IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHCR 10

Suit No 1158 of 2017 (Summons No 1582 of 2018)

Between

(1) Ayaz Ahmed
(2) Khalida Bano
(3) Ishtiaq Ahmad
(4) Maaz Ahmad Khan
(5) Wasela Tasneem
(6) Asia

… *Plaintiffs*

And

(1) Mushtaq Ahmad @ Mushtaq Ahmad s/o Mustafa
(2) Ashret Jahan
(3) Shama Bano
(4) Abu Osama
(5) Iqbal Ahmad
(6) Mohamed Mustafa & Samsuddin Co. Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure] — [Striking Out]

[Civil Procedure] — [Parties] — [*Locus standi*]

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v
Mustaq Ahmad (alias Mushtaq Ahmad s/o Mustafa) and others

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Scott Tan AR
1, 27 June 2018

4 July 2018 Judgment reserved.

Scott Tan AR:

Introduction

1 This is the 1st to 5th Defendants' (collectively, the "Defendants") application to strike out the Plaintiffs' statement of claim ("SOC"). It arises out of an action in oppression brought by the Plaintiffs under s 216 of the Companies Act (Cap 50, 2005 Rev Ed) ("CA")) on behalf of the estate of the late Mr Mustafa s/o Majid Khan (the "Mustafa Estate"), in relation to the affairs of the 6th Defendant, Mohamed Mustafa & Samsuddin Co. Pte Ltd ("MMSCPL"). The 1st to 5th Plaintiffs are the five younger children of the late Mr Mustafa while the 6th Plaintiff is his widow. The 1st Defendant is the eldest son of the late Mr Mustafa, the managing director of MMSCPL, and the sole administrator and trustee of the Mustafa Estate. The 2nd to 5th Defendants are the other directors of MMSCPL and they are, respectively, the 1st Defendant's wife, his two children, and his brother-in-law.

2 The Defendants' application is founded on three grounds:

(a) First, they submit that the Plaintiffs do not have standing to commence this action, as they are merely the beneficiaries and not the personal representatives of the Mustafa Estate. While they accept that beneficiaries may, in special circumstances, take proceedings on behalf of an unadministered estate (see the decision of the Court of Appeal in *Wong Moy (administratrix of the estate of Theng Chee Khim, deceased) v Soo Ah Choy* [1996] 3 SLR(R) 27 ("*Wong Moy*")), they contend that the so-called "*Wong Moy* exception" does not apply here, as it *only* permits a beneficiary to "institute proceedings (on behalf of the estate) to **recover assets** (as opposed to pursuing a cause of action *simplicitor* [sic]) of an unadministered estate" [emphasis in original].[1]

(b) Second, and in the alternative, they submit that the complaints which form the subject matter of the present suit are essentially corporate wrongs, and cannot be vindicated in an action for oppression.

(c) Thirdly, and further in the alternative, they submit that some of the claims in the present suit should be struck out as they are plainly and obviously unsustainable.

3 The Plaintiffs argue that the *Wong Moy* exception is not limited in the way that the Defendants contend. They submit that where it applies, the beneficiaries "stand in the shoes of the executor and administrator and are entitled to pursue all causes of action and remedies which would otherwise be available to the executor or administrator", including an action in oppression.[2] They reject the contention that their claims are legally unsustainable and argue

1 Defendant's Written Submissions ("DWS") at paras 19 and 39.

2 Plaintiff's Written Submissions ("PWS") at paras 40 and 42.

that their arguments are not only meritorious but also capable of forming the subject matter of an action in oppression.[3]

4 As this application raised a novel issue concerning the scope of the *Wong Moy* exception, I reserved judgment to consider it carefully. I now give my decision, beginning first with a summary of the facts.

Background

5 Mr Mustafa was born in India, and he first married in 1945.[4] In 1951, he had a son, the 1st Defendant, by his first wife. His first wife passed away in 1956 or 1957 (the precise date is a matter of dispute),[5] and he then married the 6th Plaintiff, with whom he had five children – the 1st to 5th Plaintiffs.

6 From the 1950s to 1980s, Mr Mustafa divided his time between Singapore, where he ran a business with Mr Shamsuddin s/o Mokhtar Ahmad, who was a cousin of his first wife, and India, where he lived with his family.[6] After the death of his first wife, the 1st Defendant (who was five at the time) moved to Singapore where he was cared for by Mr Mustafa and Mr Shamsuddin. From the time he was 12, the 1st Defendant helped Mr Mustafa and Mr Shamsuddin with their business while running his own business on the side.[7] On 11 July 1973, Mr Mustafa and Mr Shamsuddin registered a partnership under the style of Mohamed Mustafa & Samsuddin Company ("MMSC"). The 1st Defendant was made a partner of MMSC on 12 September 1973.[8]

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3 PWS at para 172

4 Statement of Claim dated 8 December 2017 ("SOC") at para 12.

5 See SOC at para 13 and Defence and Counterclaim dated 2 February 2018 ("DCC") at para 11.

6 Affidavit of Asia dated 2 May 2018 ("Asia's Affidavit") at paras 10–13.

7 DCC at paras 21–27 and Asia's Affidavit at paras 15–19.

7 On 21 February 1989, MMSCPL was incorporated and the business of MMSC was transferred to MMSCPL. The circumstances under which MMSCPL was incorporated are heavily disputed, but only a brief summary is necessary for the purposes of this judgment. In broad terms:

(a) The Plaintiffs' position is that Mr Mustafa, Mr Shamsuddin, and the 1st Defendant were partners in the true sense and in 1989, they decided to convert MMSC into a company that each would hold shares in. To this end, Mr Mustafa and Mr Shamsuddin (the 1st Defendant was away in India at the time of MMSCPL's incorporation) executed the Memorandum of Association and Articles of Association of MMSCPL ("MMSCPL Constitution") to govern their commercial relationship. Article 7 of the MMSCPL states, among other things, that unless otherwise provided by special resolution, all unissued shares must first be offered for subscription to all shareholders in proportion to their existing shareholding before being issued.[9] Their position is that Mr Mustafa had intended that his shares in MMSCPL would be divided equally between the Plaintiffs and the 1st Defendant upon his death.[10]

(b) The Defendants' position, by contrast, is that the business relationship between the three men was governed by a common understanding (referred to as the "1973 Common Understanding") that the business of both MMSC belonged to the 1st Defendant solely and that the decision to convert it into a company was one which he alone took.[11] They plead that the 1st Defendant is in truth the "absolute and

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8 SOC at paras 15–16; 3rd Affidavit of Shama Bano dated 4 April 2018 ("Shama Bano's 3rd Affidavit") at para 14.

9 SOC at paras 18–23 and Asia's Affidavit at para 20.

10 Asia's Affidavit at para 20.

11 DCC at paras 34 and 41

> sole owner of all the shares in [MMSCPL]" and that Mr Mustafa had only been given shares in MMSCPL "out of respect and goodwill" while Mr Shamsuddin was made a shareholder as the 1st Defendant was away in India at the time MMSCPL was incorporated and it was his understanding that the law required each company to have at least two shareholders and directors.[12]

8 Mr Mustafa and Mr Shamsuddin were the founding directors of MMSCPL and they each subscribed to one share. Shortly after MMSCPL was incorporated, the 1st Defendant returned to Singapore, whereupon he was appointed a director of MMSCPL. In April 1989, the 1st Defendant, Mr Mustafa, and Mr Shamsuddin subscribed to 1m shares in MMSCPL in the ratio of 51:30:19.[13] From that point onwards, the 1st Defendant became the majority shareholder in MMSCPL and the day-to-day management of the company was left to him as Mr Mustafa (who was already 71 in 1989) was frail and spent most of his time in India.[14] Since then, MMSCPL has grown into a substantial business interest that owns, among other things, Mustafa Centre at Serangoon Road, a popular shopping centre and well-known local landmark.[15]

9 On 17 July 2001, Mr Mustafa passed away without leaving a will, leaving the Plaintiffs and the 1st Defendant as the beneficiaries of his estate. Subsequently, the 1st Defendant obtained the Plaintiffs' signatures on a power of attorney which he used, in November 2003, to apply for a grant of letters of administration over the Mustafa Estate.[16] Since then, the 1st defendant has been

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12 *Ibid* at paras 41–45 and 51–52.

13 SOC at paras 18–24 and DCC at paras 42–48.

14 Asia's Affidavit at paras 21–23.

15 DCC at para 40; 5th Affidavit of Ayaz Ahmed dated 2 May 2018 ("Ayaz's 5th Affidavit") at para 84.

the sole administrator and trustee of the Mustafa Estate.[17]

10 Between the time of Mr Mustafa's passing in July 2001 and 2014, MMCPL did not declare any dividends.[18] In or around 2013, the 1st Plaintiff began making inquiries of the status of the Mustafa Estate, but apparently to no avail, as the 1st Defendant did not provide the requested information.[19] Disputes soon arose between the parties in relation to the administration of the Mustafa Estate. After several attempts at reaching a settlement, the Plaintiffs instituted High Court Suit No 1158 of 2017 (the present suit) and High Court Family Suit No 9 of 2017 on 8 December 2017.[20] As noted in the introduction, the former is an action in oppression commenced "on behalf of the Mustafa Estate", in which the Plaintiffs claim that the affairs of MMSCPL have been conducted in a manner which is oppressive to the Mustafa Estate's interests as a minority shareholder.[21] The latter is a probate action commenced against the 1st Defendant only in which the Plaintiffs claim that the 1st Defendant has breached his duties as administrator and seek, among other things, to have the letters of administration granted to him revoked.[22]

The pleadings

11 The principal complaints which form the basis of the plaintiffs' action in oppression may be summarised as follows:[23]

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16 SOC at paras 54–60 Shama Bano's 3rd Affidavit at p 21.

17 SOC at paras 1–2; DCC at para 3.

18 SOC at para 74.

19 Ayaz's 5th Affidavit at paras 29–31.

20 *Ibid* at paras 32–45.

21 SOC at para 8 and PWS at paras 11 and 12.

22 Shama Bano's 3rd Affidavit at para 11.

23 SOC at para 36.

(a) First, they plead that on 5 January 1995 and 11 December 2001, the 1st Defendant, acting in concert with some or all of the other Defendants, wrongfully caused MMSCPL to issue a total of 5,040,000 shares to himself at a price of S$1 per share. They plead that these allotments, which I shall refer to as the "1995 Share Allotment" and the "2001 Share Allotment" respectively, resulted in the dilution of the Mustafa Estate's shareholding in MMSCPL, and were (i) made at an undervalue; (ii) done without first obtaining the necessary shareholders' resolutions; and (iii) not needed in the commercial interests of MMSCPL and were purely for the Defendants' own benefit.[24]

(b) Second, they plead that the Defendants misappropriated the funds and assets of MMSCPL in three ways:[25]

(i) Between 2000 and 2015, the Defendants caused MMSCPL to extend multiple unsecured and interest free loans, many of which had no fixed terms of repayment and all of which were not in the interests of MMSCPL, to themselves.[26]

(ii) Between 2004 and 2005, the 1st Defendant "concocted sham transactions backed by sham invoices" to create the false impression that MMSCPL was indebted to B.I. Distributors Pte Ltd, a company wholly owned by himself and the 2nd Defendant, in order to siphon funds out of MMSCPL for his personal use.[27]

(iii) Over the years, the 1st Defendant caused MMSCPL to overstate the salaries of its employees in its applications for their

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24 SOC at paras 36–53.

25 *Ibid* at para 72

26 *Ibid* at paras 62–64.

27 *Ibid* at paras 65–67, particularly para 65(c).

work passes. They plead that the difference between the "declared salaries" and the actual salaries of the workers was collected from the workers each month and passed to the 1st Defendant, who kept them for his own benefit.[28]

(c) Third, between 17 July 2001 and 2014, the 1st and 2nd Defendants used their controlling stakes in MMSCPL to pay themselves directors' fees amounting to an average of 51% of MMSCPL's net profits each year while declaring no dividends, thereby unfairly precluding the Mustafa Estate from sharing in the "substantial profits" which MMSCPL made during that time.[29]

(d) Fourth, the Defendants attempted to use MMSCPL's funds to hide their wrongdoing by proposing substantial dividend payments in 2014, 2015, and 2016 in an attempt to "placate and buy off the Plaintiffs" before contriving to stretch out the payments over twelve months to place pressure on the Plaintiffs to give up their claims.[30]

12 For ease of reference, I shall refer to these as the "Wrongful Share Allotments", "Wrongful Misappropriation", "Directors' Fees and Dividends", and "Wrongful Concealment" claims respectively.

13 Insofar as the substantive reliefs are concerned, the plaintiffs seek:

(a) Declarations that the 1995 and 2001 Share Allotments are void and orders that they be set aside.[31]

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28 *Ibid* at paras 68–71, particularly paras 68(e)–(j).

29 *Ibid* at paras 74–76.

30 *Ibid* at paras 77–109, particularly at paras 79, 81, 86, and 109.

31 *Ibid* at paras IX(1)–(4).

(b) An order that an independent expert be appointed to assess the losses allegedly suffered by MMSCPL as a result of the Defendants' conduct.[32]

(c) A declaration that the Defendants are jointly and severally liable to account to MMSCPL for all sums they wrongfully misappropriated and/or all benefits they wrongfully obtained pursuant to the acts set out at [11(b)] above.[33]

(d) An order that MMSCPL be wound up.

14 The Defendants dispute the very foundation of the Plaintiffs' claim. Their position is that by virtue of the 1973 Common Understanding, the 1st Defendant is the beneficial owner of all the shares in MMSCPL, notwithstanding that a number of those shares are registered in the names of Mr Mustafa and Mr Shamsuddin.[34] They therefore counterclaim for a declaration that all the MMSCPL shares currently registered in the name of the Mustafa Estate are held on trust for the 1st Defendant and for a consequential order that the share register of MMSCPL be rectified to reflect this.[35]

15 The Defendants also deny the specific allegations raised by the Plaintiffs. I do not propose to summarise all of what they have said save to note that they have pleaded that the 1995 and 2001 Share Allotments were done with the "full knowledge" of all relevant parties. They plead that the former was supported by a shareholders' resolution executed by the 1st Defendant, Mr Mustafa, and Mr Shamsuddin (the "1995 Resolution")[36] while the latter was

32 *Ibid* at para IX(5).

33 *Ibid* at paras IX(6) and (7).

34 DCC at paras 51 and 63–65.

35 DCC at paras 53–54; paras (1)–(4) at pp 66 and 67.

supported by a shareholders' resolution executed by the 1st Defendant and Mr Shamsuddin (as Mr Mustafa had passed away by that time) in 2001 (the "2001 Resolution").[37] I shall refer to them collectively as the "Resolutions".

16 In contrast to the SOC and the Defence and Counterclaim ("DCC"), each of which exceeds 100 paragraphs, the Reply and Defence to Counterclaim ("RDCC") is relatively brief. It comprises just 12 paragraphs and while it ends with the usual *seriatim* clause it does not, for the most part, address any of the specific allegations raised in the DCC. Notably, it does not address either the 1973 Common Understanding or the Resolutions. I will say more of this later (see [64]–[67] below).

Outline of the present application

17 On 4 April 2018, the Defendants filed the present application for striking out under Order 18 r 19 of the Rules of Court (Cap 322, R 5 2014 Rev Ed) (the "Rules"). I have already outlined the three grounds of the application and the parties' respective positions at [2]–[3] above, and do not propose to summarise their arguments at this juncture as I will deal with them in the course of my analysis. The only point I would make now concerns the scope of the grounds and their relationship with the claims in this suit. The first ground, which concerns the decision in *Wong Moy*, covers the entirety of the suit, as it relates to the Plaintiffs' standing to bring this suit.[38] The second and third grounds only cover parts of the action. The former relates only to the Wrongful Misappropriation claim while the latter relates only to the Wrongful Share Allotments claim.[39]

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36 DCC at para 69.

37 DCC at para 89.

38 NE, p 14, lines 30–32.

18 Insofar as the law is concerned, the principles which govern an application for striking out are well settled and were succinctly summarised by the High Court in *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 as follows (at [79]):

> … the Court should only exercise its power to strike out in "plain and obvious" cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: *Kwa Ban Cheong* [*v Kuah Boon Sek* [2003] 3 SLR(R) 644] at [29], citing *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547 at 553. I am fully cognisant that the role of the Court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [18] and *The "Osprey"* [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see *Ko Teck Siang and another v Low Fong Mei and another and other actions* [1992] 1 SLR(R) 22 at [15], citing *Wenlock v Moloney* [1965] 2 All ER 871 at 874. Instead, the correct question for the Court to ask is whether the commencement of the present suit constitutes a *plain and obvious case* of an abuse of the process of the Court. [emphasis in original]

19 After careful consideration of the competing arguments, I reject the first and second grounds put forward by the Defendants but accept, in part, the arguments they made in relation to the third ground. However, I decline to strike out the SOC and instead order that the pleadings be amended. I set out my detailed reasons in the paragraphs which follow.

The first ground: the *Wong Moy* issue

20 In the main, an action in oppression may only be brought by a member or a holder of debentures in a company (see s 216(1) of the CA). However,

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[39] NE, p 15, lines 12–21.

s 216(7) of the CA grants standing to persons to whom "shares in the company have been transmitted by operation of law", even if they are not registered members of the company. This is significant here because when a grant of administration is made, the whole of an intestate's estate, including all shares and all choses in action, vests in the person to whom the grant is made (see s 37(4) of the Probate and Administration Act (Cap 251, 2000 Rev Ed) and the decision of the English High Court in *Ingall v Moran* [1944] 1 KB 160 at 167–168). This dual transmission – of the title to the shares and the cause of action in oppression – by operation of law confers upon the personal representative of a deceased aggrieved member standing to bring an action in oppression (see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, 2009) ("*Woon on Company Law*") at para 5.57).

21 However, the difficulty here is that none of the Plaintiffs are the personal representatives of the Mustafa Estate. Instead, they are mere beneficiaries and do not, as such, have standing to sue on behalf of the Mustafa Estate (see the decision of the High Court in *Fong Wai Lyn Carolyn v Kao Chai-Chau Linda* [2017] 4 SLR 1020 ("*Carolyn* Fong") at [7]). This general rule is subject to the exception is that the courts will, in "special circumstances", permit an action to be brought by a beneficiary on behalf of the estate (at [8]). The *locus classicus* on this is the decision of the Court of Appeal in *Wong Moy*.

22 In *Wong Moy*, the appellant commenced an action seeking a declaration that the respondent held certain property on trust for the estate of her late husband, who had died intestate. This suit was commenced before the appellant had extracted the grant of letters of administration for the estate and the respondent applied to strike the suit out on the ground that the appellant lacked standing. The suit was struck out by the High Court but reinstated on appeal. The Court of Appeal first began by affirming the general principle that the

beneficiaries of an intestate estate have no equitable or beneficial interest in any particular assets comprised in an estate which is under administration, but only a right to have it administered properly. Thus, the court held that the appellant had no *personal* right to bring the action to seek the declaration in question (at [11]). However, it then went on to hold that (at [12]):

> It does not follow from this that a beneficiary of an estate which is unadministered or under administration has no legal remedy. He or she may in certain circumstances institute action to recover assets of the estate. … [There are] cases in the equity courts in which a creditor or pecuniary or residuary legatee was allowed to follow and recover assets which had been improperly abstracted from an estate. ...

23 Citing this passage, Mr Joanthan Yuen, counsel for the Defendants, contends that the *Wong Moy* exception has no application here, as the present suit is not, *per se*, an action for the recovery of the assets of the estate.[40] In support of this submission, he pointed out that the plaintiffs in *all* the local cases which have applied *Wong Moy* "were seeking to recover or protect property which belonged to the deceased, or which was held on trust for the beneficiaries and/or the deceased's estate".[41] By contrast, Ms Sngeeta Rai, counsel for the Plaintiffs, contends that the *Wong Moy* exception is available in respect of "all causes of action" and entitles a beneficiary to claim "any type of relief", subject only to the limitation that he cannot do so for his own benefit. In support of this, she cited the decision of New South Wales Supreme Court, *Chahwan v Euphoric Pty Ltd t/as Clay & Michael and another* [2009] NSWDC 805 ("*Chahwan*") and the decision of the Singapore High Court in *Ching Chew Weng Paul v Ching Pui Sim and others* [2010] 2 SLR 76 ("*Paul Ching*").[42]

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40 DWS at para 21(b).

41 DWS at para 39.

42 PWS at paras 34–35; Plaintiff's further written submissions at para 3.

24 Against this background, two questions arise for consideration. The first is whether the *Wong Moy* exception entitles a party to bring an action in oppression on behalf of the estate or whether it is restricted only to actions for the recovery of property. The second question is whether there are "special circumstances that entitle the Plaintiffs to rely on the *Wong Moy* exception.

The scope of the Wong Moy *exception*

25 The rule that *only* the personal representative (which includes both executors and administrators) can take action on behalf of the estate is one of long standing. In *Bickley v Dorrington* (1737) 25 ER 877, a bill was filed by the creditors and a residuary legatee of a testator seeking the recovery of money owing to the estate. Lord Hardwicke LC held that the action was "totally improper" and "inconsistent with the principles of law and the rules of the court" (at 879). His Lordship explained his decision in the following way (*ibid*):

> … No action or suit can be brought against a debtor to the estate but by the executor or personal representative of the testator. *The whole management of the estate belongs to him.* The right of it is vested in him, and cannot be taken away by creditors or legatees. If he release a demand and is solvent, it is a *devastavit* in him, and he is personally answerable for the sum released. *In cases of collusion or insolvency it may be proper to come here for satisfaction against the debtor; but there must always be some special case … Many inconveniences would attend this method of proceeding, except in cases particularly circumstanced …* [emphasis added]

26 In *Carolyn Fong*, it was explained that confining the right of action to the personal representative has the salutary effect of avoiding a multiplicity of actions, which would not only subject the estate to the costs of divergent actions, but also result in the vexation of third parties, who might otherwise be subject to multiple actions (at [9]). The duty of a personal representative is to call in the assets of the deceased and distribute them according to law, and to that end he is empowered to take such proceedings as might be necessary to discharge this

duty (see G Raman, *Probate and Administration in Singapore and Malaysia* (LexisNexis, 3rd Ed, 2012) at pp 157 and 165 and *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell, 8th Ed, 2013) ("*Williams, Mortimer and Sunnucks*") at para 55-08). This includes the commencement of such proceedings as the deceased could have taken in order to maximise the value of the estate, such as the taking of timely action to call in debts, and a personal representative may be liable if the estate suffers loss as a result of his failure to do so (see *Williams, Mortimer and Sunnucks* at para 57-20). Thus, it has always been assumed that the interests of the beneficiaries are adequately protected against the adverse acts of third parties through actions instituted by personal representatives (see the decision of the High Court of Australia in *Alexander v Perpetual Trustees WA Limited* (2004) 204 ALR 247 at [55]).

27 The principal recourse for disgruntled beneficiary in the face of inaction by the administrator was to bring an administration action. In exceptional cases, however, beneficiaries could sue in the Court of Chancery to either (a) compel the administrator to take action or (b) to seek leave to sue in his name (see *Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597 at 609 and the decision of the Supreme Court of New South Wales in *Ramage v Waclaw* (1988) 12 NSWLR 84 at 89–93). Later, to avoid a multiplicity of actions, beneficiaries were permitted to bring both the leave application and the substantive suit itself in a single action (see the decision of the Supreme Court of Victoria in *Porker v Richards & Ors* [2016] SASC 98 at [88]). In the United Kingdom (see the decision of the United Kingdom Supreme Court in *Roberts v Gill & Co and another* [2011] 1 AC 240 ("*Roberts v Gill*")) and New Zealand (see the decision of the New Zealand Court of Appeal in *Cowan v Martin* [2014] NZAR 1197 at [53]), this is now known as a "beneficiaries' derivative action".

28 The use of the expression "derivative" is helpful because it makes it clear that the beneficiaries are not exercising any right of action personal to them, but are instead bringing an action on behalf of the estate. As Lord Collins of Mapesbury JSC explained, "the beneficiary [in a derivative action] *stands in the place of the administrator and sues in the right of the estate,* and does not enforce duties owed to him rather than to the administrator" [emphasis added] (see *Roberts v Gill* at [22]). In the seminal decision of the Privy Council (on appeal from the High Court of Australia) in *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston* [1965] AC 694 ("*Livingston*"), Viscount Radcliffe put the point as follows (at 714A–C):

> … The basis of such proceedings is they are *taken* ***on behalf of the estate*** and, if they are successful, they can only result in ***the lost property being restored to the estate*** for use in the due course of administration. *Thus, while they assert the beneficiary's right of remedy, they* ***assert the estate's right of property****, not the property right of creditor or legatee*; indeed, the usual situation in which such an action has to be launched is that in which the executor himself, the proper guardian of the estate, is in default and thus his rights have to be put in motion by some other person on behalf of the estate. [emphasis added in italics and bold italics]

29 Mr Yuen submitted that the use of the expression "lost property being restored to the estate" implies that the *Wong Moy* exception relates only to actions for the recovery of assets.[43] During the hearing, I expressed the view that these six words seemed to be a rather slender foundation on which to qualify a principle that appeared to be of much wider application.[44] After reviewing the relevant authorities, I am fortified in my view. It seems to me that there are at least three reasons to reject this reading of *Livingston*, and the accompanying restriction on the *Wong Moy* exception it would entail.

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43 Defendants' further written submissions at para 6.

44 NE, p 17, lines 6–24.

30 First, such a reading ignores the proper context of the decision in *Livingston*. That case concerned the payment of succession duty, and the facts were these. A testator died leaving a third of his estate to his widow. However, the widow herself passed away before the estate could be wholly administered and a question then arose as to whether, at the time of her death, she had a *beneficial interest* in the testator's estate such as would attract the payment of succession duty under the relevant taxing statute. The Privy Council answered this question in the negative, affirming the long-standing principle that a beneficiary has no proprietary interest in any specific asset in an unadministered estate (see [22] above). In the course of his speech, Viscount Radcliffe addressed several criticisms that had been advanced against this principle, one of which was that it seemed to ignore cases where beneficiaries were permitted to bring a derivative action to "follow and recover assets which have been improperly abstracted from an estate" (at 714A). He explained that these cases did not in fact contradict the general principle because the beneficiaries in those cases were never exercising any cause of action *personal* to them, but were instead exercising the *estate's* right of action (at 714B).

31 Viscount Radcliffe had referred specifically to cases involving actions for the recovery of lost property because his intention was to make it clear that they did not contradict the general proposition that beneficiaries have no proprietary interest in any specific asset in an unadministered estate, which was the principal issue in that case. The issue of the scope of the beneficiaries' derivative action was *never* within his contemplation (indeed, the cases on a beneficiaries' derivative action were only referred to in passing in a single paragraph of his Lordship's speech). When seen in their proper context, therefore, it seems to me to be clear that the words "lost property restored to the estate" imply focus rather than exclusion, and cannot be used to justify any sort of limitation on the scope of the *Wong Moy* exception.

32 Second, such a reading would be contrary to principle. As I explained at [25]–[27] above, the whole point of the *Wong Moy* exception is to allow beneficiaries to do what the personal representatives ought to have done to ensure that "the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded" (see *Livingston* at 713B *per* Viscount Radcliffe). To accomplish this, it is not enough that beneficiaries be allowed to take action to recover lost property, because this would limit the scope of a beneficiary's derivative action only to the *preservation* of assets which are already in the estate. It would not allow them to take action to take steps to call in and realise the full value of the estate (see [26] above). There does not appear to be any principled reason to permit beneficiaries to bring the former category of actions (that is, actions for the recovery of lost property), but not the latter category (actions to collect and realise the full value of the estate) when both types of action result in the realisation of property to the estate "for use in the due course of the administration" (see *Livingston* at 714B).

33 This view finds support in the decision of the Privy Council (on appeal from the Court of Appeal of Hong Kong) in *Joseph Hayim Hayim v Citibank NA* [1987] AC 730 ("*Joseph Hayim*"), where Lord Templeman summarised the position in the authorities as follows (at 748F–G):

> These authorities demonstrate that *a beneficiary has* ***no cause of action*** against a third party *save in* ***special circumstances*** which embrace a failure, excusable or inexcusable, by the trustees in the performance of *the duty owned by the trustees to the beneficiary to* ***protect the trust estate*** *or to* ***protect the interests of the beneficiary in the trust asset.*** [emphasis added in italics and bold italics]

34 Two observations should be made about this passage. The first is that Lord Templeman clearly contemplates that a derivative action is to be brought in order that the beneficiaries can do *whatever* the personal

representative/trustees ought (but failed) to do. This includes, among other things, the taking of timely action to call in debts (see [26] above) even though his cannot be characterised as an action for the recovery of estate property. The second is that he emphasises that actions may be taken not only to "protect the trust estate", but also the "interests of the beneficiary in the trust asset". The latter is a wider category that would appear to embrace all actions which have as their object the realisation of the full value of the estate through, among other things, actions to recover possession of property (see, *eg*, the decision of the English Court of Appeal in *Heslop and another v Burns and another* [1974] 3 All ER 406) or actions to set aside void or voidable dispositions, such as those made by the deceased while under undue influence (see, *eg*, the decision of the English High Court in *In re Craig* [1971] Ch 95).

35 Third, the defendants' proposed reading runs against the grain of contemporary authority. While earlier authority limited the beneficiary's right of action only to equitable claims, this is no longer the modern position (see the decision of the Federal Court of Australia in *Lidden and another v Composite Buyers Ltd and others* (1996) 67 FCR 560 at 552 and 553, followed by the New South Wales Court of Appeal in *Lamru Pty Ltd v Kation Pty Ltd* (1998) 9 BPR 16,571 at 16,574–16,15757 and the Australian Central Territories Court of Appeal in *John Patrick Davey v Valerie Herbst, Adam Richard Herbst and Eric Malcolm Bray (No 2)* [2012] ACTCA 19 at [80]). Instead, it has been judicially recognised in Australia that the beneficiaries' derivative action is not confined to any particular causes of action. In *Chahwan*, Brereton J held that (at [18]):

> … the doctrine *is available in respect of* ***all causes of action*** *which a trustee may have against third parties.* However, it must always be borne in mind *the action brought by a beneficiary in such a case is no more and no less than the action that the trustee would and could have brought against the third party.* It is a claim brought, albeit by the beneficiary, in the right of the trustee. … [emphasis in italics and bold italics]

36 This is not to say that beneficiaries have *carte blanche* to pursue whatever causes of action they wish. The requirement of "special circumstances" serves as a fine mesh filter that sieves out actions which are properly brought by way of a derivative action and those which are not (see [47] below). This also appears to be the position in Singapore. In *Paul Ching*, Steven Chong J (as his Honour then was) held that a beneficiary bringing a derivative action can "claim any reliefs on behalf of the estate" (at [58]). The limiting principle is that "a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner" (see *Wong Moy* at [14]), citing 747C of *Joseph Hayim*). This is entirely logical, for the *Wong Moy* exception only allows a beneficiary to exercise the estate's right of action and cannot be invoked to confer upon the beneficiary a cause of action which even the administrator, acting on behalf of the estate, would not have.

37 The decision of the High Court in *Lakshmi Anil Salgaocar v Vivek Sudarshan Khabya* [2017] SGHC 120, which Mr Yuen cited, is instructive in this regard. The plaintiff was the wife of a man who died intestate. She commenced an action on behalf of her late husband's estate against the defendant, who was the chief executive officer of a company of which her late husband was the sole shareholder. She claimed, among other things, that the defendant had misappropriated rental income which properly belonged to the subsidiaries of the company and sought (a) "an account of all money due to the beneficiaries of the Estate which was received by the defendant" and (b) "a declaration that the defendant is personally liable to make good all sums received by him as trustee or agent for the beneficiaries of the Estate" (at [54]). At the time she commenced the suit, the plaintiff had applied for, but not yet received, letters of administration but she argued, relying on *Wong Moy*, that she had standing to bring the suit. The action was struck out by the Assistant Registrar at first instance, and the decision was upheld on appeal.

38 George Wei J explained that while the *Wong Moy* exception would entitle the plaintiff to exercise *the estate's* right of action, this was of little use in this context because the estate did not – as a mere shareholder – have any standing to bring an action to recover *the company's* income or assets, let alone those of the company's subsidiaries. At [55], he observed that "what stands between the beneficiaries of the Estate and the [rental income, among other things] themselves is not a trust but the corporate forms of [the company] and the 22 subsidiaries". Any action against the defendant would therefore have to be taken by the aggrieved companies themselves. However, as I pointed out to My Yuen during the hearing, there is no such difficulty in this case as it is not disputed that the action in oppression is one which the personal representatives of the Mustafa Estate would have standing to bring (see [20] above).

39 By reason of the foregoing, I was prepared to conclude that there was no reason, either in authority, principle, or policy, to conclude that the *Wong Moy* exception does not extend to the bringing of a claim in oppression. However, after the hearing, and after a draft of this judgment had been prepared, Hoo Sheau Peng J released her grounds of decision in *Sia Chin Sun v Yong Wah Poh (Sia Tze Ming, non party)* [2018] SGHC 142 ("*Sia Chin Sun*"), where she held that *Wong Moy* exception only permitted a beneficiary to bring "proprietary claims to protect and preserve the assets of an estate" (at [50]). Given that *Sia Chin Sun* appeared to be directly relevant to the present issue, I invited the parties to tender further written submissions to address the case, and they both did. I record my appreciation to counsel for their assistance.

***The decision in* Sia Chin Sun**

40 *Sia Chin Sun* concerned an action commenced by a testator while he was still alive. The precise nature of the testator's case was, in the words of the Hoo

J, "somewhat confusing", but in gist the action was centred on two principle allegations. The first was that the defendant had misappropriated a total of $1.2m from the testator's bank account as well as the account of his sole proprietorship. The second is that he had exercised undue influence to persuade the testator to transfer his share of a property in Emerald Garden to the defendant at an undervalue. The testator sought, among other things, an order that the defendant account to him for all "loss and damage" and an injunction prohibiting the defendant from disposing of his assets (at [13]). Less than a year after the action was commenced, the testator passed away. Probate proceedings were then commenced to determine, among other things, the question of who had the right to represent his estate. Before the probate proceedings could run their course, the testator's daughter (who was a beneficiary under the testator's will) applied, relying on *Wong Moy*, for leave to intervene in the application to seek an interim injunction, on behalf of the estate of the testator, against the defendant to prevent him from disposing of his assets. This was resisted by the defendant on the ground that the *Wong Moy* exception only allowed a beneficiary to institute proceedings "where there were claims of a proprietary nature", and that there was "no legal basis to permit a beneficiary to intervene pursue purely pecuniary claims" (at [23(a)]).

41 Hoo J agreed with the defendant's submissions on the scope of the *Wong Moy* exception but disagreed that the present claim was one which concerned only pecuniary claims. At [27] of *Sia Chin Sun*, Hoo J held that:

> With that in mind, I turn to the first point made by Mr Yong's counsel that based on *Wong Moy,* a beneficiary does not have *locus standi* to pursue purely pecuniary claims on behalf of an estate. It bears noting in this regard that the High Court in *Omar* cited the following remarks from *Re Atkinson, deceased* [1971] VR 612 ("*Re Atkinson*") at 700 to explain that the basis for such proceedings by a beneficiary is that "they are taken on behalf of the estate and if they are successful, they can only result in the lost property being restored to the estate for use in

> the due course of administration. Thus, while they assert the beneficiary's right of remedy, they assert the estate's right of property…" *Therefore, I agreed with Mr Yong's counsel's contention that a beneficiary would not have locus standi to pursue a personal claim with pecuniary reliefs on behalf of the estate.* ***Any proceedings must be grounded in the need to protect and preserve the assets of the estate.*** [emphasis added in italics and bold italics]

42 Turning to apply this to the facts, Hoo J first rejected the contention that a claim for the return of money could not be a proprietary claim, observing that "[m]oney belonging to an estate is as much an asset … as any other asset of the estate" (at [29]). On this basis, she held that the claim for the return of money was a proprietary claim because a tracing order had been prayed for (at [30]). Likewise, she held that the claim in relation to the Emerald Garden property was also a proprietary claim, as the gist of the testator's claim was that no consideration had in fact been provided for the transfer (at [31]). Thus, she concluded that "the action [was] one giving rise to both personal and proprietary claims in relation to the money belonging to the estate", and was therefore properly brought under the *Wong Moy* exception (at [35]).

43 The crux, as I see it, is the dichotomy between "proprietary claims" and "purely pecuniary claims". Hoo J did not explain precisely what she meant by this, but as a starting point, it seems to me that her Honour could not have in mind the distinction, applied in the conflict of laws, between (a) proceedings against a *res* concerning title to property and (b) purely *in personam* claims (see, generally, *The Republic of the Philippines v Maler Foundation and others and other appeals* [2014] 1 SLR 1389 at [64]–[66] and [84]). This is because Hoo J held that the claim for the return of the $1.2m, and the Emerald Garden property claim were *both* proprietary claims even though neither of them related *per se* to the question of title (at [30]–[31]). It is also equally clear that Hoo J did not mean that a proprietary claim must be one for the *return of estate assets* because

the action was commenced when the testator was still alive and his estate had not been constituted yet. Furthermore, the claim for arising out of the $1.2m allegedly misappropriated is plainly framed as an *in personam* action against the defendant for breach of trust in respect, as the testator had sought the remedies of equitable compensation and an account of profits, both of which are personal, and not proprietary, remedies (see the decision of the High Court in *Quality Assurance Management Asia Pte Ltd v Zhang Qing* [2013] 3 SLR 631 at [34] and [101]). (Tracing is neither a cause of action nor a remedy, but an evidential tool: see the decision of the Court of Appeal in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [114].)

44 What, then, did Hoo J mean by a "proprietary claim"? It seems to me that the answer is given in the final sentence of [27]: it is a claim which has as its *object* the protection and preservation of the assets of the estate. By this measure, the present action in oppression passes muster since its whole purpose is to protect the value of the Mustafa Estate's shares in MMSCPL (and to realise their full value) by seeking redress for the harm caused by the defendants' allegedly oppressive acts. To this end, the Plaintiffs seek, among other things, an order that the 1995 and 2001 Share Allotments be reversed and that MMSCPL be wound up in order that the value of the Mustafa Estate's shareholding can be realised.[45] It is plain that any judgment obtained here would not merely be a "monetary judgment flowing from a successful claim for personal relief", which Hoo J held cannot be brought under *Wong Moy* (at [51]).

45 In any event, I am mindful that what is before me is an application for striking out. As the Court of Appeal cautioned in *The Bunga Melati 5* [2012] 4

[45] SOC at para IX(8)

SLR 546 at [76], "knotty points of law requiring serious argument … should not be decided by a court exercising summary jurisdiction". Given the novelty and importance of the point in issue, I am satisfied that this is a case where this principle should apply, and it is sufficient that I consider that it is at least arguable that the *Wong Moy* exception would allow a beneficiary to bring an action in oppression on behalf of an estate. My view would not change even if it were held that I was wrong in my interpretation of *Sia Chin Sun*. As Choo Han Teck J held in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2015] SGHC 44, even if the law were settled (which I do not think it is), it would still be open for a party "to try and unsettle it" and it would not be proper for such an attempt to be stymied at an interlocutory stage through an application for striking out (at [11]–[14]). This is subject, of course, to the caveat that it must not be "plain and obvious" that its attempt is doomed to fail, but for the reasons set out above, I do not think that is the case here. With that, I turn now to consider the issue of whether there are "special circumstances" that entitle the Plaintiffs to rely on the *Wong Moy* exception.

Whether there are special circumstances

46 Mr Yuen contends that the Plaintiffs cannot avail themselves of the *Wong Moy* exception because they have not "exhausted all possible means to protect the estate".[46] He points out that they are presently trying to have the 1st Defendant replaced as administrator of the Mustafa Estate through probate proceedings in the Family Justice Courts (see [10] above) and submits that their attempt to seek concurrent relief here by relying on *Wong Moy* "is impermissible and an abuse of process".[47] With respect, I cannot agree.

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46 DWS at para 21(c).

47 *Ibid*.

47 In *Wong Moy*, the Court of Appeal said that in deciding whether a beneficiary should be permitted to institute proceedings on behalf of the estate "all the circumstances of the case should be considered", and in the course of that inquiry it "may be pertinent to see whether the circumstances made it 'impossible, or at least seriously inconvenient for the representatives to take proceedings'" (at [28]). In *Carolyn Fong*, Chong JA explained that the list of "special circumstances" is not closed and the courts would have to consider a wide range of factors, including "the executor's unwillingness or inability to sue, the merits of the case, and the potential loss to the beneficiaries" in determining whether the test is satisfied (at [8] and [9]). The short point is that while the availability of alternative avenues of redress is certainly a relevant factor, Mr Yuen has not pointed me to any authority which states that the exhaustion of alternative remedies is a *condition precedent* to the availability of the *Wong Moy* exception. Indeed, any such submission would appear to be untenable in light of *Sia Chin Sun*, where the beneficiary was permitted to bring a claim even though there were ongoing probate proceedings.

48 On the facts, there is at least one factor which weighs strongly in favour of the plaintiffs' position, and it is that the administrator of the estate – the 1st Defendant – is himself one of the defendants in this suit. On the authority of *Wong Moy*, this is a "pertinent" factor that weighs in favour of the grant of relief. Of course, this alone is not determinative, and the court will have to consider matters in the round before deciding whether to allow the Plaintiffs recourse under the *Wong Moy* exception, but it is not for me, at this interlocutory stage, to perform this exercise. It is sufficient for me to conclude, which I have no hesitation in doing, that it is not "plain and obvious" that the Plaintiffs' attempt will fail. For these reasons, I reject the first ground of the application.

The second ground: the corporate claims issue

49 I turn to consider the second ground, which relates to the Defendants' argument that the Wrongful Misappropriation claim (see [11(b)] above) is a corporate claim that cannot be brought in an oppression action. Before I turn to the substantive arguments, I will first deal with a preliminary point. The corporate claims argument was only raised for the raised time in the reply affidavit which was filed by the 1st Defendant on 16 May 2018. It was neither raised in the body of the summons nor in the supporting affidavit which was filed by the 3rd Defendant in support of this application on 4 April 2018. Ms Rai objected strongly to the way in which this ground had been raised, arguing that her clients were prejudiced in not being able to reply to it.[48] If this were the whole of it, I might have been prepared to agree with Mr Yuen that this objection is unpersuasive since this ground of the application raises a pure question of law which the Plaintiffs had ample time to prepare for and respond to.[49] However, I think that the difficulty runs deeper than that.

50 The present summons contains two substantive prayers. The first, which relates only to the *Wong Moy* argument, is that the SOC be struck out in its entirety.[50] The second, which is prayed for in the alternative, is that only the paragraphs in the SOC listed in Schedule 1 of the Summons, all of which which relate to the Wrongful Share Allotments claim, be struck out. There is *no* indication of the paragraphs that ought to be struck out if it were found that the Wrongful Misappropriation claim cannot be brought in this suit.[51] In my view, this omission is fatal. It is settled law that if a party wishes for the court to strike

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48 DWS at para 165 and NE, p 21, lines 16–25.

49 NE, p 24, lines 15–19.

50 NE, p 14, lines 30–32.

51 NE, p 15, lines 12–21.

out any part of a pleading, it is incumbent upon that party to state, in clear and unambiguous terms, "the exact words or passage[s] or lines in the pleadings that are sought to be struck out" (see the decision of the Malaysian High Court in *Dr Leela Ratos & Ors v Anthony Ratos s/o Domingos Ratos & Ors* [1996] 3 MLJ 167 ("*Dr Leela Ratos*") at 179). It is no answer to this objection to say, as Mr Yuen did during the hearing, that it would suffice for me to make an order that "all paragraphs relating to [the Wrongful Misappropriation claim] be struck out".[52] In this regard, the following extract from the judgment of Kamalanathan Ratnam JC in *Dr Leela Ratos* is instructive (at 179–180):

> … Buckley J held in *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 3)* [1970] Ch 506 that where a party sought to strike out some part of his opponent's pleading, he had to indicate clearly exactly what it was he wanted struck out; if the allegation objected to was not in express terms, ***it was not sufficient merely to ask that it be struck out 'in so far as it may contain' such an allegation***. I am of the view that the duty of an applicant to strike out a paragraph or part thereof is to identify that which is sought to be struck out. ***It does not behove an applicant to be vague and ambiguous in his application as to the prayers he wants, and to rely on such prayers on matters averred to in his affidavit. An affidavit is to support the application, not vice versa. An affidavit can contain very many prayers.*** *I could thus be opening the proverbial Pandora's box if I were to accept the first respondent's arguments* that I ought to look for the prayers he wants not in his application, but in his supporting affidavit.
>
> *Such a dangerous precedent could be used with impunity by any applicant who, having failed to specify what exactly he is asking for, could rely on some statement or paragraph of his affidavit to infer any prayer* that he wants. …
>
> [emphasis added in italics]

51 I respectfully agree. The danger, as I see it, is two-fold. First, an order that a pleading be struck out "in so far as" it relates to a particular claim is so vague as to be thoroughly unhelpful, and will just lead to more downstream litigation over the precise terms of compliance with the order. Second, it places

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52 NE, p 23, lines 21–24 and 29–30.

both the respondent and the court in an invidious position as it would be difficult, if not impossible, to defend or decide the application when the precise scope of it has not been properly defined and is liable to be enlarged through further material put forward on affidavit. In my view, this is sufficient to dispose of this ground of the application. However, in the event that I am wrong on this, and in deference to the extensive arguments advanced by counsel on this issue, I will give my reasons for why I would not have allowed the application on this ground even if it had been properly brought.

The distinction between personal and corporate wrongs

52 In *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*"), the Court of Appeal explained that there were two main reasons why s 216 of the CA cannot be used to "vindicate essentially corporate wrongs". First, it would undermine the legislative scheme which contemplates that corporate claims should be pursued by way of a derivative action under s 216A of the CA, for which leave is required, instead of an oppression claim under s 216 of the CA, in respect of which there is no leave requirement. Second, it would result in an "improper circumvention" of the proper plaintiff rule (at [63]–[65]). In its recent decision in *Ho Yew Kong v Sakae Holdings and other appeals* [2018] SGCA 33 ("*Sakae (CA)*"), the Court of Appeal set out the following analytical framework to assist parties in distinguishing between personal and corporate wrongs in the context of s 216 of the CA (at [116]):

> 116 … In our judgment, the appropriate analytical framework to ascertain whether a claim that is being pursued under s 216 is an abuse of process is as follows:
>
> (a) **Injury**
>
> (i) What is the real injury that the plaintiff seeks to vindicate?

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) **Remedy**

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

(ii) Is it a remedy that can only be obtained under s 216?

53 In cases involving a miscellany of different complaints, the proper approach is to proceed in two steps (see the decision of the Newfoundland Supreme Court in *Pappas v Acan Windows Inc* (1991) 2 BLR (2d) 180 at [110] and [111], approved by the High Court in *Tan Eck Hong v Maxz Universal Development Group Pte Ltd* [2017] SGHC 309 at [37]). First, the court should examine if the derivative and personal claims are so "'intermingled' and 'inextricably woven' that the cause of action is of an essentially derivative character. If this is the case, the action cannot be allowed to proceed. If, however, the "personal claims can be clearly separated from the derivative claims as to permit their continuance while discontinuing the derivative claims", then the court should move to the second step, which is to consider whether to exercise its discretion in the plaintiff's favour. With these points in mind, I turn to characterisation of the Wrongful Misappropriation claim.

The characterisation of the Wrongful Misappropriation claim

54 Mr Yuen's argument is a short one. He submits that the Wrongful Misappropriation claim is, on its face, plainly a corporate claim, as it is one which seeks redress for a wrong done to the company – the misappropriation of company funds. He accepts that the usurpation of corporate assets for personal purposes can, in some cases, amount to minority oppression. However, he

contends that in all the cases where such an argument was accepted, there was something *more* than the mere act of misappropriation or breach of fiduciary duty (almost invariably, this comes in the form of a legitimate expectation between the shareholders) which transmuted the corporate wrong into a personal one. However, he submits that this critical ingredient is missing here.[53]

55 I was initially persuaded by Mr Yuen's argument. At first blush, the Wrongful Appropriation claim appears to be a quintessential example of a corporate claim, as the injuries (the lost funds, the exposure to possible criminal and civil liability etc.) were sustained solely by MMSCPL. The Mustafa Estate's losses, it would appear, arise solely out of the diminution of the value of its shares, which makes it reflective loss that cannot found an independent cause of action. It would therefore seem to follow that if the alleged misappropriations are to be seen not only as a corporate wrong against MMSCPL, but also as a separate and distinct wrong committed against the late Mr Mustafa, then *something more* must, but has not, been shown. On reflection, however, I consider that this is not the right approach to adopt. In this regard, I found the following remarks of Millett J in the decision of the English High Court in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 to be instructive (at 783*f*–*h*):

> Counsel for the petitioners asked: 'If misconduct in the management of the company's affairs does not without more constitute unfairly prejudicial management, what extra ingredient is required?' *In my judgment the distinction between misconduct and unfairly prejudicial management does not lie in the particular acts or omissions of which complaint is made, but in the nature of the complaint and the remedy necessary to meet it. It is a matter of perspective.* ***The metaphor is not a supermarket trolley but a hologram. If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the complaint is one of misconduct simpliciter.*** *There is no need to assume the burden of alleging and proving that the acts*

53 NE, p 15, lines 2–21.

> *or omissions complained of evidence or constitute unfairly prejudicial management of the company's affairs. It is otherwise if the unlawfulness of the acts or omissions complained of is not the whole gist of the complaint, so that it would not be adequately redressed by the remedy provided by law for the wrong.* In such a case it is necessary to assume that burden, but it is no longer necessary to establish that the acts or omissions in question were unlawful, and a much wider remedy may be sought. [emphasis added in italics and bold italics]

56 The phrase "not a supermarket trolley but a hologram" is piquant and evocative. The proper approach is not to ascertain whether the individual acts or omissions would, in and of themselves, be characterised simply as corporate wrongs, before then considering whether they can nevertheless be said to have been oppressive because of some additional factor. Instead, the court ought to ascertain the true nature of the plaintiff's complaint in the context of the pleadings as a whole, having regard both to the "real injury" sought to be vindicated and the "essential remedy" sought (see *Sakae (CA)* at [116(a)(i)], cited at [52] above), in order to determine the true character of the claim.

57 Reading the SOC in its totality, the constant refrain which is repeated throughout is that the Defendants had abused their directorships and conducted MMSCPL's affairs with the principal purpose of benefiting themselves at the expense of the minority shareholders. For instance, it is pleaded the 1995 and 2001 Share Allotments were "devised by [the 1st Defendant] and/or [the 2nd Defendant] for [the 1st Defendant's] own benefit, and consequently for [the 1st Defendant's] own family".[54] In like manner, the thrust of the Directors' Fees and Dividends claim is that the 1st and 2nd Defendants had unfairly privileged their own interests over those of the minority shareholders by paying themselves excessive directors' fees, thereby preventing dividends from being declared.[55] The Wrongful Misappropriation claim is no different. It is founded on the

54 SOC at paras 44 and 52.

55 *Ibid* at para 75.

allegation "the [1st Defendant had a] penchant for enriching himself" and would "siphon funds out of MMSCPL for his own benefit [and that of his family]", heedless of the injury that they were causing to the interests of the minority shareholders.[56] This is clearest at paragraph 72 of the SOC:

> By acting in the manner pleaded in paragraphs 62 to 71 above, [the Defendants] acted in breach of their fiduciary duties set out in paragraph 34 above and *have treated and continue to treat the funds and assets of MMSCPL as their personal funds and assets and/or have misused and/or misapplied the funds and assets of MMSCPL for the benefit of persons and entities related to [the 1st Defendant].* The Plaintiffs will be relying on the breaches of fiduciary and other duties set out in paragraph 62 to 71 above as ***evidence of the manner in which [the Defendants] had conducted the affairs of MMSCPL oppressively and in disregard of the Mustafa Estate's interests as a minority shareholder.*** [emphasis added in italics and bold italics]

58 Read fairly and in context, the "real injury" that the Plaintiffs complain of is not the financial losses arising from the misappropriations *per se* (if it were so, it would be debatable if this could be characterised as a personal claim, as these losses would accrue only to MMSCPL). Instead, the wrongful misappropriations have been relied on as *evidence* of the systemic nature of the abuse which they say, taken as a whole, signifies the Defendants' wanton disregard of the Mustafa's Estate's interests as a minority shareholder and constitutes serious commercial unfairness (see *Ng Kek Wee* at [69]). The essential remedy the Plaintiffs seek is that MMSCPL be wound up, which is relief that is only available under s 216 of the CA. While they did pray for restitutionary orders against the defendants (namely, orders that the defendants account for all sums allegedly misappropriated), these support, rather than supplant, the winding up order as their object is to ensure that all sums belonging to MMSCPL are returned in order that there might be a proper account to all shareholders upon the company's dissolution (see *Sakae (CA)* at [128]).

[56] *Ibid* at paras 65, 66, and 71–72, especially para 71.

59 When viewed in this light, it is clear that the Plaintiffs' "true complaint" is that the Defendants have used their positions in MMSCPL to cause the company's assets to be diverted for their personal benefit (or, as the Plaintiffs put it rather more forcefully in their written submissions, that they have "treated MMSCPL as [their] personal piggybank"[57]). This has been described in a leading treatise as "the most singularly censurable form of oppressive conduct", as it "disregards the common interests of the corporate participants and offends the basic expectation of the corporate participants to share in the assets and profits of the enterprise" (see Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 4.119).

60 Of course, it might well be the case that at the end of the trial the court will find that the allegations do not in fact make out a case in oppression, and that the substance of the Plaintiffs' case at trial is one which is more properly litigated by way of a derivative action. However, that is not the inquiry which is before me. The question before me, at this interlocutory stage, is whether it is so "plain and obvious" that the complaint is one which cannot be mounted by way of an action in oppression, and for the reasons which I have outlined above, I answer this question in the negative.

The third ground: the Wrongful Share Allotments claim

61 Finally, I come to the third ground of this application, which concerns the argument that the Wrongful Share Allotments claim is plainly and obviously unsustainable. In *The Bunga Melati 5*, the Court of Appeal explained that an action which is "plainly or obviously unsustainable" is one which is either legally or factually unsustainable (at [39]). An action is legally unsustainable if it is "clear at as a matter of law at the outset that even if a party were to succeed

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57 PWS at para 51.

in proving all the facts that he offers to prove he will not be entitled to the remedy he seeks" while an action is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance" (*ibid*). Here, the Defendants contend that the Wrongful Share Allotments claim is unsustainable in both senses.

Legal sustainability

62 In their written submissions, the Defendants contended that this claim should be struck out for being legally unsustainable because it relates to events which occurred before the formation of the Mustafa Estate on 21 July 2001.[58] However, Mr Yuen did not press this point during the hearing, and I think for good reason, because I consider – with respect – that the argument is misconceived. While the Mustafa Estate was only formed after many of the events which are complained of happened, this is quite beside the point. Upon the death of a person, all causes of action, save for those specifically excepted, subsisting against or vested in him survive and inure to his estate (see s 10 of the Civil Law Act (Cap 43, 1999 Rev Ed) and *Teo Gim Tiong v Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased)* [2014] 4 SLR 15 at [21]). Given that there is no question that the late Mr Mustafa would have been able to bring a claim in respect of the 1995 Share Allotment while he was alive, anyone clothed with the authority to act on behalf of his estate would likewise be able to bring such a claim today.

Factual sustainability

63 Next the Defendants contend that the claim is factually unsustainable because the 1995 and 2001 Share Allotments were – contrary to what was pleaded in the SOC – authorised by the Resolutions in accordance with the

[58] DWS at paras 48–54.

MMSCPL Constitution and therefore cannot be said to be oppressive (see [15] above).[59] They further contend that any reference to the involvement of the 5th Defendant in the 1995 Share Allotment should be struck out as he was neither a director nor a shareholder of MMSCPL at the material time nor did he have any role in authorising the 1995 Share Allotment.[60]

64 The Resolutions were referred to in the DCC, but they were exhibited for the first time on 4 April 2018 in the affidavit which the 3rd Defendant filed in support of the present application.[61] On 18 April 2018, the Plaintiffs filed notices of non-admission of respect of the Resolutions.[62] In the reply affidavits which they filed on 3 May 2018, they made the following five points:

(a) First, they argue that the circumstances under which the Resolutions had been produced were "highly suspicious" as they were only produced after this suit had been commenced, and were not included in the set of resolutions which were provided pursuant to their request for copies of "all shareholders' and directors' resolutions" that was made in late 2016, before the commencement of this action.[63]

(b) Second, they point out that the Resolutions, which record that extraordinary general meetings were held to discuss the 1995 and 2001 Share Allotments, contradict what is said in the 3rd Defendant's supporting affidavit and the DCC, where it is explained that pursuant to the 1973 Common Understanding, no actual meetings were held and the issuance of the notices of general meeting was just a formality.[64]

59 DWS at paras 57–59.

60 DWS at para 68.

61 Shama Bano's Affidavit at pp 30 and 41.

62 See notices of non-admission (Plaintiff's Bundle of Affidavits, Tab 6).

63 PWS at paras 68–77.

(c) Third, they aver that it is "inconceivable" that Mr Mustafa would have signed the 1995 Resolution as it had the effect of diluting his shareholding, contrary to his stated intention to protect his shares for the benefit of the Plaintiffs (see [7(a)] above).[65]

(d) Fourth, they state that they "do not accept that it is [Mr] Mustafa's signature on the 1995 Resolution and/or [Mr Shamsuddin's] signature on the 1995 and 2001 Resolution[s]".[66] In this regard, they assert that the signature on the 1995 Resolution is very different from those which appear on Mr Mustafa's passports and they say that even if it had in fact been signed by Mr Mustafa, it is clear, from the fact that it was signed in an "unsteady hand", that he was very frail at the time.[67]

(e) Finally, they submit that even if Mr Mustafa and Mr Shamsuddin had signed the Resolutions, they did not do so with the intention of approving the 1995 and 2001 Share Allotments. In this regard, they point to, among other things, the fact that (i) neither of them could read or write English and therefore could not have known the purpose of the Resolutions; (ii) both of them routinely "sign[ed] documents blindly"; and (iii) in 1995, Mr Mustafa was already ailing and accepted whatever the 1st Defendant told him as he trusted him implicitly.[68]

65 In his reply affidavit dated 16 May 2018, the 1st Defendant categorically denies all of this and avers that the raising of these points is "nothing more than

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64 PWS at paras 78–79; Shama Bano's 3rd Affidavit at paras 40 and 48, and the DCC at paras 69(b) and 89(b).

65 PWS at paras 80–81 and Asia's Affidavit at para 20.

66 PWS at para 82.

67 Ayaz's 5th Affidavit at paras 97–98 and Asia's Affidavit at para 28.

68 PWS at paras 83–90.

a smear tactic" by the Plaintiffs.[69] He said that while MMSCPL belonged to him absolutely under the 1973 Common Understanding (see [14] above), he would always explain the contents of any documents that he asked Mr Mustafa and Mr Shamsuddin to sign as a matter of courtesy. He also averred that Mr Mustafa remained lucid and mentally alert until shortly before his passing.[70]

66 It is plain to me, and indeed Mr Yuen very fairly conceded as much during the hearing, that there are serious disagreements of fact which cannot be resolved at this stage.[71] For instance, the issue of the authenticity of the signatures on the Resolutions is not one that can be resolved by the speculations of laypersons, however familiar they might be with the handwriting of the purported signatory. Instead, it is a matter that must be given proper forensic treatment, and it is possible that expert evidence might have to be led. Likewise, the allegations that Mr Mustafa lacked mental capacity must be tested by reference to the testimony of persons familiar with Mr Mustafa's condition at the relevant time. It is not possible for this to be resolved on the basis of affidavit evidence alone, without the benefit of further discovery and cross-examination. The problem, however, is that that *none* of the allegations have been pleaded. This poses a particular difficulty in this context as the allegations – which raise, among other things, arguments of *non est factum* and forgery – are serious and must be specifically pleaded (see O 18 r 8 of the Rules and *Singapore Civil Procedure 2018* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell 2018) ("*Singapore Civil Procedure*") at para 18/8/26).

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69 1st Affidavit of Mustaq Ahmad @ Mushtaq Ahmad s/o Mustafa dated 16 May 2018 at para 11.

70 *Ibid* at paras 25–29.

71 NE, p 16, lines 20–30.

67 In these circumstances, and putting aside for now the question who is to blame for the absence of these points from the RDCC (the Plaintiffs contend that blame lies at the Defendants' door because of their late disclosure of the shareholders' resolutions),[72] I would have thought it quite unarguable that the proper way forward would be to order an amendment, since the general approach of the courts in such cases is to save rather than destroy (see the decision of the Court of Appeal in *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 at [12]). It is for this reason that I invited the Plaintiffs to amend their pleadings. However, the Plaintiffs declined the invitation and submitted instead that no amendment was necessary nor should one be ordered, because even without the additional material introduced in the reply affidavits, the present application would have been bound to fail because a claim in oppression can be brought even if the plaintiff had signed a shareholders' resolution approving the impugned act.[73] With respect, I cannot agree.

68 As a starting point, I accept that a claim in oppression can be brought even if the plaintiff had signed a shareholders' resolution approving the impugned act. However, this alone is not sufficient to save the SOC from being liable to be struck out. The issue, as I see it, turns on the burden of proof. In order to explain this, it is useful to start by considering the three cases cited by Ms Rai. In *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 ("*Over & Over*"), the Court of Appeal found that a share transfer was oppressive even though the minority shareholder had consented to it, because the circumstances were such that the majority shareholder had contrived to give the minority little choice but to agree (at [102]–[105]). Likewise, in *Sakae Holdings Ltd v*

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72 PWS at paras 73–77.

73 NE, p 22, line 20 to p 21, line 19; p 23, lines 6–19.

Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit [2017] SGHC 73 ("*Sakae (HC)*"), the High Court found that an act was oppressive even through it had been approved by a shareholders' resolution signed by the chairman of the plaintiff's board of directors (Mr Foo). Critical to the court's reasoning was its finding that Mr Foo had signed the resolution without paying heed to its contents as he trusted one of the defendants (Mr Ong) unquestioningly because he saw their interests as being completely aligned (at [154]–[156]). By contrast, the opposite result was reached in *Thio Syn Kym Wendy and others v Thio Syn Pyn and others* [2017] SGHC 169 ("*Wendy Thio*"). The issue before the court there was whether the act of the defendant-brothers in procuring the payment of performance bonuses to themselves as reimbursement for legal fees which they had incurred in defending themselves in a personal suit commenced against them by their father was oppressive. The court held that it was not, because the evidence was that plaintiffs were fully aware of the purpose of the performance bonuses "and had in fact knowingly facilitated them" (at [93]).

69 What unites *Over & Over* and *Sakae (HC)* is that the plaintiffs had led cogent evidence to show they had not *freely and knowingly* consented to the acts in question. This was a critical part of their case. If they had not done so, their claims in oppression would have failed, for it does not lie in one's mouth to complain that the acts which one has approved are oppressive. This was precisely where the claim in *Wendy Thio* faltered. Prakash JA held that while it was not "good corporate practice for directors to take money from the company to fund personal litigation … [their doing so could not constitute] commercial unfairness since all the plaintiffs were complicit in it" (at [93]).

70 The gravamen of the Plaintiffs' complaint in the Wrongful Share Allotments claim is that the Defendants had contrived to allow the 1st

Defendant to "acquire further shares in MMSCPL at a steep discount, thereby diluting the Mustafa Estate's shareholding in MMSCPL in the process."[74] This dilution is wrong, they plead, because it contravenes the MMSCPL Constitution, which mandates that all unissued shares must first be offered for subscription to all shareholders in proportion to their existing shareholdings *unless otherwise agreed by special resolution*.[75] As it is the Plaintiffs who are asserting that the 1995 and 2001 Share Allotments were wrongful because they were done outside the scope of the MMSCPL Constitution, they bear the legal burden of proving this. If they are unable to attack the Resolutions by showing that Mr Mustafa and/or Mr Shamsuddin had not *freely and knowingly* consented to the 1995 and 2001 Share Allotments – as the plaintiffs in *Over & Over* and *Sakae* had done but which they would not be able to, if they do not raise this in their pleadings – then it does seem to me that they can make good their case.

71 Furthermore, it is plain that there are parts of the SOC which cannot stand in the light of the material which has been put forward. The most obvious is the statement that the defendants had "disregarded" certain terms of the MMSCPL Constitution because they "did not obtain" any shareholders' resolutions authorising the Share Allotments.[76] Given that the Defendants have now produced the Resolutions, this statement is either factually incorrect or critically ambiguous, because it is not clear if the Plaintiffs' position is that the documents are forgeries or do not comply with the terms of the MMSCPL Constitution or otherwise. On the one hand, the Plaintiffs state that they "do not admit to the authenticity" of the Resolutions because they do not accept that the signature on the 1995 Resolution was Mr Mustafa's; on the other hand, they say that even if the signature was Mr Mustafa's, he "would not have understood"

74 SOC at paras 44 and 52.

75 *Ibid* at para 21.

76 SOC at paras 41 and 49.

what he was signing (see [64] above).[77] These are clearly alternatives that are mutually exclusive, and while they might plausibly be pleaded in the alternative, this must be stated clearly in the pleadings.

72 The next concerns the statement that the 5th Defendant was complicit in the 1995 Share Allotment. At the material time, the 5th Defendant was *not* a director of MMSCPL, and was only its company secretary. As a matter of law, company secretaries exercise *administrative*, and not *executive* functions and have no power to make commercial decisions such as those involving the placement of new shares (see *Woon on Company Law* at para 7.5–7.6 and Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at paras 08.097). Furthermore, there is nothing in the affidavits which suggest that the 5th Defendant was involved in the passing of the 1995 Resolution. In fact, the only evidence is to the contrary. The 1995 Resolution records that the decision to approve the 1995 Share Allotment was taken by the 1st and 2nd Defendants and Mr Mustafa and Mr Shamsuddin. The 5th Defendant's only role, as far as it appears from the face of the 1995 Resolution, was to file the necessary forms with the Registry of Companies.[78] Thus, I agree with Mr Yuen that the paragraphs alleging the complicity of the 5th Defendant in the 1995 Share Allotment must either be amended or struck out.

73 In any event, I note that the court always has the power to order an amendment of the pleadings of its own motion. In this regard, O 20 r 8(1) of the Rules provides as follows:

> **Amendment of certain other documents (O. 20, r. 8)**
>
> 8.—(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of

[77] Ayaz's 5th Affidavit at paras 95–102 and Asia's Affidavit at paras 24–28.

[78] Shama Bano's 3rd Affidavit at p 30.

> correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

74 It has been said that in an adversarial system of justice such as ours, this power will rarely be exercised. However, it is one which is always available to allow the court "to raise the real point at issue between the parties, and to ensure that [the] proceedings are free from errors and defects" (see *Singapore Civil Procedure* at paras 20/8/4 and 20/8/5). I am satisfied that this a fitting case for this power to be exercised because the Plaintiffs themselves admit that the crux of the issue is whether Mr Mustafa had freely and knowingly approved the 1995 Share Allotment, and that in order to decide this, the court must (but presently cannot, because they have not been pleaded) consider all the points raised at [64] above.[79] Thus, even if the Wrongful Share Allotments claim were not liable to be struck out without an amendment, I would nevertheless have been minded to order that the pleadings be amended to ensure that all the allegations made in the affidavits which ought to be specifically pleaded are included.

75 This brings me to the form of the order. I am mindful that it is not for the court force upon the parties amendments which they do not ask for (see *Singapore Civil Procedure* at para 20/8/4). Thus, I propose to grant the Plaintiffs leave to amend their SOC and RDCC to address the matters set out at paragraphs [63]–[74] above without specifying the precise form that the amendments should take. If necessary, I will review the proposed amendments and hear arguments on their propriety at a separate hearing.

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79 PWS at para 84.

Conclusion

76 For the reasons set out above, I decline to strike out the SOC, whether in whole or in part, and instead order that both the SOC and RDCC be amended. As the amendments to the SOC are minor and will consist mostly of deletions, I do not propose to grant the Defendants leave to amend their DCC at this point, although I am prepared to hear arguments on this if need be.

77 As far as the future conduct of this summons is concerned, I direct as follows:

(a) the Plaintiffs shall provide the Defendants with a copy of their proposed amended pleadings within two weeks of the date of this judgment;

(b) a further hearing shall be scheduled for a date to be fixed, whereupon I will hear arguments on the propriety of the proposed amendments to the pleadings and deal with the issue of costs; and

(c) the parties are granted the usual liberty to apply.

78 In closing, it remains only for me to thank Ms Rai and Mr Yuen for their comprehensive and helpful submissions, which greatly assisted me in the preparation of this judgment.

Scott Tan
Assistant Registrar

Davinder Singh SC, Sngeeta Rai, and Teo Li Fang (Drew & Napier LLC) (instructed); and Darshan Singh Purain, Avtar Ranee Kaur Purain, and Avinash Singh Purain (Darshan & Teo LLP) for the plaintiffs;
Lee Eng Beng SC, Hamidul Haq, Yuen Djia Chiang Jonathan, Gan Eng Tong, Istyana Putri Ibrahim, Chiang Hai Qiang Jason Gabriel, Chia Ming Yee Doreen, and Wong Shi Yun (Rajah & Tann Singapore LLP) for the defendants.