for the Defendants were under E3's control when in fact substantial amounts had already been disbursed to third party or parties from April to August 2008. Further, Ms Sieh misrepresented to E3's shareholders, creditors and the relevant authorities in E3's announcement on SGX-Net on 16 July 2009 that E3 had an investment in SYPC when the Defendants' interest in SYPC had already been wrongfully diverted to OJ and HKDF on 9 May 2008, and that substantial amounts of the trust monies held by OJ had already been disbursed to third party or parties.

30 In an affidavit filed by Mr Poon to resist the application ("Mr Poon's affidavit"), the Defendants refuted the allegations against Ms Sieh. I will deal with the merits of the Plaintiff's allegations later. For now, I turn to the law.

The Law

31 Under s 216A(2) read with subsection (1) of the Act, a shareholder of a company may apply to the court for leave to bring an action in the name and on behalf of the company. Section 216A(3) sets out the three requirements before a shareholder can be granted leave to do so as follows:

> No action may be brought … 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…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….

Issues

Notice

32 It is not in dispute that the Plaintiff has satisfied the first requirement. On 6 June 2013, notice was given by Nicholas & Tan Partnership LLP ("the s 216A(3) notice"). Through their previous lawyers, Cheah Associates LLC, the Defendants sought certain clarifications on 21 June 2013. Following clarifications received on 12 August 2013, Cheah Associates LLC rebutted the allegations on 7 September 2013 ("the 7 September 2013 rebuttal"). Before me, the contested issues were whether the other two requirements for leave to be granted had been satisfied by the Plaintiff.

Good faith

33 Counsel for the Plaintiff submitted that the Plaintiff has satisfied the good faith requirement. In summary, his arguments were as follows.

34 First, Ms Sieh had materially caused E3's failure in completing the SYPC project, leading to significant losses for the Defendants. These were meritorious claims.

35 Next, in Suit 363, E3's Board did not sufficiently address all issues, or take action against all necessary parties. Suit 363 ended abruptly after two days of Ms Sieh's testimony. While the Defendants were successful against Mr Kenneth Ngo and OAH, this was only for the sum of $12.2m (RMB61m), and not for the full investment by the Defendants. Moreover, Mr Kenneth Ngo has not been found, and the legal fees of $650,000 expended would prove to be a complete waste of funds. The outcome of Suit 363 was not satisfactory. There was a need to uncover what really went wrong with the Failed Investments, and to hold Ms Sieh accountable for the losses.

36 Further, Counsel for the Plaintiff explained that it would be in the interest of the Defendants to recover the losses suffered, having regard to the need to enhance shareholders' value. The Plaintiff's self-interest coincided with the interest of the Defendants.

37 Finally, the Plaintiff had acted without undue delay. It was only sometime late in 2013 that he was able to obtain material information such as Ms Sieh's 6 October 2012 AEIC, Mr Kenneth Ngo's 26 September 2011 affidavit, the SGX reprimand and the Special Audit Report.

38 In gist, Counsel for the Defendants put forth these arguments.

39 First, the allegations against Ms Sieh were without merit. Further, the Plaintiff's allegations against Ms Sieh mirrored those brought by JCR in Suit 805, which have been denied by the Defendants. The Plaintiff was asking the Defendants to take contrary positions in different proceedings. Also, the Defendants would require Ms Sieh as a key witness in Suit 805, to explain the dealings between the Defendants and JTH/JCR. Inexplicably, the Plaintiff did not contemplate action against other key individuals who were not sued in Suit 363. Overall, there appeared to be a tactical ploy to undermine the Defendants' defence in Suit 805 to JCR's benefit.

40 Next, while the Plaintiff expressed dissatisfaction with the outcome of Suit 363, taking legal action against Ms Sieh, a person without substantial resources and who did not personally benefit from the misappropriation of funds, would stretch the Defendants' limited resources and not be cost effective.

41 Finally, Ms Sieh was no longer a director of the Defendants. She was not in the position to exert any control over the Boards. The Boards were not acting dishonestly, irrationally or unreasonably in not pursuing the claims against Ms Sieh. Counsel for the Defendants characterised

the case as one of a minority shareholder acting against the Defendants' interest.

42 In *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*"), the Court of Appeal held that no presumption of good faith applies, and that the onus is on an applicant to establish good faith (at [23]). In assessing good faith, the motivations of the applicant should be considered (at [13]). However, it is more important that the purpose of the proposed action must have an obvious nexus with the company's benefit or interests (at [16]).

43 Certain factors are indicative of good faith. In *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*"), the Court of Appeal provided guidance on how to establish good faith as follows (at [20]):

> 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*)].

44 This passage was endorsed in *Ang Thiam Swee* ([42] *supra*) (at [12]). Further, at [29], the Court of Appeal went on to state that while the applicant's good faith and the merits of the claims need not be unconnected, "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". This is not inconsistent with the dicta in *Pang Yong Hock* ([43] *supra*) (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". However, objective considerations of legal merits might be more appropriately dealt with under the requirement within s 216A(3)(*c*) of the Act (*Ang Thiam Swee* at [58]).

45 Guided by the framework, I propose to discuss the legal merits of the claims later. I should also state that I did not find fault with the Plaintiff on the ground of delay. Nonetheless, the other pertinent factors highlighted by the Defendants showed a lack of good faith on the Plaintiff's part.

46 For a start, the Plaintiff appeared bent on damaging the Defendants' legal position *vis-à-vis* JCR. A material witness in Suit 805, Ms Sieh would be required to provide an account of the relevant dealings with JTH/JCR. Should legal action be commenced against her, in all likelihood, Ms Sieh would cease to assist the Defendants. The Plaintiff made an assertion that other witnesses would be available. In this regard, the Defendants' account that Ms Sieh is one of the few former officers willing and able to assist the Defendants, and that for one, Mr Ow has not been forthcoming, was to be preferred. This was borne out by the fact that Ms Sieh was the main witness in Suit 363. When pressed on this aspect, Counsel for the Plaintiff suggested that any action against Ms Sieh can be stayed until after the conclusion of Suit 805. However, as rightly pointed out by Counsel for the Defendants, any threat of such action against Ms Sieh would compromise the Defendants' position. Besides, the Defendants have denied claims made by JCR in Suit 805, including allegations against Ms

Sieh. I agreed with Counsel for the Defendants that, to pursue claims against Ms Sieh, the Defendants would have to take a contradictory position in the different proceedings, to the detriment of the defence in Suit 805.

47 Next, it was perplexing to me why legal action was being contemplated only against Ms Sieh. Counsel for the Plaintiff denied targeting Ms Sieh, and stated that it was because of Ms Sieh's role as a witness in Suit 363 that has led to the train of inquiry indicating her liability. As set out above ([27] to [29] *supra*), the Plaintiff attributed liability to Ms Sieh because of her role and responsibilities as CFO and co-signatory of OJ's Songyuan account, how she signed certain documents, and made certain representations. There was also the fact that the SGX reprimand included Ms Sieh.

48 I observed that there were other key appointment holders such as Mr Ow, the CEO, Mr Chong, the Deputy Group President, and Mr Liau, Deputy Executive Chairman, who were not sued in Suit 363. Admittedly, Mr Ow was not included in the SGX reprimand. However, Mr Ow signed various documents, including the first two supplementary agreements and the two trust deeds. In fact, according to Ms Sieh (para 120 of Ms Sieh's 6 October 2012 AEIC), she signed the third supplementary agreement on behalf of Mr Ow because she happened to be in China at the time. On 28 August 2008, Mr Ow also made the representations to the Audit Committee on how funds with OAH and OJ were well within the Defendants' control. As for Mr Liau, according to Mr Poon (para 49 of Mr Poon's affidavit), Mr Peter Ngo, Dr Soh and Mr Liau formed the Business Action Committee, driving major decisions. As set out above ([11] *supra*), Mr Liau, together with Mr Peter Ngo, approved the first and second payments to OJ. Mr Poon also explained (para 48 of Mr Poon's affidavit) that Mr Chong, apart from being an officer of the Defendants, was also an officer of JTH, and was involved in the decision making on the funds. The Plaintiff did not seriously dispute these points. Mr Liau and Mr Chong were included in the SGX reprimand. As such, I agreed with Counsel for the Defendants that Ms Sieh has been singled out, and the Plaintiff has not provided a satisfactory reason for doing so.

49 Moving on, even if I were to accept that the purpose for the proposed action was truly to recover some of the losses from Ms Sieh, it did not have an obvious nexus to the Defendants' benefit or interests. Put in another way, I was of the view that the Plaintiff's professed self-interest to recover some of the losses against Ms Sieh so as to enhance share value did not coincide with the Defendants' benefit or interests. To elaborate, at this juncture, it seemed to me critical that the Defendants focus on defending Suit 805. The claims by JCR amounted to approximately $8.5m with additional damages to be assessed. The Defendants should also strive to enforce the judgement in Suit 363. Resources would be better spent on such efforts. Moreover, even if the Defendants were to succeed in an action against Ms Sieh, there would not be any reasonable prospects of recovering substantial damages against Ms Sieh. Counsel for the Plaintiff argued that it was premature to take this view. Should judgment be obtained, the Defendants could then take steps to ascertain her assets. I did not agree. The likelihood of recovery is always an important practical consideration before commencing litigation. There was no serious allegation that Ms Sieh actually profited from any wrongdoing, or any evidence adduced that she is a person of substantial assets or means. Little would be gained from taking action against her. In contrast, there is the real risk of jeopardising the Defendants' position in Suit 805. It would not be in interests of the Defendants to sue Ms Sieh.

50 Assuming for the moment that the claims were legitimate, this was not a case where the Boards were unreasonably reluctant to pursue such claims. It was clear that investigations had taken place before the Defendants proceeded with Suit 363. In Mr Poon's affidavit, he recounted how the Boards assessed the respective roles and responsibilities of the directors and officers, and ensured that legal action was taken against the individuals liable for the losses, being Mr Peter Ngo, Dr Soh and Mr Kenneth Ngo. After the Plaintiff gave the s 216A(3) notice, the Boards considered the specific allegations against Ms Sieh. A detailed explanation was provided in the 7 September 2013 rebuttal,

not only setting out the assessment of the legal merits of the claims, but the practical considerations involved.

51 There was no indication that the Boards were influenced by Ms Sieh, who resigned in June 2011, or that the Boards were hostile towards the Plaintiff. At the time of the hearing, E3's Board comprised Mr Poon and Mr Seow, who were not involved in the Failed Investments, and Mr Ang and Mr Mohan, who were the independent directors. While the Plaintiff may be genuinely aggrieved by the mismanagement of the Failed Investments, he seemed to have ignored the recovery efforts taken in the aftermath by the Boards. In these circumstances, the Plaintiff's insistence in challenging the Boards' decision not to sue Ms Sieh did not reflect good faith. For all the foregoing reasons, I found that the requirement within s 216A(3)(*b*) of the Act has not been satisfied.

Prima facie in the interests of the Defendants

52 In any event, the Plaintiff also had to satisfy the third requirement within s 216A(3)(*c*) that "it appears to be prima facie in the interests of the company that the action be brought." In *Ang Swee Thiam* ([42] *supra*) at [53], the Court of Appeal held that "the applicant must cross the threshold of convincing the court that [the claims] would be legitimate and arguable." At this stage, the court is only concerned with whether there is a reasonable basis for the claim. In *Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471 ("*Agus Irawan*") at [8], the High Court stated 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. …

53 Once again, the Plaintiff's claims are set out above ([27]–[29] *supra*). Counsel for the Defendants contended that while Ms Sieh held the position of CFO, compared to the other key individuals such as Mr Peter Ngo, Dr Soh and Mr Kenneth Ngo, or even those who were not sued like Mr Ow, Mr Chong and Mr Liau, Ms Sieh was a relatively junior officer, who acted in good faith to give effect to what were essentially business decisions and instructions of the management. More importantly, it has also been determined that Mr Kenneth Ngo acted in breach of his fiduciary duties, and misappropriated the Defendants' funds held with OAH/OJ.

54 Specifically, the Defendants denied that Ms Sieh had wrongfully diverted the Defendants' interest to other parties, or procured the Defendants to enter into various agreements without due diligence. Although signed by Ms Sieh, the third supplementary agreement was referred to in the announcement by E3 on 10 July 2008 albeit without details, and the announcement was approved by the directors. Certainly, there was no wrongful diversion by Ms Sieh alone, without knowledge of the Boards.

55 As for the two trust deeds, these were signed by Mr Ow, not Ms Sieh. The two trust deeds provided that the monies and shares were to be dealt with only with the consent of the Defendants. They also provided that the monies and shares were to be held on trust for ERE. OJ was owned by OAH, and there was nothing untoward about signing the two trust deeds with OAH instead of OJ. Even if there were inadequacies in the trust deeds, there was no basis to say that Ms Sieh was the one who failed to protect the Defendants' interest.

56 Turning to the SPA, again, the Defendants contended that it was signed by Mr Ow, and not by Ms Sieh. E3 made an announcement of the SPA on 2 June 2008, and then made an announcement on 10 July 2008 that the SPA would not be proceeded with. There was no basis to claim that it was Ms

Sieh who procured the transaction, or that it was a sham transaction. In any case, given that the SPA was not proceeded with, the SPA did not cause any loss suffered by the Defendants.

57 As for the transaction with GTL, Mr Ow was heavily involved in the negotiations, and executed the GTL transfer agreement. An announcement on the deal was made on 10 July 2008. Once again, the Defendants' position was that there was no basis to say that the GTL transaction was a sham, or that Ms Sieh was in a position to decide on her own whether to proceed with the deal with GTL.

58 As for the unauthorised fund transfers to third parties from OJ, the Defendants stated that Ms Sieh did not wrongfully authorise any payments from OJ's Songyuan account to third party or parties. The Defendants maintained that it was Mr Kenneth Ngo who misappropriated the funds, as demonstrated by the judgment entered against Mr Kenneth Ngo in Suit 363. Ms Sieh played no part in the misappropriation.

59 Regarding the misrepresentation of crucial information, it was not disputed that Ms Sieh was a co-signatory of OJ's Songyuan account, and her signature should have been required for payments. There was no misrepresentation on her part to the Audit Committee. However, Ms Sieh did not authorise any payments from OJ's Songyuan account. While it was still not clear what exactly Mr Kenneth Ngo did to transfer the funds, he was responsible for the unauthorised diversions of the funds. As for the SGX-Net announcement, the Defendants stated that it could not have been made by Ms Sieh alone. It was made with the approval of E3's Board.

60 Before me, the documents available included the Special Audit Report, the SGX reprimand and the affidavits for Suit 363. Admittedly, there were unsatisfactory aspects to the series of transactions involving the supplementary agreements, the two trust deeds, the SPA, the GTL transfer agreement and even the contents of public announcements. However, despite the materials already disclosed about the Failed Investments, there did not appear to be any evidence to contradict the Defendants' assessment that Ms Sieh acted in good faith and in accordance with the Boards' approval to execute what were essentially business decisions. In my view, the complaints about wrongful diversion and failure to protect the Defendants' interests could not be substantiated.

61 In so far as the Plaintiff alleged that payments were made out from the OJ's Songyuan account, again, no evidence linked Ms Sieh to the misappropriation apart from the fact that she was a co-signatory of the account. That was hardly sufficient, given the judgment against Mr Kenneth Ngo for misappropriation. As for the allegations of misrepresentation, it was not disputed that Ms Sieh was a co-signatory of OJ's Songyuan account. Her statement to the Audit Committee that the funds could not be withdrawn without her signature would not amount to misrepresentation.

62 I appreciated that the threshold to be met by the Plaintiff at this stage was low. However, I accepted the Defendants' responses ([53]–[58] *supra*), which amply demonstrated that the allegations could not be substantiated. As such, I found that the claims were not legitimate or arguable, and were without *reasonable* basis. Launching the proposed action would not *prima facie* be in the interests of the Defendants.

63 In *Ang Swee Thiam* ([42] *supra*) at [56], the Court of Appeal held that apart from a detached assessment of the legal merits, the court may examine whether it would be in the practical and commercial interests of the company for an action to be brought. All the circumstances should be weighed to decide whether the claims should be pursued. To this extent, there is an interplay or interconnection between this and the good faith requirement. In *Pang Yong Hock* ([43] *supra*), the Court of Appeal stated at [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.

64 Counsel for the Plaintiff argued that there were no genuine commercial considerations to stop action from being taken against Ms Sieh. Counsel for the Defendants disagreed, referring essentially to the arguments already set out at [39] to [41]. Given the interconnection with the good faith requirement, I considered the matters set out in [46] and [49] (*supra*) to be pertinent. Relying on those factors, even if I were to be wrong in my findings on whether the Plaintiff acted in good faith, and or whether the claims were legitimate, for practical and commercial reasons, legal action against Ms Sieh was quite simply not in the interests of the Defendants. The requirement in s 216A(3)(*c*) of the Act has also not been met.

Conclusion

65 In *Pang Yong Hock* ([43] *supra*) (at [19]), the Court of Appeal stated that the legislative purpose of the statutory derivative action is to provide:

> … 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.

Also, in *Agus Irawan* ([52] *supra*) at [8], the High Court stated:

> … But it is axiomatic that ordinarily, legal action is best left to the decision of the board of directors. It will not be in the interests of a company if all shareholders are at liberty to take it to court on Quixotic crusades. This is obviously more pertinent where there are many diverse groups of shareholders in the company. …

66 The Defendants have already taken legal action against those most liable for the losses suffered. The Defendants are now engaged in defending Suit 805. Ms Sieh is a key witness. Pains have been taken to explain the Boards' deliberations to the Plaintiff, who holds 0.19% of the shares in E3. I saw no reason for the Plaintiff to interfere in the management decision not to sue Ms Sieh. Accordingly, I dismissed the application.

67 The hearing was a contested half-day hearing. I awarded costs of $6,000 to be paid by the Plaintiff to the Defendants.

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