IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 133

Originating Summons No 1513 of 2018 (Summons No 5458 of 2019)

Between

Reignwood International
Investment (Group) Co Ltd

… *Plaintiff*

And

Opus Tiger 1 Pte Ltd

… *Defendant*

Originating Summons No 1514 of 2018 (Summons No 5459 of 2019)

Between

Reignwood International
Investment (Group) Co Ltd

… *Plaintiff*

And

Opus Tiger 2 Pte Ltd

… *Defendant*

Originating Summons No 1515 of 2018 (Summons No 5460 of 2019)

Between

Reignwood International
Investment (Group) Co Ltd

… *Plaintiff*

And

Opus Tiger 3 Pte Ltd

… *Defendant*

Originating Summons No 1516 of 2018 (Summons No 5461 of 2019)

Between

Reignwood International
Investment (Group) Co Ltd

… *Plaintiff*

And

Opus Tiger 4 Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Parties] — [Joinder] — [Non-party applying for joinder after final order made] — [Whether court still had power to order joinder] — [Whether power to order joinder should be exercised] — [O 15 r 6(2)(*b*) Rules of Court (Cap 322, R 5, 2014 Rev Ed)]
[Companies] — [Statutory derivative action] — [Intended defendant applying to be joined to application for leave to commence action]

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v
Opus Tiger 1 Pte Ltd and other matters

[2021] SGHC 133

General Division of the High Court — Originating Summonses Nos 1513, 1514, 1515 and 1516 of 2018 (Summonses Nos 5458, 5459, 5460 and 5461 of 2019)
Vinodh Coomaraswamy J
18 August, 23 September 2020

23 June 2021

Vinodh Coomaraswamy J:

Introduction

1 Reignwood International Investment (Group) Co Ltd ("Reignwood") commenced these four originating summonses in December 2018.[1] The sole defendant in each originating summons is a subsidiary of a company called Opus Offshore Ltd ("OOL").[2] The four defendants are somewhat unimaginatively called Opus Tiger 1 Pte Ltd ("OT1"), Opus Tiger 2 Pte Ltd, Opus Tiger 3 Pte Ltd and Opus Tiger 4 Pte Ltd.[3] I shall refer to the defendants

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1 Lai Yi-Chun's 3rd Affidavit in HC/OS 1513/2018 at paras 3 and 5.

2 Cosimo Borrelli's Tiger 1 Affidavit at para 7; Cheng Siu Ming's Tiger 1 Affidavit at para 5.

3 Cheng Siu Ming's Tiger 1 Affidavit at para 5; Cosimo Borrelli's Tiger 1 Affidavit at para 7.

collectively as the "Opus Tiger Companies" and to each defendant as an "Opus Tiger Company".

2 In each originating summons, Reignwood sought an order granting it leave under s 216A(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") to commence derivative proceedings in the name of each Opus Tiger Company against a company called Shanghai Shipyard Co Ltd ("SHSY").[4] In May 2019, I granted Reignwood the leave that it sought, albeit on certain undertakings (see [28] below).[5]

3 By four interlocutory summonses filed in October 2019, SHSY has applied under O 15 r 6(2)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) to be joined as a party to the s 216A applications. SHSY's joinder applications present two questions which are novel, at least in Singapore. Both questions lie at the intersection of company law and procedural law. The first question is whether the intended defendant in proposed derivative proceedings may be joined under O 15 r 6(2)(*b*) as a party to the s 216A application which seeks leave to bring the derivative proceedings. The second question is, if so, whether the intended defendant may be so joined even after the court has granted the leave.

4 SHSY advances three arguments in support of its joinder applications. First, the intended defendant in proposed derivative proceedings has an obvious interest in the subject-matter and outcome of the s 216A application. SHSY therefore satisfies the requirements for joinder set out in O 15 r 6(2)(*b*). Second,

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4 Lai Yi-Chun's 3rd Affidavit in HC/OS 1513/2018 at para 3.

5 HC/ORC 3169/2019; HC/ORC 3170/2019; HC/ORC 3380/2019; HC/ORC 3379/2019.

even though I have already granted Reignwood the leave which it sought, the s 216A applications have not yet concluded. Therefore, I continue to have the power under O 15 r 6(2) to join SHSY as a party to the s 216A applications. Third, SHSY is not to blame for bringing its joinder applications only after I had granted leave to Reignwood. Reignwood deliberately concealed the s 216A applications from SHSY and misled SHSY to prevent SHSY from opposing them.[6]

5 Reignwood advances two arguments in response to SHSY. First, these s 216A application concluded when I granted the leave to Reignwood or, at the very latest, when the time expired for the Opus Tiber Companies to appeal against my grant of leave. Therefore, I no longer have any power under O 15 r 6(2) to join SHSY to the s 216A applications. Second, the subject matter of the s 216A applications – leave to bring proposed derivative proceedings under s 216A(2) of the Act – raises only issues which are internal to the company and which are no concern of the intended defendant in the proposed derivative proceedings. Therefore, SHSY cannot satisfy the requirements of O 15 r 6(2)(*b*).[7]

6 I have dismissed SHSY's joinder applications. I accept SHSY's submission that I still have the power under O 15 r 6(2)(*b*) to join it to the s 216A applications even though I have already granted leave to Reignwood. However, I accept Reignwood's submission that an intended defendant in proposed derivative proceedings cannot satisfy the requirements of O 15 r 6(2)(*b*) simply by virtue of its status as the intended defendant.

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6 SHSY's Written Submissions dated 11 August 2020 ("SWS") at paras 3 and 36(b).

7 Plaintiff's Written Submissions dated 11 August 2020 ("PWS") at para 39.

7 Further, on the facts of this case, I decline to exercise my inherent jurisdiction, preserved by O 92 r 4, to join SHSY to the s 216A applications, or even to allow Reignwood to be heard on certain interlocutory applications which are pending in the s 216A applications (see [34] below).

8 Given that the questions which arise on SHSY's joinder applications are novel (see [3] above), I have granted SHSY leave to appeal. I now set out the grounds for my decision.

Background

The parties

9 Reignwood is a company incorporated in Hong Kong.[8] It owns 70% of the shares of OOL.[9] Together with a related company, Reignwood is also a substantial creditor of OOL, claiming a total debt of US$79.2m.[10]

10 OOL is a company incorporated in Bermuda.[11] It is the ultimate holding company of a group of companies called the Opus Group. The Opus Group is an offshore drilling contractor: it owns offshore drilling rigs, constructs and owns drill ships and provides offshore drilling services to the oil and gas industry.[12]

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8 Cheng Siu Ming's Tiger 1 Affidavit at para 4.

9 Cheng Siu Ming's Tiger 1 Affidavit at para 5.

10 Cosimo Borrelli's Tiger 1 Affidavit at para 34.

11 Cheng Siu Ming's Tiger 1 Affidavit at para 5.

12 Cosimo Borrelli's 1st Affidavit in HC/OS 1513/2018 ("Cosimo Borrelli's Tiger 1 Affidavit") at para 7.

11 As its full name suggests (see [2] above), SHSY is a shipyard incorporated in and carrying on business in Shanghai in the People's Republic of China ("the PRC").[13]

12 The Opus Tiger Companies are wholly owned subsidiaries of OOL and are all incorporated in Singapore.[14] Each Opus Tiger Company exists for the sole purpose of owning a single drill ship to be built by SHSY.[15] Each Opus Tiger Company therefore has its own shipbuilding contract with SHSY (the "Contracts" and each a "Contract") under which it was to pay SHSY a substantial sum of money in exchange for a drill ship to be constructed and delivered by SHSY.

OOL's insolvency

13 In February 2017, with Reignwood's support, the Supreme Court of Bermuda made an order winding up OOL and appointing joint provisional liquidators ("the JPLs").[16]

14 Each Opus Tiger Company is entirely dependent on OOL for funding. As a result of OOL's insolvency, the Opus Tiger Companies are therefore also

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13 Cheng Siu Ming's 1st Affidavit in HC/OS 1513/2018 ("Cheng Siu Ming's Tiger 1 Affidavit") at para 10.

14 Cosimo Borrelli's Tiger 1 Affidavit at para 7; Cheng Siu Ming's Tiger 1 Affidavit at para 5.

15 Cheng Siu Ming's Tiger 1 Affidavit at paras 6, 12 and 18; Cheng Siu Ming's 1st Affidavit in HC/OS 1514/2018 ("Cheng Siu Ming's Tiger 2 Affidavit") at paras 12 and 17; Cheng Siu Ming's 1st Affidavit in HC/OS 1515/2018 ("Cheng Siu Ming's Tiger 3 Affidavit") at para 12; Cheng Siu Ming's 1st Affidavit in HC/OS 1516/2018 ("Cheng Siu Ming's Tiger 4 Affidavit") at para 12.

16 Cheng Siu Ming's Tiger 2 Affidavit at paras 8 to 9; Cosimo Borrelli's Tiger 1 Affidavit at p 38, para 3.

themselves insolvent.[17] Unlike OOL, the Opus Tiger Companies are not subject to any formal insolvency proceedings. But the JPLs have taken direct control of the Opus Tiger Companies by appointing their nominees to form a majority on each Opus Tiger Company's board.

15 OOL's provisional liquidation is a light-touch provisional liquidation under Bermudan law (see *In the Matter of Up Energy Development Group Limited and in the matter of the Companies Act 1981* [2016] SC (Bda) 83 Com (20 September 2016) and *In the Matter of Z-obee Holdings Limited* [2017] SC (Bda) 16 Com (21 February 2017)). The JPLs were therefore not appointed to liquidate OOL and its subsidiaries. The JPLs were instead appointed to take advantage of the moratorium against creditor action which OOL now enjoys in order to restructure OOL and the Opus Group's debts and business, and thereby to achieve an enhanced return for creditors.[18]

16 Soon after their appointment in February 2017, therefore, the JPLs started negotiations with the creditors of OOL and of the Opus Group. These negotiations broke down in late 2018, in large part because SHSY and Reignwood could not agree how to treat SHSY's claim against OT1 (see [18]–[20] below) in the Opus Group's restructuring.[19]

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17 Cosimo Borrelli's Tiger 1 Affidavit at paras 13 and 21.

18 Cosimo Borrelli's Tiger 1 Affidavit at paras 34 to 58.

19 Cosimo Borrelli's Tiger 1 Affidavit at para 58; Cheng Siu Ming's Tiger 1 Affidavit at para 72.

The Contracts

17 It is now necessary to move backwards in the chronology in order to describe the Contracts in more detail.

18 The earliest and most advanced of the Contracts between SHSY and the Opus Tiger Companies is the one between SHSY and OT1.[20] The OT1 Contract obliged OT1 to pay SHSY the price of the drill ship in three instalments.[21] OT1 was obliged to pay the third and final instalment of US$170m to SHSY when SHSY delivered the drill ship.[22]

19 SHSY's position is that OT1 breached the Contract in late 2016 when it failed to pay SHSY the final instalment under the OT1 Contract and failed to take delivery of the drill ship.

20 Accordingly, in December 2016, SHSY served a notice to complete on OT1.[23] In January 2017, while the winding up petition was pending against OOL, SHSY served a notice of default on OT1. Finally, in February 2017, on the same day that the JPLs were appointed, SHSY served a notice on OT1 formally terminating the OT1 Contract.

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20 Cheng Siu Ming's Tiger 1 Affidavit at para 18.

21 Cheng Huanmin's 1st Affidavit at pp 99 to 172.

22 Cosimo Borrelli's Tiger 1 Affidavit at paras 14 and 16.

23 Cheng Siu Ming's Tiger 1 Affidavit at para 32.

21 In March 2017, SHSY served notices on the other three Opus Tiger Companies formally terminating their Contracts.[24]

22 SHSY has the benefit of a guarantee from Reignwood of OT1's obligation to pay the final instalment of US$170m under the OT1 Contract.[25] In May 2017, SHSY served a demand on Reignwood under the guarantee requiring Reignwood to pay US$170m to SHSY.[26]

23 In November 2018, SHSY commenced proceedings against Reignwood in the English Commercial Court to enforce SHSY's rights under the guarantee.[27]

24 Reignwood's position on SHSY's claim under the guarantee is that: (a) OT1 is not obliged to take delivery of the drill ship; (b) the final instalment payable under the OT1 Contract has not fallen due; (c) Reignwood is not liable to SHSY under the guarantee; and (d) SHSY had no right to terminate the OT1 Contract. Indeed, Reignwood's case is that SHSY's purported termination of all four of the Contracts is itself a repudiatory breach of the Contracts for which SHSY is obliged to compensate the Opus Tiger Companies.

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24 Cheng Siu Ming's Tiger 1 Affidavit at para 43; Cheng Siu Ming's Tiger 2 Affidavit at para 33; Cheng Siu Ming's Tiger 3 Affidavit at para 28; Cheng Siu Ming's Tiger 4 Affidavit at para 28.

25 Cheng Siu Ming's Tiger 1 Affidavit at para 16.

26 Cheng Siu Ming's Tiger 1 Affidavit at para 37; p 245, para 19.

27 SWS at para 5; Cheng Huanmin's 1st Affidavit at para 6; Cheng Siu Ming's Tiger 1 Affidavit at para 74.

The relevance of the background

25 None of this background is directly relevant to SHSY's four joinder applications which are now before me. But the background does shed light on the motivations of all those involved. In particular, the background explains the proliferation of litigation since late 2018. SHSY has commenced litigation against Reignwood in England (see [22]–[23] above). Reignwood commenced these four s 216A applications against the Opus Tiger Companies in Singapore. Reignwood has commenced the derivative proceedings against SHSY pursuant to the leave I granted to Reignwood on the s 216A applications. The Opus Tiger Companies have filed four applications seeking directions on the scope of the leave I granted (see [34] below). SHSY has filed these four joinder applications. And SHSY has, with my leave, filed four appeals against my dismissal of its joinder applications.

26 What is going on is, in effect, a battle between Reignwood (who is the single largest shareholder and claims to be a substantial creditor of OOL)[28] and SHSY (who claims to be OOL's single largest creditor)[29] for influence and advantage as to how the claims and crossclaims arising from the Contracts should be treated in OOL's insolvency and restructuring.[30]

27 Be that as it may, SHSY's joinder applications must be approached and will be determined only in the terms in which they have been presented to me:

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28 Cheng Siu Ming's Tiger 1 Affidavit at para 5; Cosimo Borrelli's Tiger 1 Affidavit at para 34.

29 Notes of Argument ("NAs") dated 18 August 2020, p 16, lines 4 to 5; p 20, lines 29 to 30.

30 NAs dated 18 August 2020, p 20, line 24 to p 21, line 14.

by applying the principles applicable to the joinder of parties to the specific context of an application under s 216A(2) of the Act.

The s 216A applications

28 In May 2019, as I have mentioned, I made orders under s 216A granting Reignwood leave to commence derivative proceedings against SHSY. The derivative proceedings are four arbitrations in London against SHSY, one in the name of each Opus Tiger Company. The relief sought in each arbitration is damages against SHSY for its alleged repudiatory breaches of the Contracts. Given the insolvency of the Opus Tiger Companies, I made the s 216A orders on Reignwood's undertaking to bear the costs of the arbitrations. The undertaking covers not only the Opus Tiger Companies' legal costs in pursuing the arbitrations but also: (a) any costs awarded in SHSY's favour; and (b) the JPLs' costs of rendering support in the arbitrations, *eg,* by reviewing and collating the Opus Tiger Companies' documents for discovery.[31]

29 I made the s 216A orders even though Reignwood is not a shareholder of the Opus Tiger Companies. In doing so, I accepted Reignwood's submission that its status as a shareholder of OOL – being the sole shareholder of the Opus Tiger Companies – makes it a "proper person" within the meaning of s 216A(1)(*c*) to apply for a s 216A order against the Opus Tiger Companies (see Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at paras 10.042 to 10.043).[32] Thus, the arbitrations which I gave Reignwood leave to commence against SHSY are what are commonly called "double derivative proceedings" or "multiple derivative proceedings" (see

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31 Annex A to HC/ORC 3169/2019 in HC/OS 1513/2018.

32 PWS dated 29 April 2019, paras 68–69.

Universal Project Management Services Ltd v Fort Gilkicker Ltd and others [2013] Ch 551 at [25]).

30 The deadline for the Opus Tiger Companies to appeal against the s 216A orders expired in June 2019. They did not appeal.

Events leading to the joinder applications

31 In June 2019, under the authority of the s 216A orders, Reignwood started the first arbitration against SHSY in the name of OT1. In its demand for arbitration,[33] Reignwood claimed to exercise two of OT1's rights under or arising from the OT1 Contract: (a) it exercised OT1's right to accept what it characterised as SHSY's repudiatory breach of the OT1 Contract; and (b) it exercised OT1's right under the OT1 Contract to direct SHSY to send all future notices and other communications in respect of the OT1 Contract to Reignwood's English solicitors rather than to OT1.

32 In August 2019, SHSY informed the Opus Tiger Companies that Reignwood's demand for arbitration against OT1 had purported to exercise OT1's rights in these two ways. SHSY suggested that the Opus Tiger Companies seek directions from the court as to whether the s 216A order in respect of OT1 permitted Reignwood to exercise these rights.[34]

33 In September 2019, Reignwood started the remaining three arbitrations against SHSY in the names of the remaining three Opus Tiger Companies.[35] In

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33 Cheng Huanmin's 1st Affidavit at p 492.

34 Cosimo Borrelli's 3rd Affidavit in HC/OS 1513/2018 at paras 27 to 33 and pp 27 to 30.

35 Lai Yi-Chun's 3rd Affidavit in HC/OS 1513/2018 at para 5.

those demands for arbitration, Reignwood did not attempt to terminate the relevant Contract for repudiatory breach. Reignwood did, however, exercise the three Opus Tiger Companies' rights to direct SHSY to send all future notices and other communications in respect of those Contracts to Reignwood's English solicitors rather than to the relevant Opus Tiger Company.

34 On 18 October 2019, the Opus Tiger Companies filed four applications seeking directions from the court as to whether the s 216A orders permitted Reignwood to exercise these rights on behalf of the Opus Tiger Companies. I shall refer to these applications as "the Directions Applications".[36]

35 On 31 October 2019, SHSY filed the four joinder applications which are now before me. SHSY's objective in applying to be joined as a party to the s 216A applications is twofold. Its immediate objective is to be heard on the Directions Applications. But its ultimate objective is to have the s 216A orders reversed and Reignwood's leave to commence the arbitrations revoked.[37] It intends to achieve this by applying for an extension of time to appeal against the s 216A orders and then by pursuing such an appeal.

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[36] HC/SUM 5234/2019; HC/SUM 5235/2019; HC/SUM 5236/2019; HC/SUM 5237/2019.

[37] NAs dated 18 August 2020, at p 9, lines 27 to 30; p 10, lines 17 to 24.

Order 15 r 6(2)(*b*)

36 SHSY brings its four joinder applications under O 15 r 6(2)(*b*).[38] That sub-rule provides, in so far as it is material:

> **Misjoinder and nonjoinder of parties**
>
> …
>
> (2) … at any stage of the proceedings … the Court may … —
>
> …
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person … whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party …

37 In *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*Ernest Ferdinand*"), the Court of Appeal held (at [195]) that O 15 r 6(2)(*b*) involves a two-stage inquiry. At the first stage, the inquiry is whether the court still has the power to order joinder, *ie*, whether the application is brought "at any stage of the proceedings" within the meaning of O 15 r 6(2). At the second stage, the inquiry is whether the court can and should exercise that power. The inquiry at the second stage is further subdivided into two parts: (a) first, the court determines whether the non-discretionary requirements of O 15 r 6(2)(*b*) are

[38] SWS at para 37.

satisfied (at [203]–[204]); and (b) second, the court undertakes a discretionary assessment as to whether joinder should be ordered, bearing in mind "all the factors which are relevant to the balance of justice in a particular case" (at [205]).

38 In *Ernest Ferdinand* at [195], the Court of Appeal referred to r 6(2)(*b*)(i) as "the necessity limb" and r 6(2)(*b*)(ii) as "the just and convenient limb". The Court of Appeal of course intended these terms merely to be convenient shorthand for – and not substitutes for or even summaries of – the actual statutory tests set out in each limb. Thus, as *Ernest Ferdinand* makes clear (at [203]–[204]), r 6(2)(*b*)(i) is not satisfied merely upon showing that joinder is necessary any more than r 6(2)(*b*)(ii) is satisfied merely upon showing that joinder is just and convenient. With that understanding, I shall use the Court of Appeal's terms to describe these limbs.

Questions to be determined

39 In light of the *Ernest Ferdinand* framework, SHSY's joinder applications raise four questions:

(a) Has SHSY brought these applications "at any stage of the [s 216A] proceedings", within the meaning of O 15 r 6(2)?

(b) If so, does SHSY satisfy the non-discretionary requirements of either the necessity limb or of the just and equitable limb?

(c) If so, should I exercise my discretion under O 15 r 6(2)(*b*) to join SHSY as a party to the s 216A applications, after assessing all the factors relevant to the balance of justice?

(d) If not, should I nevertheless exercise my inherent jurisdiction either: (a) to join SHSY as a party to the s 216A applications; or (b) to allow SHSY to be heard on the Directions Applications without being joined as a party?

40 Before addressing these questions in turn, I deal first with two submissions by SHSY and two points of terminology.

Two of SHSY's submissions

41 First, SHSY submits that the overarching consideration in a joinder application is fairness.[39] That is not correct. No doubt the Rules of Court are built on the fundamental conception of fairness. But they give effect to that conception by setting out specific statutory procedures that a person must follow and specific statutory requirements that it must satisfy in order to secure a desired procedural result. The overarching consideration on an application under O 15 r 6(2)(*b*) is therefore whether the party applying to be joined satisfies O 15 r 6(2)(*b*). Fairness is just one element of that consideration. It is not the overarching consideration.

42 Second, SHSY suggests that a person can satisfy O 15 r 6(2)(*b*) merely by showing that joinder is "necessary" or that joinder is "just and convenient".[40] I reject this submission also. As I have pointed out (see [38] above), these terms are not a substitute for the statutory test set out in each limb of O 15 r 6(2)(*b*).

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39 SWS at para 28.

40 NAs dated 18 August 2020, p 11, lines 17 to 20; p 17, lines 8 to 10; p 18, lines 19 to 24; p 21, lines 15 to 20; p 40, lines 15 to 16; p 44, lines 9 to 12.

Two preliminary points on terminology

43 I also make two preliminary points on terminology.

44 First, I shall refer to a person who makes a s 216A application as a "complainant". I do so because that is the word which s 216A itself uses to describe a person who has standing to bring an application under that section. A complainant will typically be a member of the company who is to be the plaintiff in the derivative proceedings. But as Reignwood's s 216A applications demonstrate, that will not always be the case (see [29] above). Section 216A(1)(*c*) gives standing to any person whom the court considers a "proper person" to bring a s 216A application against a company.

45 Second, the parties in the application before me use the word "intervene" and its cognate expressions throughout their written and oral submissions to describe what SHSY seeks to do by these four joinder applications. In fact, O 15 does not empower the court to allow a person to "intervene" in proceedings at all. The word "intervene" appears nowhere in O 15. What O 15 empowers the court to do is only to sever, add or join *parties* to proceedings.

46 There are only two kinds of person whom the Rules of Court call an "intervener": (a) a person who secures leave under O 70 r 16(2) to intervene in an action *in rem* on the basis that it has an interest in the property against which that action is brought or in money representing the proceeds of sale of that property; and (b) a person who secures leave to intervene in a probate action under O 72 r 4. A person who applies to be joined as a party to proceedings under O 15 r 6(2)(*b*) is in neither category. That person therefore is not, strictly speaking, an "intervener".

47 The distinction is not merely one of semantics. An intervener in the strict sense of the word does not, simply by intervening, become a party to the proceedings in which it intervenes for all purposes. A person who is joined to proceedings under O 15 r 6(2)(*b*) does, simply by the joinder, become a party to those proceedings for all purposes. Further, the effect of the joinder relates back to the date on which the plaintiff commenced the proceedings (see [75]–[76] below). Having said that, however, it probably does no harm to use the word "intervene" in connection with joinder under O 15 r 6(2)(*b*) so long as this distinction is always borne in mind.

48 I now deal with the four questions in turn.

Existence of the power

49 On the first question (see [39(a)] above), the following two propositions are common ground. First, the court has no power to order a party to be joined to proceedings after the proceedings have concluded: *Ernest Ferdinand* ([38] above) at [195]. Second, proceedings are not concluded so long as something remains to be done in the proceedings: *Ernest Ferdinand* at [198], citing *The Duke of Buccleuch* [1892] P 201.

50 What is not common ground is the nature of that "something" which must remain to be done in order to prevent the proceedings from being concluded and thereby to keep alive the court's power to order joinder.

51 The relevant chronology is as follows: (a) I made the s 216A orders in May 2019; (b) the time for the Opus Tiger Companies to appeal against those orders expired in June 2019; (c) the Opus Tiger Companies filed the Directions

Applications on 18 October 2019; and (d) SHSY filed its joinder applications on 31 October 2019.

The parties' arguments

52 Reignwood's argument on the first question is as follows. The s 216A applications concluded either in May 2019, when I made the s 216A orders, or at the very latest, in June 2019 when the Opus Tiger Companies allowed the time for appealing against those orders to expire without appealing. In either event, the s 216A orders were final well before October 2019, when SHSY applied to be joined. The s 216A applications have therefore concluded. SHSY has failed to bring its joinder applications "at any stage of the [s 216A] proceedings" within the meaning of O 15 r 6(2).[41]

53 SHSY's argument in response is as follows. Even after a court makes a final order in proceedings, there will often be issues which the court has to deal with before those proceedings conclude. These issues include assessing damages, levying execution, making orders in aid of enforcement and giving directions on how to implement the court's orders.[42] In this case, the fact that the Opus Tiger Companies have taken out the Directions Applications show that there indeed remains something to be done in the s 216A applications. SHSY has therefore applied for joinder "at any stage of the [s 216A] proceedings". The power to join SHSY to the s 216A applications under O 15 r 6(2)(*b*) remains alive.[43]

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41 PWS at paras 51 to 53.

42 SWS at para 33.

43 SWS at paras 31 and 35.

The orthodox principle or a more liberal standard?

54 The phrase "at any stage of the proceedings" in O 15 r 6(2) has been part of the rules of civil procedure governing joinder in England, the ultimate source of our Rules of Court, since the Victorian era. The *locus classicus* in both England and Singapore on the interpretation of this phrase is the decision of the English Court of Appeal in *The Duke of Buccleuch*.

55 In *The Duke of Buccleuch*, a cargo-owner applied to have itself joined to an action as the plaintiff in place of its agent after the defendant had been adjudged liable for a collision at sea. Lord Esher MR (at 211) and Fry LJ (at 212) held that the judgment on liability did not conclude the action because damages had yet to be assessed. As Fry LJ put it, proceedings are not concluded so long as "anything remains to be done in the case". The cargo-owner's application was therefore allowed.

56 In *Ernest Ferdinand*, the Court of Appeal held (at [198]) that *The Duke of Buccleuch* represented the current state of Singapore law on the meaning of the phrase "at any stage of the proceedings" in O 15 r 6(2):

> 198 We … find that *The Duke of Buccleuch* does represent the current state of the law in Singapore in so far as the existence of the power to order joinder post-judgment is concerned – *viz*, it exists if and only if something remains to be done in the matter, such as the assessment of damages.

The Court of Appeal called this "the orthodox *Duke of Buccleuch* principle" (at [201]).

57 The orthodox *Duke of Buccleuch* principle holds that proceedings conclude for the purpose of the rules relating to joinder as soon as the court makes an order or enters judgment which determines with finality the entire *lis*

between the parties to the proceedings. In an ordinary writ action for damages, the court determines the entire *lis* with finality when it enters the last judgment which, when taken with any preceding interlocutory judgments, fully determines both liability and quantum. Of course, there is no scope for any bifurcation in a s 216A application. Thus, on the orthodox *Duke of Buccleuch* principle, a s 216A application concludes as soon as the court makes an order determining with finality whether the complainant is or is not to be granted leave under s 216A(2) of the Act.

58 The Court of Appeal in *Ernest Ferdinand* recognised, however, that the English authorities have gone beyond the orthodox *Duke of Buccleuch* principle and established a more liberal standard in English law for determining when proceedings are concluded for the purposes of joinder. The more liberal standard holds that proceedings do not conclude upon a final order or judgment disposing of the entire *lis* between the parties. Instead, the proceedings continue until the final order or judgment has been fully performed or satisfied. Thus, in an ordinary writ action resulting in a money judgment for damages, the proceedings – and therefore the court's power to order joinder – continue until the judgment is fully satisfied.

59 The application of the orthodox *Duke of Buccleuch* principle sufficed for the Court of Appeal to dispose of the appeal in *Ernest Ferdinand* (at [201]). The Court of Appeal thus held that it was unnecessary for it to decide whether the more liberal standard should be recognised in Singapore law. It expressly left that issue to be "explored on an appropriate occasion" (at [201]).

60 The parties' arguments on the first question require me to decide whether it is the orthodox *Duke of Buccleuch* principle or the more liberal

standard which represents Singapore law on the meaning of "at any stage of the proceedings" in O 15 r 6(2). If it is the orthodox *Duke of Buccleuch* principle, SHSY's joinder applications fail at the first stage of the *Ernest Ferdinand* inquiry (see [39(a)] above). On the other hand, if it is the more liberal standard, SHSY succeeds at the first stage.

61 As the Court of Appeal made clear in *Ernest Ferdinand* (at [201]), it is not the *ratio* of that case that Singapore law does not recognise the more liberal standard. I am therefore not obliged by *stare decisis* to reject SHSY's arguments on the first question. I am conscious, however, that the Court of Appeal did express serious doubts about the desirability of recognising the more liberal standard, calling it a "bold proposition" (at [200]) with "troubling implications for finality in litigation" (at [201]).

62 Even bearing those points in mind, I consider with respect that Singapore law should recognise the more liberal standard. I say that for three reasons: (a) it is correct as a matter of statutory interpretation; (b) it permits the court to take a more pragmatic approach to joinder; and (c) it is the more conceptually appropriate approach to joinder.

63 I deal with each reason in turn.

Statutory interpretation

64 The Rules of Court are subsidiary legislation. Section 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) establishes that the starting point for ascertaining the meaning of O 15 r 6(2)(*b*) is the ordinary meaning of its words, taking into account its context: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [37].

65 The ordinary meaning of the phrase "at any stage of the proceedings" is wide enough to accommodate the more liberal standard. The words "any stage" are words of unrestrained width. Further, the word "proceedings" is not a legal term of art. Instead, it is a protean word, whose meaning depends on the context in which it is used. I therefore turn to consider that context.

66 The purpose of O 15 r 6 is set out very clearly in O 15 r 6(1): to prevent civil proceedings from being defeated by misjoinder or nonjoinder of parties. The purpose of O 15 r 6 is therefore to give the court a wide discretion to deal with misjoinder and nonjoinder by elevating substance and pragmatism over form and technicality. In that context, the intent of the phrase "at any stage of the proceedings" is clearly to expand the scope of the power under O 15 r 6(2) so as to advance its purpose rather than to restrict that scope. In other words, the intent of the phrase is to eliminate technical arguments about whether or not proceedings are concluded rather than to generate such arguments.

67 This suggests to me that the phrase "at any stage of the proceedings" should be interpreted with an inclination towards keeping the court's power under O 15 r 6(2) alive, to ensure that it can be exercised whenever issues of misjoinder and nonjoinder can arise. Those issues may arise whenever there remains an avenue for the parties to return to the court for its assistance even after the *lis* between the parties has been fully and finally determined. This in turn suggests to me that the phrase ought to be given the widest meaning which remains consistent with its ordinary meaning. That widest meaning is the more liberal standard.

68 Thus, in my view, the more liberal standard is the correct interpretation of the phrase "at any stage of the proceedings" in O 15 r 6(2) because it is the interpretation which better advances the purpose of O 15 r 6(2).

Pragmatic considerations

69 That leads me to my second reason for preferring the more liberal standard: pragmatism. The case which the Court of Appeal cited in *Ernest Ferdinand* ([38] above) as establishing the more liberal standard in English law is the decision of Aikens J (as he then was) in *C Inc plc v L* [2001] Lloyd's Rep 459 ("*C Inc*").

70 The facts of *C Inc* are an excellent example of the pragmatic advantages of the more liberal standard. In that case, a plaintiff secured final judgment against a defendant. When the plaintiff attempted to enforce the judgment, the defendant claimed that she held all of her known assets on trust for her husband. The plaintiff therefore applied to join the husband as a party to the proceedings in order to seek a post-judgment *Mareva* injunction against him in aid of execution.

71 Aikens J held that "the word 'proceedings' should be given a broad interpretation … [and] should embrace all stages of an action from the time it has been started until it becomes finally complete or moribund". As Aikens J pointed out in *C Inc* (at [83]), there are any number of reasons the court's assistance may be needed even after a final judgment has been entered:

> … There are many 'proceedings' in which a judgment is obtained but it is not satisfied. At that stage further action may be needed in order to enforce the judgment. The 'proceedings' have not finished at that point. A claimant may wish to appoint a receiver by way of equitable execution to get in the assets of

> the defendant to satisfy the judgment. Or he may wish to obtain a freezing order in aid of execution. The 'proceedings' must still be continuing in those instances. In my view the 'proceedings' against [the defendant] are still continuing.

Aikens J therefore joined the husband as a party to the proceedings and granted the *Mareva* injunction against him.

72 I consider it almost certain that if a case like *C Inc* came before our courts, we would incline towards Aikens J's pragmatic approach. On the facts of *C Inc*, it would be the height of technicality to decline joinder – and thereby to decline post-judgment relief against a non-party in aid of execution – simply because the court had already entered final judgment against the defendant.

73 It may be said that the application of the more liberal standard in *C Inc* is not surprising. *C Inc* was a case in which it was the *plaintiff* who was asking the court to join an additional *defendant* to the proceedings. In that sense, the outcome of *C Inc* is merely an application of the general principle that it is the plaintiff's prerogative to choose its defendants (see [91] below). *C Inc* was not a case, such as the present, in which a person was asking to be joined as a party *against* the plaintiff's wishes.

74 I do not consider that that distinction of fact makes any difference of principle. Whether joinder is consistent with or contrary to the plaintiff's wishes has no bearing on the meaning of the phrase "at any stage of the proceedings". Proceedings are either concluded or not concluded. The outcome of that inquiry is independent of who it is who is seeking the joinder. Thus, Aikens J interpreted the phrase in *C Inc* on its own, in terms independent of who was seeking the joinder. So too, O 15 r 6(2)(*b*) is framed in terms which are independent of who is seeking the joinder. A plaintiff's attitude towards joinder is, at most, a factor

which goes to the discretionary assessment at the second stage of the *Ernest Ferdinand* inquiry, not to the first stage.

Conceptual considerations

75 My third reason for preferring the more liberal standard is related to the first two reasons. I must, of course, accept the Court of Appeal's valid concerns expressed in *Ernest Ferdinand* about facilitating an overly broad approach to misjoinder and nonjoinder. A person, once joined under O 15 r 6(2)(*b*), becomes a party to the proceedings for all purposes. It is entitled to behave, and is liable to be treated, just like any other party. Therefore, it can make a claim or defend one. It can make a counterclaim or defend one. It can bring an interlocutory application or oppose one. It can secure a final judgment in its favour or suffer one against it. It can be awarded costs or be ordered to pay costs.

76 Further, the joinder does not operate only prospectively. It relates back to the commencement of the proceedings. The joined party is therefore treated as though the plaintiff had named it as a party from the outset. The relation back can defeat the effect of an expired limitation period. It can permit a joined party to appeal against orders made before it was joined. If the joined party is out of time to appeal, it can apply for an extension of time. That is one of SHSY's objectives in seeking to be joined to these originating summonses (see [35] above).[44]

77 I accept that joining a party to proceedings creates an unintended and undesirable risk to finality in litigation. But I do not accept that it is conceptually appropriate to place the entire strain of addressing this risk on the interpretation

[44] NAs dated 18 August 2020, at p 9, lines 27 to 30; p 10, lines 17 to 24.

of the phrase "at any stage of the proceedings". The intent of that phrase, as I have found, is to expand the court's power of joinder rather than to restrict it. It is far more appropriate that the strain of addressing this risk falls: (a) on the interpretation of the non-discretionary requirements for severance and joinder under O 15 r 6(2); (b) on the discretionary assessment of whether to order severance and joinder under O 15 r 6(2); and (c) on the principles which govern the application which actually and directly poses a risk to finality in litigation.

78 SHSY's objectives for seeking joinder illustrate my point (see [35] above). One of its objectives is to seek an extension of time to appeal against the s 216A orders. Any such application carries precisely the "troubling implications for finality in litigation" which caused the Court of Appeal in *Ernest Ferdinand* (at [201]) to express grave misgivings about the more liberal standard. But SHSY would, I think, readily accept that it will face an uphill task in at least two respects: (a) on the discretionary assessment for joinder, if its *only* objective in seeking joinder were to reverse the s 216A orders; and (b) if it is joined, on its application to extend time to appeal against the s 216A orders. No doubt, SHSY would insist bravely that it can and will crest both hills. But that does not detract from my conceptual point as to where the strain of addressing that risk should fall.

79 The desire to prevent an unintended and undesirable consequence of joinder should not result in an artificially narrow interpretation of the phrase "any stage of the proceedings", contrary to its ordinary meaning. After all, there is a risk even now that the Opus Tiger Companies will themselves seek an extension of time to appeal against the s 216A orders. Any such application would have equally troubling implications for finality in litigation. But those implications are addressed by the principles which govern an application for an

extension of time to file an appeal. The risk that SHSY will pose to finality, if joined, is no different conceptually from the risk which the Opus Tiger Companies now pose to finality. The principles which govern the application to extend time for appeal suffice to address and mitigate that risk, whoever it is who is posing it.

80 In conclusion, for the foregoing reasons, it is my view that the more liberal standard best advances the purpose of O 15 r 6(2) by focusing the inquiry on the merits of the joinder application rather than on the technical question as to whether the proceedings in which the joinder application is made are or are not concluded. I therefore consider with respect that the more liberal standard represents Singapore law on the meaning of "at any stage of the proceedings" in O 15 r 6(2).

81 I now turn to consider how the more liberal standard should be applied to a s 216A application.

Applying the more liberal standard to a s 216 application

82 If the court *dismisses* a s 216A application, the difference between the orthodox *Duke of Buccleuch* principle and the more liberal standard is of little relevance. Once the application is dismissed, there is no longer anything which remains to be done in the proceedings, save perhaps in connection with enforcing or levying execution on the relatively small sum which may have been awarded as costs. It is thus fair to say that, even on the more liberal standard, the court's power to join a party to a s 216A application comes to an end for all intents and purposes when it dismisses the s 216A application.

83 However, if a court *allows* a s 216A application, the more liberal standard permits the court's power to order joinder to continue even after it makes the order granting the leave and even though that order is final. In these circumstances, just as in an ordinary civil suit such as *C Inc* ([69] above), something remains to be done in the s 216A application. In fact, the position on a s 216A application is *a fortiori* the position on an ordinary civil suit. A civil suit ends with one or more judgments which, taken together, fully and finally determine the parties' substantive rights and liabilities. A s 216A application does not end in a judgment and does not address the parties' substantive rights and liabilities. The effect of a s 216A order is purely procedural. It merely clothes the complainant with the statutory authority conferred by s 216A to bring derivative proceedings against the intended defendant in the name of the company.

84 For these reasons, there is even greater potential for the court's continued involvement in a s 216A application after it makes an order granting leave than in an ordinary civil suit. The court's continued involvement can arise in two ways. First, as SHSY points out,[45] a successful complainant has a right on a purposive interpretation of s 216A(5)(*a*) of the Act to return to the court for orders which are "necessary for the derivative action to be brought in a fair manner for adjudication by the court at a trial, whether or not there [are] specific directions in the leave order to that effect": *Lew Kiat Beng v Hiap Seng & Co Pte Ltd and another appeal* [2012] 1 SLR 488 ("*Lew Kiat Beng*") at [29]. Second, an order granting a complainant leave to commence derivative proceedings may expressly give the parties liberty to apply. That liberty will not, of course, allow the parties to return to court to vary or reverse the order.

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[45] SWS at para 40.

But a liberty to apply does allow the parties to return to court for directions on interpreting or implementing the order.

85 In any event, the critical point on the more liberal standard is that there is clear potential for the court's continued involvement in a s 216A application even after the final order granting the complainant leave to commence the derivative proceedings. That potential comes to an end only when the derivative proceedings themselves are concluded.

86 For these reasons, therefore, I consider that a successful s 216A application does not conclude for the purposes of the court's power to order joinder so long as the derivative proceedings themselves have not concluded.

Applying the more liberal standard to the facts of this case

87 Applying the more liberal standard to the facts of this case, I hold that SHSY has brought its joinder applications "at any stage of the proceedings" as required by O 15 r 6(2). As SHSY points out,[46] the s 216A orders expressly grant the parties liberty to apply. There is also the common law right under *Lew Kiat Beng* to apply for orders which are necessary to bring the derivative proceedings in a fair manner. Neither avenue will close until the arbitrations themselves conclude. As the Directions Applications themselves show, this is not merely theoretical.

88 Reignwood submits that I have: (a) addressed with finality all of the relief that Reignwood sought in its s 216A applications;[47] and (b) disposed fully

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46 SWS at para 42.

47 PWS at para 55.

of each *lis* that Reignwood and the Opus Tiger Companies placed before me in the s 216A applications.[48] All of that is, of course, true. But all of that is simply irrelevant on the more liberal standard.

89 Reignwood next submits that it is wrong in principle that SHSY should have the opportunity to reverse the s 216A orders at any time before the arbitrations against SHSY conclude.[49] I have dealt with this objection at [75]–[78] above. This is indeed an undesirable and unintended consequence of the more liberal standard. But, for the reasons I have given, the proper place to address this consequence is not in artificially restricting the meaning of "at any stage of the proceedings". In any event, the inquiry at the first stage is whether the s 216A *proceedings* have concluded, not whether an *issue* that SHSY wishes to contest in the s 216A proceedings upon being joined has been finally decided.

90 For these reasons, I accept that my power to join SHSY as a defendant to the s 216A applications continues to exist even though I have made final orders in Reignwood's favour under s 216A(2) and even though the time for appealing against those orders has expired. So long as the arbitrations against SHSY have not concluded, the power of joinder remains alive. This approach puts the true focus of the court's inquiry on a joinder application where it should lie: on the second stage of the inquiry. I therefore turn now to consider the second stage.

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48 PWS at paras 54 to 56.

49 NAs dated 18 August 2020, at p 23, lines 22 to 27; p 24, line 11 to p 25, line 4.

The non-discretionary requirements

91 In our adversarial system of civil procedure, the general rule is that it is plaintiff's prerogative "to choose the person against whom to proceed, and to leave out any person against whom he does not desire to proceed": *Singapore Civil Procedure 2020*, vol 1 (Chua Lee Ming gen ed) (Sweet & Maxwell, 10th Ed, 2019) at para 15/6/7. In so far as Order 15 r 6(2) allows the court to order severance or joinder of a person despite the objections of a plaintiff, it is thus a departure from the general rule.

92 In addressing the second stage of the inquiry, I shall consider whether SHSY satisfies the non-discretionary requirements of each limb of O 15 r 6(2)(*b*) before undertaking the discretionary assessment. This approach is in accordance with the guidance of the Court of Appeal in *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW (CA)*") at [40]–[41].

93 SHSY accepts that O 15 r 6(2)(*b*) does not allow a person to be joined as a party to proceedings simply because it has an interest in the proceedings.[50] SHSY also accepts that s 216A does not give an intended defendant any right be heard on a s 216A application, let alone to be joined as a party to it.[51] SHSY's case for joinder therefore turns on whether SHSY can satisfy the non-discretionary requirements of one or both limbs of O 15 r 6(2)(*b*).

94 In my view, SHSY cannot satisfy the non-discretionary requirements of either limb. I consider that neither limb of O 15 r 6(2)(*b*) allows a person to be

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50 NAs dated 23 September 2020, at p 5, lines 23 to 28.

51 NAs dated 18 August 2020, at p 20, lines 1 to 4.

joined as a defendant to a s 216A application simply because it is the intended defendant in the proposed derivative proceedings.

95 I now analyse the non-discretionary requirements of each limb of O 15 r 6 (2)(*b*) in turn. It is easiest to carry out that analysis first on the assumption that SHSY had applied to be joined to the s 216A applications *before* I made the s 216A orders. I do that for two reasons. First, nothing in O 15 r 6(2)(*b*) turns on the precise stage in the proceedings at which an application for joinder is made. Second, even if I am wrong on that point, if SHSY would have been unable to satisfy the non-discretionary requirements of O 15 r 6(2)(*b*) *before* I made the s 216A orders, it cannot be better off because it applied for joinder *after* I made the s 216A orders.

The necessity limb

96 I begin my analysis of O 15 r 6(2)(*b*) with the necessity limb before turning to the just and convenient limb.

The scope of the necessity limb

97 A person who seeks to be joined to proceedings under the necessity limb must satisfy one of two alternative non-discretionary requirements: (a) the person must be one who ought to have been joined as a party to the proceedings; or (b) joining the person must be necessary to ensure that the court determines and adjudicates all issues in the proceedings effectually and completely.

98 The scope of the necessity limb is narrower than the scope of the just and convenient limb (see *Singapore Court Practice 2021* (Jeffrey Pinsler gen

ed) (LexisNexis, 2021) at para 15/6/9). A textual analysis and a comparison of the limbs reveal three ways in which this is true.

99 First, the necessity limb (as the term suggests) requires joinder to be *necessary*: *Ernest Ferdinand* ([38] above) at [203]. Necessity is implicit in the first alternative requirement (see [97] above): the person to be joined must be one whom the plaintiff *ought to have* joined from the outset of the proceedings, not merely one whom it was desirable for the plaintiff to have joined from the outset. Necessity is explicit in the second alternative requirement, as indicated by the word "necessary". Joinder being necessary for one purpose is a narrower test than joinder being just and convenient for an analogous purpose.

100 Second, the necessity limb requires there to be a *lis* between a party to the proceedings and the person to be joined. The requirement of a *lis* is implicit in the first alternative requirement. It cannot be said that a plaintiff ought to have joined a person to proceedings from the outset unless there is a *lis* between that person and the plaintiff. The requirement of a *lis* is explicit in the second alternative requirement, as indicated by the conjunctive use of the verbs "determine" and "adjudicate". The verb "determine" envisages the court ascertaining or establishing disputed issues by making findings of fact or holdings of law. The verb "adjudicate" envisages the court resolving those disputed issues fully and finally by entering a formal order or judgment making those issues *res judicata*. No judgment can be entered between any two persons unless there is a *lis* between them. Both alternative requirements of the necessity limb therefore require there to be a *lis* between the person to be joined and a party to the proceedings. That party may not be the plaintiff. For example, the person to be joined could have a *lis* as against a defendant on its counterclaim against the plaintiff. In contrast, the just and convenient limb uses only the verb

"determine". It makes no reference to "adjudicate" at all. The just and convenient limb therefore does not require there to be any such *lis* between the person to be joined and the parties to the proceedings.

101 Finally, only two types of persons may be joined under the necessity limb: (a) a person "who ought to have been joined as a party"; and (b) a person "whose presence before the court is necessary to ensure that all matters…may be effectually and completely determined and adjudicated upon". Thus, building on the second point, the necessity limb applies only to: (a) a person whom the plaintiff could have and should have joined as a party to the proceedings; or (b) a person who has a *lis* as against a party to the proceedings to be determined *and adjudicated upon*. In contrast, the just and convenient limb does not restrict the person to be joined in the same way: any person may be joined under the just and convenient limb so long as the non-discretionary requirements of that limb are satisfied (see [137] below).

102 Bearing these points in mind, it is my view that SHSY does not come within the necessity limb for three reasons: (a) SHSY is not a person whom Reignwood ought to have, in any sense, joined to the s 216A applications; (b) the s 216A applications give rise to no *lis* as between SHSY and either Reignwood or the Opus Tiger Companies; and (c) it is not necessary to join SHSY to the s 216A applications in order to ensure that the court determines and adjudicates completely and effectually all issues in the s 216A applications.

103 I deal with each of these reasons in turn.

Reignwood had no obligation to name SHSY as a defendant

104 Section 216A is silent as to whom the complainant is to name as a defendant to a s 216A application. The company must, of course, be a defendant. Beyond that, the ordinary rule of civil procedure applies (see [91] above). It is therefore the complainant's prerogative whom else it names as a defendant, subject only to the procedural consequences for misjoinder, including the liability to pay a misjoined party's costs.

105 The important point for present purposes is that s 216A does not in any way oblige a complainant to name an intended defendant as a defendant to a s 216A application. In every case, therefore, it remains the complainant's procedural prerogative whether to do so or not. It is of course open to a complainant to name the intended defendant, or even the shareholders and the directors of the company, as defendants to a s 216A application. If the plaintiff does so, those parties have a right to be served with the application and to be heard upon it. And they would be bound directly by the s 216A order as a party, including any orders under s 216A(5) and any order as to costs. But this joinder takes place by the voluntary act of the complainant when it commences the proceedings. This joinder is thus free of the non-discretionary requirements of O 15 r 6(2)(*b*). The fact remains that s 216A itself makes clear that an intended defendant is not a person whom a plaintiff "ought to have joined" to a s 216A application within the meaning of the first alternative requirement of the necessity limb.

106 In short, a complainant has no obligation whatsoever to name the intended defendant as a defendant to a s 216A application. SHSY is therefore not a person whom Reignwood ought to have joined to the s 216A applications.

SHSY cannot satisfy the first alternative non-discretionary requirement under O 15 r 6(2)(*b*).

There is no lis as between SHSY and the parties

107 For the reasons I have set out above, the necessity limb requires there to be a *lis* as between the person seeking joinder and the parties to the proceedings. In my view, there is no *lis* between an intended defendant and either the complainant or the company in a s 216A application.

108 The sole *lis* in every s 216A application is whether the court ought to sanction a deviation from a fundamental principle of company law, *ie*, the principle of majority rule. That fundamental principle vests: (a) ultimate control of the company in a majority of its shareholders in general meeting; and (b) executive control of the company in a majority of its directors in a board meeting. The fundamental principle of majority rule naturally extends to the shareholders' and the directors' decision as to whether the company should litigate and, if so, how much of the company's resources to commit to the litigation.

109 The sole issue in a s 216A application is therefore whether (and if so on what terms under s 216A(5)) the court should sanction a deviation from the fundamental principle of majority rule by compelling the company to litigate contrary to the will of the majority of its shareholders and directors. As the Court of Appeal said in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [19], the legislative intention of s 216A 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".

110 When a s 216A application is viewed that way, as I consider it must, the only persons who have a *lis* as against the complainant or the company are those persons whose concern it is whether the court should sanction a deviation from the fundamental principle of majority rule. Those persons can only be insiders to the company. These insiders will, of course, include the company's other shareholders, whether majority or minority, and the company's directors. The shareholders and the directors are, after all, the persons whose ultimate or executive control over the decision to litigate the complainant is inviting the court to override. In the case of shareholders, they are also the persons who will bear the ultimate economic consequence of committing the company's resources to the litigation.

111 A "proper person" within the meaning of s 216A(1)(*c*) may also have a *lis* against the complainant or the company. A "proper person" can include a shareholder in the company's parent company, like OOL. Such a person has equal standing with the complainant to bring a s 216A application and may well be able to demonstrate a direct concern in whether the court sanctions a deviation from the fundamental principle of majority rule. A "proper person" may also have a direct concern as to whom – as between itself and the complainant – the court should authorise to exercise control over that litigation and the extent to which the company's resources should be committed to pursuing it.

112 The authority for this analysis is *Lederer v 372116 Ontario Ltd (cob Hemispheres International Manufacturing Co)* ("*Lederer*") [2001] OJ No. 565.

Lederer is a decision of the Ontario Court of Appeal on s 246 of the Ontario Business Corporations Act, RSO 1990, c B-16 ("OBCA"). Section 246 of the OBCA is *in pari materia* with s 216A of the Act. Indeed, s 246 was one of the models for s 216A.

113 In *Lederer*, Goudge JA explained why the legislation does not contemplate an intended defendant as a participant in an application for leave to commence derivative proceedings (at [14]):

> … the seeking of leave to commence a derivative action under s. 246 of the Act is fundamentally a proceeding between the complainants on the one hand and the corporation and the directors on the other. The complainants seek to have the company do something which they say is in its interest but which the directors refuse to authorize. That these are the core players in the application for leave is confirmed by s. 246(2) which requires that advance notice of the complainants' intention to apply for leave be given solely to the directors of the company. There is no suggestion in s. 246 that intended defendants are to be participants in an application for leave to commence a derivative action.

114 What is clear is that an intended defendant does not – simply because of its status as the intended defendant – have a *lis* of any kind against any party to a s 216A application. For the reasons I have already given, the sole issue in a s 216A application concerns only the company's shareholders, its directors and perhaps "proper persons" within the meaning of s 216A(1)(*c*) of the Act. It is not *necessary* for the court to *determine* or *adjudicate* – as against the intended defendant – whether to sanction a deviation from the fundamental principle of majority rule.

115 None of the following circumstances is capable of giving rise to a *lis* as between an intended defendant and the complainant or the company: (a) the fact that granting the complainant leave to commence derivative proceedings against

the intended defendant in the name of the company will affect the intended defendant's economic or other interests; (b) the fact that the intended defendant can assist the court in deciding the s 216A application; or (c) the fact that the intended defendant wishes to have an early opportunity to put its defence to the derivative proceedings before the court in order to establish that those proceedings will lack merit.

116 If any one of these circumstances sufficed in itself to satisfy the non-discretionary requirements of the necessity limb, or indeed of the just and convenient limb, then every intended defendant has a right to be joined to every s 216A application. That would directly contradict the premise of s 216A, which is that no intended defendant is entitled even to notice of the s 216A application, let alone to be joined to it as a defendant. As Griffin J said of this argument in the decision of the Supreme Court of British Columbia in *Pierce v Chalice Capital Inc* [2016] BCJ No. 892 ("*Pierce*") (at [55]):

> If the logic of the argument of [the intended defendant] is accepted, it would virtually mean that in all petition proceedings to commence a derivative action, the potential defendants of the derivative action should be given notice and standing. This would greatly change the character and nature of such a petition proceeding, and in my mind, for the worse and contrary to the intention of the [British Columbian Business Corporations Act] and to the interests of the efficient administration of justice.

117 The decision in *Pierce* turned on ss 232 and 233 of British Columbia's Business Corporations Act, SBC 2002, c 57 and rr 6-2(7)(b) and 6-2(7)(c) of British Columbia's Supreme Court Civil Rules, BC Reg 168/09. Although the British Columbian provisions are not identical to the Singapore provisions, the elements that are material to this case are sufficiently similar (see *Woon's*

Corporations Law (LexisNexis Singapore, 1999, April 2021 release) at para 406). The reasoning in *Pierce* therefore carries great force by analogy.

118 Any one of the circumstances listed at [115] above may be grounds for a court to exercise its inherent jurisdiction to hear from the intended defendant on a s 216A application either as an indulgence to the intended defendant or to assist the court in achieving rectitude of decision. But none of these circumstances suffice to satisfy the non-discretionary requirements of the necessity limb.

119 The structure of s 216A shows a positive legislative intent that the intended defendant's opportunity to present its case on the merits of the derivative proceedings will come in the derivative proceedings themselves, not on the s 216A application. As Griffin J put it in *Pierce* (at [89]), when a plaintiff decides to sue a person in the usual way, that person has no opportunity to prevent the plaintiff from commencing suit. It would be exceptional if that person did have such a right simply because it was an intended defendant in proposed derivative proceedings. Goudge JA said much the same in *Lederer* (at [17]):

> … it is hard to see why intended defendants in a derivative action should have any earlier opportunity to stop the proceedings than defendants in other proceedings just because the derivative action requires a leave application before it is begun.

120 For all of the foregoing reasons, I hold that a s 216A application creates no *lis* as between the intended defendant on the one hand and either the complainant or the company on the other. Accordingly, SHSY cannot satisfy the second alternative non-discretionary requirement under O 15 r 6(2)(*b*).

No matters which the court will fail to determine and adjudicate

121 The necessity limb requires that the person to be joined be one whose "presence before the court is necessary to ensure that all matters…may be effectually and completely determined and adjudicated upon". To see whether an intended defendant satisfies this non-discretionary requirement of O 15 r 6(2)(*b*), it is necessary to identify the issues which a court must determine and adjudicate upon in a s 216A application.

122 A s 216A application requires the court to adjudicate upon only one issue: whether to sanction a deviation from the fundamental principle of majority rule. In order to enliven the court's power to adjudicate upon that single issue, s 216A requires the complainant to satisfy four conditions precedent:

(a) First, the complainant must establish that it comes within one of the three limbs of s 216A(1) and therefore has standing to apply for an order under s 216A(2).

(b) Second, the complainant must establish that it has given 14 days' notice of its intention to bring the s 216A application to the directors of the company as required by s 216A(3)(*a*).

(c) Third, the complainant must establish that it is acting in good faith within the meaning of s 216A(3)(*b*) in bringing the s 216A application.

(d) Fourth, the compliant must establish that bringing, prosecuting, defending or discontinuing the proposed derivative proceedings appears to be *prima facie* in the company's interests within the meaning of s 216A(3)(*c*).

123 The merits of the proposed derivative proceedings arise on a s 216A application only as a subsidiary issue on the fourth condition precedent, *ie* only as one factor in establishing that the proceedings will be *prima facie* in the interests of the company. That is why the threshold for establishing the merits of the proposed derivative proceedings on a s 216A application is deliberately set low. The complainant need only show that the proceedings have a "legitimate or arguable basis" (see *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [58]). A complainant need not establish that there is a serious question to be tried let alone that the intended derivative proceedings are likely to succeed.

124 SHSY submits that the fact that it has submissions and evidence to contradict Reignwood's case in the s 216A applications on the third and fourth conditions precedent is sufficient to satisfy the non-discretionary requirements of the necessity limb.[52] In particular, SHSY says that it is better placed than the JPLs to demonstrate to the court that Reignwood's arbitrations against SHSY in the name of the Opus Tiger Companies lack merit.[53]

125 I do not accept this submission. First, the third and fourth conditions precedent raise considerations which are all fundamentally internal to the company. An outsider to the company has no basis to insist on being heard on whether the complainant has standing, whether the complainant is acting in good faith or whether the proposed derivative proceedings are *prima facie* in

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52 SWS at paras 63, 66 and 68 to 69; NAs dated 18 August 2020, at p 11, lines 17 to 25.

53 NAs dated 18 August 2020, at p 18, lines 3 to 5.

the company's interests. In *Pierce*, Griffin J surveyed the law in Ontario and Manitoba and then held as follows for British Columbia (at [66]):

> In this province as in Ontario and Manitoba, the issue to be determined on an application to commence a derivative action is one between the applicant complainant and the company and the directors who refuse to commence the action. The key question, whether the lawsuit is in the best interests of the company, cannot be answered by the defendant to the proposed lawsuit who is directly adverse in interest on that question.

126 It is only on the subsidiary issue as to the merits of the proposed derivative proceedings that an intended defendant can even hope to mount an argument that it satisfies the non-discretionary requirements of the necessity limb. Even then, I do not consider that an intended defendant is a person whose presence before the court is *necessary* on a s 216A application to ensure the effectual and complete determination and adjudication of whether the proposed derivative proceedings have sufficient merit. I say that for three reasons.

127 First, whether the proposed derivative proceedings have sufficient merit is determined on a s 216A application solely for a purpose which is specific to the s 216A application and which is of no concern to the intended defendant at all. That purpose is to ascertain whether it is *prima facie* in the interests of the company to compel it to commit its resources and its name to litigation contrary to the majority will of its shareholders and directors. It is for that reason that a complainant need only cross a deliberately low threshold to establish that the proposed derivative proceedings have sufficient merit. This is so that "only the most obviously unmeritorious claims will be culled": *Ang Thiam Swee* at [55]. That is also why the court does not adjudicate factual disputes arising from the proposed derivative proceedings on a s 216A application: *Jian Li Investments Holding Pte Ltd v Healthstats International Pte Ltd* [2019] 4 SLR 825 at [50].

The court determines whether the proposed derivative proceedings have sufficient merit at a very low threshold and only for a very specific purpose.

128 This point can be illustrated by an example. Assume that a complainant exercises its prerogative and names an intended defendant as a party to a s 216A application. Assume also that the court determines – with the benefit of evidence and submissions from the intended defendant – that the proposed derivative proceedings do indeed have sufficient merit to help establish the complainant's case on the fourth condition precedent. That determination is made purely for the purposes of and in the context of determining whether the complainant has established that condition precedent. The determination does not result in any *adjudication* as to the merits of the proposed derivative proceedings. It creates no issue estoppel or *res judicata* binding the intended defendant, the company or the complainant. The intended defendant remains at liberty in the derivative proceedings to present a full substantive defence to the claim. It even remains at liberty to apply to strike out the derivative proceedings under O 18 r 19 of the Rules of Court. That is simply because the court determined the sufficiency of the merits of proposed derivative proceedings on the s 216A application at an entirely different threshold and for an entirely different purpose.

129 Now assume instead that the court determines that the proposed derivative proceedings *do not* have sufficient merit. That determination too does not bind the intended defendant, the company or the complainant. It gives rise to no issue estoppel or *res judicata* which precludes the company from pursuing the intended defendant on the same claim in the future if the majority of the company's shareholders or directors resolve to do so. That can happen if the shareholders and directors change. It can also happen if the shareholders and directors do not change, but simply change their minds. Once again, this is

simply because the court determined the sufficiency of the merits of proposed derivative proceedings on the s 216A application at an entirely different threshold and for an entirely different purpose.

130 Second, the first point shows that joining an intended defendant to a s 216A application does not advance the purpose of O 15 r 6(2)(*b*). That purpose is to prevent a multiplicity of proceedings in order to: (a) prevent the waste of time, money and judicial resources which would result from multiple parties commencing multiple actions against each other arising from the same cause or matter; and (b) to prevent the same or substantially the same questions or issues of fact or law arising from the same cause or matter being tried twice or more before different tribunals with possibly different or conflicting results: *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 ("*Wee Soon Kim*") at [19]; *Singapore Civil Procedure 2020* at para 15/6/8.

131 As I have demonstrated, there is no sense in which joining an intended defendant to a s 216A application prevents a multiplicity of proceedings. That is because the four conditions precedent (see [122] above) are not determined in a s 216A application as forensic ends in themselves but simply as the prescribed statutory rubric for enlivening the court's jurisdiction to sanction a deviation from the fundamental principle of majority rule. Even if the intended defendant is a party to a s 216A application – whether by being named as a co-defendant from the outset or as a result of being joined under O 15 r 6(2)(*b*) contrary to the complainant's wish – none of these four conditions precedent will be determined in a way which binds the intended defendant in any adjudicatory sense, as is required by the necessity limb.

132 For the reasons I have already given, the sole issue in a s 216A application – and the four conditions precedent for enlivening the court's jurisdiction to adjudicate on that sole issue – is of no concern to an intended defendant. They are simply not matters on which an intended defendant can or should assist the court. As Griffin J put it in *Pierce* ([116] above) (at [75]):

> … the proposed defendant…has no direct interest in the issue to be determined on this proceeding, which is a question having to do with whether it is in the best interests of [the company] to commence the action, a director of [the company] having refused to do so. The outcome of the determination of this issue, if leave is granted, will not prejudice [the intended defendant's] rights to defend itself in the proposed action. The proposed defendant… will be in no worse position than any other defendant sued by a corporation.

The effect of Reignwood initially joining SHSY as a party

133 There is one fact which may be said to complicate the analysis on the necessity limb. Even though it had no obligation to do so, Reignwood did in fact name SHSY as the second defendant in each s 216A application. Further, on 2 January 2019, Reignwood notified SHSY of the s 216A application against OT1 by pleading a reference to the application in its defence in the English litigation.[54] However, on 3 January 2019, Reignwood applied for and secured leave to discontinue all four of the s 216A applications as against SHSY. On 7 January 2019, Reignwood filed the notices of discontinuance terminating the s 216A applications. It did so without ever having served the s 216A applications on SHSY and without informing SHSY that the applications had been discontinued.[55]

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54 Cheng Huanmin's 1st Affidavit at p 34.

55 SHSY's Bundle of Documents at Tab 7; SWS at para 9.

134 SHSY, quite correctly, does not suggest that Reignwood's discontinuance of the s 216A applications as against SHSY is in any way procedurally defective. The result of the discontinuance is therefore that SHSY ceased to be a party to the s 216A application on 7 January 2019. SHSY was, from that date, as much a stranger to the s 216A applications as any other person whom Reignwood chose not to name as a defendant to those applications.

135 The fact that Reignwood initially named SHSY as a party to the s 216A applications and then discontinued the applications against SHSY does not assist SHSY in satisfying the non-discretionary requirements of the necessity limb. Whether a person ought to have been joined as a defendant to a s 216A application is an objective question of law. Its answer does not turn on the complainant's actual conduct in joining or omitting the intended defendant as a party to the s 216A application.

136 Having found that SHSY cannot satisfy the non-discretionary requirements of the necessity limb, I now turn to consider whether SHSY can satisfy the non-discretionary requirements of the just and convenient limb.

The just and convenient limb

137 A person who seeks to be joined to proceedings under the just and convenient limb must satisfy two cumulative non-discretionary requirements: (a) there must be an issue between that person and any party to the proceedings which is connected in some way to an issue between the existing parties to the proceedings; and (b) the court must be of the opinion that it is just and convenient to determine that issue as between that person and that party as well as between the existing parties to the proceedings: *Ernest Ferdinand* ([38]

above) at [204], citing *Singapore Civil Procedure 2017*, vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 7th Ed, 2016) at para 15/6/8.

138 SHSY argues that an intended defendant satisfies the non-discretionary requirements of the just and convenient limb because the issue which arises on a s 216A application as between the complainant and the company and also as between the two of them and the intended defendant is whether the derivative proceedings appear to be *prima facie* in the company's interests within the meaning of s 216A(3)(*c*) of the Act.[56] This, it says, is an issue which concerns the intended defendant in its capacity as an intended defendant, even if it is assumed that the sole issue which arises on a s 216A application is no concern of an intended defendant.[57]

139 For this submission, SHSY relies on *Actis Excalibur Ltd v KS Distribution Pte Ltd and others* [2016] SGHCR 11 ("*Actis Excalibur*") and *A R Evans Capital Partners Limited v Gen2 Partners Inc* [2012] HKCU 1284 ("*A R Evans*"). In each case, an intended defendant was joined to an application for leave to commence statutory derivative proceedings at least in part because the intended defendant could assist the court in determining whether the complainant had established the conditions precedent to enlivening the court's jurisdiction to grant the leave.

140 I do not accept SHSY's submission at [138] above for three reasons.

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56 NAs dated 23 September 2020, at p 10, line 19 to p 11, line 3; p 14, lines 17 to 21.

57 NAs dated 23 September 2020, at p 11, lines 10 to 12.

141 First, the mere fact that an intended defendant can assist the court in determining whether a complainant can establish the four conditions precedent does not make the issue on that condition precedent one which it would be just and convenient to determine as between the intended defendant and either the complainant or the company as well as between the complainant and the company.

142 In *Actis Excalibur*, the complainant sought leave under s 216A to sue the intended defendants in the name of the company for breaches of fiduciary and directors' duties. The intended defendants applied to be joined to the s 216A application so that they could argue: (a) that the application was not taken out in good faith; and (b) that the proposed derivative proceedings lacked merit and were therefore not *prima facie* in the companies' interests.

143 The Assistant Registrar joined the intended defendants to the s 216A application under the just and convenient limb. He held that it was "not objectionable" to join an intended defendant to a s 216A application so that it could demonstrate to the court that the complainant could not establish the third and fourth conditions precedent: *Actis Excalibur* at [34]–[35].

144 In *A R Evans*, the Hong Kong Court of First Instance joined intended defendants to an application under s 168BC of the Hong Kong Companies Ordinance (Cap 32) ("the Ordinance") by which a complainant sought leave to commence derivative proceedings against the intended defendants. The court considered that it would be "likely, in general, to be assisted by submissions that bear on such questions as the jurisdiction to make an order under the section, or indeed as to the merits of the proposed claim": at [27]. Whether in their capacity as shareholders of the company or in their capacity as the intended

defendants, the court held that the intended defendants were entitled to be heard in opposition to the application for leave: at [27].

145 In my view, *Actis Excalibur* and *A R Evans* go too far if they suggest that the mere fact that a person is able to assist the court with evidence and submissions on an issue which the court will have to determine in pending proceedings is sufficient in itself to warrant joining that person as a party to those proceedings under the just and convenient limb. There will always be many persons who can assist the court with evidence and submissions on an issue which the court will have to determine in pending proceedings. It will no doubt be appropriate to receive that evidence and to hear those submissions in some cases, subject to according procedural fairness to the parties, before determining that issue, either as an indulgence to that person or to assist the court in achieving rectitude of decision. But it cannot seriously be suggested that all of those persons are entitled to be joined *as parties* to the proceedings under the just and convenient limb if they insist upon it, with all of the consequences which follow from joinder (see [75]–[76] above). Further, as I have pointed out, a test framed so widely would allow every intended defendant in every s 216A application to satisfy this non-discretionary requirement, contrary to the deliberate scheme of s 216A.

146 For the reasons I have already given, whether Reignwood can establish the four conditions precedent necessary to enliven the jurisdiction under s 216A is not SHSY's concern. Whether Reignwood can do so is a concern only of the Opus Tiger Companies' shareholders and directors, and perhaps of any "proper person" within the meaning of s 216A(1)(*c*) (see [107]–[120] above). If s 216A intended the court to determine whether the complainant had established these conditions precedent as between an intended defendant and a complainant or as

between an intended defendant and the company, one would expect s 216A to require a complainant to name an intended defendant as a defendant to a s 216A application, or at the very least to give the intended defendant notice of a s 216A application so that it can consider whether to apply to be joined to it.

147 The second reason I do not accept SHSY's submission at [138] above is that the just and convenient limb requires the question or issue involving the intended defendant to be one that can be determined in the s 216A application as between complainant or the company and the intended defendant and also as between the complainant and the company. SHSY argues that the merits of the proposed derivative proceedings are one such issue. The argument is that the threshold for assessing the merits of the derivative proceedings on a s 216A application is the converse of the threshold for assessing whether the derivative proceedings, once brought, ought to be struck out under O 18 r 19 of the Rules of Court.[58]

148 That is not correct. It is true that a complainant will fail to establish that the proposed derivative proceedings are *prima facie* in the interests of the company if the derivative proceedings lack merit. It is also true that proceedings which would be struck out under O 18 r 19 if brought voluntarily by the company lack sufficient merit for the purposes of the fourth condition precedent. But it does not follow that the threshold on the merits which a complainant must clear to prove that the proposed derivative proceedings are *prima facie* in the interests of the company is the converse of – and therefore the same issue as – the threshold on the merits which an intended defendant must clear to strike out the derivative proceedings under O 18 r 19 after they

[58] NAs dated 23 September 2020, at p 9, line 28 to p 10, line 5.

have been commenced. The threshold on the merits for the fourth condition precedent is set deliberately low. It is to be carried out at a high level. It is to be carried out without any need to resolve contested facts. It is carried out without discovery and even before pleadings are filed. The fourth condition precedent does not raise the same issue as that which would arise as between the intended defendant and the company on an application to strike out the derivative proceedings once commenced.

149 The link between a successful s 216A application and the derivative proceedings which follow it also does not suffice to give rise to the type of issue which the just and convenient limb requires. It is true, as held in *Actis Excalibur*, that the questions or issues between the complainant and the intended defendants are "clearly and directly linked" to the relief or remedy which the complainant claims in the s 216A application, *ie*, leave to bring the derivative proceedings: at [33]. They are necessarily linked because the only derivative proceedings which the complainant can bring against the intended defendant in the name of the company are the very same proceedings that the court gave the complainant leave to bring when it made the s 216A order. But, for the reasons I have given, that does not mean that there is a question or issue to be determined as between the company and the intended defendant as well as between the company and the complainant on that issue for the purposes of the just and convenient limb.

150 The third reason I do not accept SHSY's submission at [138] above is that *Actis Excalibur* and *A R Evans* are distinguishable. In *Actis Excalibur*, the intended defendants were company insiders. They were *de jure* or *de facto* directors of the companies in whose name the complainant was seeking leave to commence the derivative proceedings (at [3]–[4]). As such, it was the

intended defendants' own decision not to cause the companies to litigate the subject matter of the derivative proceedings that the complainant was asking the court to override under s 216A. The intended defendants therefore had a *lis* as against the complainant and the company, sufficient to support joinder under O 15 r 6(2)(*b*). But that *lis* arose from their status as directors of the companies, not from their status as intended defendants. I do recognise, however, that the decision in *Actis Excalibur* did not rest on this point. Indeed, this argument was put forward by the complainant (at [10(b)] and rejected in that case. In that respect, and with respect, I consider *Actis Excalibur* to be wrong.

151 *A R Evans* is distinguishable for two reasons. First, it is not clear whether the court assessed critically whether the intended defendant satisfied the non-discretionary requirements for joinder under the Hong Kong equivalent of the just and convenient limb. Assuming in SHSY's favour that the court did do so, it is my view, for the reasons that I have already given, that an intended defendant does not satisfy those requirements. I therefore decline to adopt the reasoning in *A R Evans*.

152 Second, s 168BC of the Ordinance is materially different from s 216A of the Act. Like s 216A(3)(*c*) of the Act, s 168BC(3)(*a*) of the Ordinance requires a complainant to establish that granting leave appears on the face of the application to be in the company's interests. But s 168BC(3)(*b*) of the Ordinance goes further and requires the complainant to establish that the proposed derivative proceedings raise "a serious question to be tried". The Ordinance therefore sets the merits of the proposed derivative proceedings as an independent condition precedent for the complainant to establish, unlike the Act which makes no express mention of the merits at all. Further, the Hong Kong legislation sets a higher threshold for the complainant on the merits than

the Singapore courts have in interpreting and applying the fourth condition precedent under s 216A.

153 These differences may be sufficient, under Hong Kong law, for the threshold on the merits on an application under s 168BC of the Ordinance to be the converse of the threshold on the merits on a striking out application. If that is indeed the effect of the "serious question to be tried" condition precedent in the Ordinance, it is obviously a waste of time, money and judicial resources to grant a complainant leave to commence derivative proceedings if the intended defendant can demonstrate at the leave stage that it will be able to have those proceedings struck out if brought. That would then give rise to an issue as between the intended defendant and the complainant which comes within the just and convenient limb. In Singapore, for the reasons I have given, the two thresholds are quite clearly and deliberately not even an approximate converse of each other.

154 SHSY also cites *Siow Doreen and others v Lo Pui Sang and others (Horizon Partners Pte Ltd, first intervener, and Reghenzani Claude Augustus, second intervener)* [2008] 1 SLR(R) 172 ("*Siow Doreen*") to illustrate when a person affected by proceedings may apply to be joined as a party to those proceedings.[59] In that case, the consenting subsidiary proprietors of a strata development appealed to the High Court against the Strata Titles Board's decision to reject its application for approval of an *en bloc* sale: at [5]. The *en bloc* buyer then applied to be joined as a party to the appeal. The buyer argued that: (a) it was the only person with a real interest in the appeal succeeding, because the property market had moved post-contractually in its favour and

[59] SHSY's letter dated 24 August 2020 at p 6.

against the interests of the consenting subsidiary proprietors; and (b) the outcome of the appeal might have a severe effect on its separate claim against the consenting subsidiary proprietors for breach of contract: at [2]. Choo Han Teck J held that "prudence requires that [the buyer] be heard" because whether the outcome of the appeal would affect the buyer's claim against the consenting subsidiary proprietors could not be determined until the court heard from the buyer: at [5]. In my view, this case is best understood as an instance of the court exercising its inherent jurisdiction to permit a party to be heard as an indulgence to that party and to assist the court in achieving rectitude of decision, and not as an instance of the court exercising its power of joinder for all purposes under O 15 r 6(2)(*b*).

SHSY's authorities

155 I now turn to consider some of the other authorities which SHSY has cited on both limbs of O 15 r 6(2)(*b*). I do not consider that any of these authorities support SHSY's case for joinder.

An intended defendant is joined

156 SHSY cites five Singapore authorities and one Hong Kong authority: *Chan Tong Fan and another v Chiam Heng Luan Realty Pte Ltd (Chiam Toon Tau and another, non-parties)* [2013] SGHC 192 at [9] and [17]; *Tam Tak Chuen v Eden Aesthetics Pte Ltd and another (Khairul bin Abdul Rahman and another, non-parties)* [2010] 2 SLR 667 at [1] and [8]; *Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)* [2009] SGHC 223 at [1], [5] and [6]; *Low Hian Chor v Steel Forming & Rolling Specialists Pte Ltd and another* [2012] SGHC 10 at [1] and [11]; *Actis Excalibur* ([141] above) at [2] and [37]; *A R Evans* at [1], [10], [12] and [27].

157 SHSY cites these authorities[60] to establish that an intended defendant is, in practice, routinely joined as a party to a s 216A application. On the strength of these authorities, SHSY submits that, whatever may be the proper scope of the non-discretionary requirements of O 15 r 6(2)(*b*), I ought to follow the practice established by these authorities.[61] To reconcile this practice with the non-discretionary requirements of O 15 r 6(2)(*b*), SHSY suggests that these requirements are not applied as strictly on a s 216A application as they are in other proceedings.

158 All of these authorities involve a complainant seeking leave to commence derivative proceedings in the name of the company against either: (a) a director of the company for breaches of directors' duties; or (b) a shareholder of the company for breach of a shareholders' agreement to which the company was also a party. The intended defendants in each of these cases were therefore insiders to the company. The sole issue in these applications (see [110] above) was one which concerned them, *ie,* whether the court should sanction a deviation from the fundamental principle of majority rule. These cases are not authority for the proposition that an intended defendant, by virtue of that status alone, satisfies the non-discretionary requirements of O 15 r 6(2)(*b*).

159 It is true that none of these cases draws a distinction between joining an intended defendant to a s 216A application and joining an insider to the company to a s 216A application. But it is also true that none of these cases

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60 SWS at paras 23 to 24; SHSY's letter dated 24 August 2020 at p 3.

61 NAs dated 18 August 2020, at p 20, lines 5 to 7; NAs dated 23 September 2020, at p 6, lines 1 to 3.

explain satisfactorily or at all how an intended defendant, in that capacity alone, satisfies the non-discretionary requirements for joinder under O 15 r 6(2)(*b*) despite the points I have analysed above on the proper scope of those requirements in light of the nature of an application under s 216A. I reject SHSY's submission that the non-discretionary requirements of O 15 r 6(2)(*b*) are not applied as strictly on a s 216A application as they are in other proceedings. For the reasons I have already given, there is no warrant for that submission as a matter of precedent, principle or policy.

160 I therefore prefer the analysis in *Lederer* ([112] above) and *Pierce* ([116] above) to SHSY's submission as to the practical weight of these authorities.

A person directly affected is joined

161 SHSY cites *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 ("*Pegang Mining*") as authority for the proposition that a person may be joined to any proceedings where that person would be directly affected by any order that court may make in those proceedings. In the specific context of a s 216A application, SHSY submits that a person may be joined to the application where the person is in a position to assist the court on the merits of the proposed derivative proceedings.[62] These submissions appear to be supported by authority (see *Singapore Civil Procedure 2020* at para 15/6/8).

162 In my view, SHSY states its submission at far too high a level of generality. *Pegang Mining* is not authority for the proposition that any person may be joined to proceedings if that person will be directly affected by an order in those proceedings. The true question is whether the person's "*rights against*

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62 SHSY's letter dated 24 August 2020 at p 2, para 6 and p 3.

or liabilities to any party to the action in respect of the subject matter of the action [will] be directly affected by an order which may be made in the action": *Singapore Civil Procedure 2020* at para 15/6/8, [emphasis added].

163 Thus, where a plaintiff seeks a *Mareva* injunction freezing property legally owned by a defendant but said to be beneficially owned by a non-party, the beneficial owner may be joined as a party to the proceedings: *C Inc* ([69] above). So too, where a plaintiff seeks a *Mareva* injunction freezing property said to be beneficially owned by a defendant but legally owned by a non-party, the legal owner may be joined as a party to the proceedings: *Lee Kuan Yew v Tang Liang Hong and other suits* [1997] 1 SLR(R) 248. And where determining proceedings in a plaintiff's favour will result in a non-party, such as a guarantor, becoming liable to the plaintiff, the guarantor may be joined to the proceedings: *People's Parkway Development Pte Ltd v Ramanathan Yogendran* [1990] 2 SLR(R) 338.

164 I have demonstrated that, unlike all of these examples, a s 216A application does not create any rights or impose any liabilities on an intended defendant whatsoever. As I have mentioned (at [83] above), the effect of a s 216A order is purely procedural. Its rights and liabilities as against the company are entirely independent of the outcome of the s 216A application. As held in *Pierce* ([116] above) (at [53]), an intended defendant is affected by the outcome of a s 216A application at most only indirectly in that it may, as a result, find itself engaged in litigation which it would not otherwise have to be engaged. That sort of indirect and procedural effect does not suffice to satisfy any of the non-discretionary requirements of either limb of O 15 r 6(2)(*b*).

The Attorney-General is joined in the public interest

165 SHSY cites *Comptroller of Income Tax v ARW and another (Attorney-General, intervener)* [2017] SGHC 180 ("*ARW (HC)*").[63] In *ARW(HC)*, the High Court allowed the Attorney-General's application to be joined as a party to proceedings under both limbs of O 15 r 6(2)(*b*) in order to oppose the defendant's discovery application against the Comptroller of Income Tax. On appeal, in *ARW (CA)*, the Court of Appeal applied the framework set out in *Ernest Ferdinand* and affirmed the High Court's decision.

166 The Court of Appeal's reasons for affirming the first instance decision make *ARW(CA)* distinguishable. On the necessity limb, the Court of Appeal held that it was necessary to join the Attorney-General because the issue of public interest privilege could not be effectually and completely determined without the Attorney-General's participation. As the guardian of the public interest, the Attorney-General could present a perspective distinct from that of either party on the issue, given that the issue necessarily involved the public interest. Further, in performing this public duty, the Attorney-General would be able take into account confidential information and considerations to which the parties to the proceedings were not privy: *ARW (CA)* at [42].

167 It is true, by analogy with *ARW (CA)*, that an intended defendant can present a perspective on the merits of proposed derivative proceedings which is distinct from both the complainant's and the company's perspectives. But SHSY does not argue that a mere difference in perspective suffices to satisfy the non-discretionary requirements of O 15 r 6(2)(b). In any event, both *ARW*

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63 SHSY's letter dated 24 August 2020 at p 3.

(HC) and *ARW (CA)* were decided in an "unique context" (see *ARW (HC)* at [54]). That case involved the public interest and public interest immunity, an area of law laden with issues of high policy. I do not think it is possible to draw any general proposition from that case about joining a person to ordinary civil litigation in between private persons raising issues of only private law. *ARW (HC)* and *ARW (CA)* do not assist SHSY.

Conclusion

168 I therefore do not consider that any of the authorities which Reignwood has cited detracts from my analysis above of the non-discretionary requirements of O 15 r 6(2)(*b*) as applied to a s 216A application.

Conclusion on the requirements of O 15 r 6(2)(b)

169 For all these reasons, I hold that a person like SHSY who is an intended defendant but is not at the same time an insider to the company cannot satisfy the non-discretionary requirements of O 15 r 6(2)(*b*). The fundamental difficulty is that a s 216A application raises different issues as between different persons to be decided on different principles at a different threshold and for a different purpose from any issue that may arise in any proposed derivative proceedings which may follow the s 216A application.

170 An intended defendant will have its day in court and its chance to contest the derivative proceedings *in those proceedings*, once they are commenced. In *Pierce* ([116] above), Griffin J noted that "it is hard to see why intended defendants in a derivative proceedings should have any earlier opportunity to stop the proceedings than defendants in other proceedings just because the derivative proceedings requires a leave application before it is begun": at [81],

citing *Lederer* ([112] above) at [17]. That observation in *Pierce* applies equally to s 216A and O 15 r 6(2)(*b*). It is no part of the purpose of s 216A to give an intended defendant a first bite of the cherry on the merits of the claim against it. Like any other defendant, an intended defendant like SHSY will have its first and only bite at first instance when it defends the claim.

171 My decision would be different if SHSY were, for example, a shareholder in OOL or even in the Opus Tiger Companies. That status as a shareholder – equivalent to Reignwood's status (see [10] above) – would satisfy the non-discretionary requirements of O 15 r 6(2)(*b*) and would be a basis for joining SHSY as a party to the s 216A applications. But SHSY is not a shareholder of the Opus Tiger Companies at any level. Its position is that, as the largest creditor of OOL, it is the economic owner of the Opus Tiger Companies with a better claim (because they are insolvent) to control the Opus Tiger Companies than an indirect shareholder like Reignwood has.[64] That may be true as a matter of insolvency law. But it does not give SHSY standing equivalent to that of a complainant for the purposes of s 216A as a matter of company law or for the purposes of O 15 r 6(2)(*b*) as a matter of procedural law. In any event, as Reignwood points out,[65] SHSY's rights and its status as a creditor are yet to be adjudicated upon. That is the very objective of the arbitrations that I have granted Reignwood leave to commence.

172 I have arrived at my findings and holdings thus far on the assumption, in favour of SHSY, that it had applied to be joined to the s 216A applications *before* I made the s 216A orders. A party who cannot satisfy the non-

64 NAs dated 18 August 2020, at p 20, line 24 to p 21, line 10.

65 NAs dated 18 August 2020, at p 33, lines 11 to 21.

discretionary requirements of O 15 r 6(2)(*b*) *before* a s 216A order is made cannot hope to satisfy those requirements *after* a s 216A order has been made. SHSY is therefore unable to satisfy the non-discretionary requirements of O 15 r 6(2)(*b*) on the actual facts of this case.

The discretionary assessment

173 Having reached this conclusion, it is unnecessary for me to undertake the discretionary assessment. I do so, however, conscious that my decision on whether an intended defendant can meet the requirements of O 15 r 6(2)(*b*) with respect to a s 216A application could be seen to contradict the practice manifested in the authorities that SHSY has cited and the reasoning in those authorities.

174 Even if I had held that SHSY does satisfy the non-discretionary requirements of O 15 r 6(2)(*b*), I would nevertheless have dismissed SHSY's joinder applications on the discretionary assessment.

175 The discretionary assessment requires the court to consider all factors relevant to the balance of justice in a particular case. The discretionary assessment under both limbs raises substantially the same concerns: *Ernest Ferdinand* at [205].

176 Reignwood relies on four factors on the discretionary assessment: (a) joining SHSY to the s 216A applications contradicts the doctrines of *res judicata* and abuse of process; (b) SHSY is guilty of delay in applying to be joined; (c) joining SHSY at this late stage will cause prejudice to Reignwood;

and (d) SHSY has a more appropriate forum in which it to contest the merits of the derivative proceedings, *ie,* in the arbitrations themselves.[66]

177 SHSY relies on two factors on the discretionary assessment: (a) Reignwood deliberately kept SHSY in the dark about the s 216A applications to deprive SHSY of an opportunity to be heard on them; and (b) SHSY will suffer prejudice if it is not joined to the s 216A applications.[67]

178 I shall address the discretionary factors in three categories. (a) *res judicata* and abuse of process; (b) why SHSY did not apply to be joined before the s 216A orders were made; and (c) prejudice, inconvenience and alternative forum. In addressing these factors, I now take the facts as they are, and no longer assume that SHSY had brought its joinder application before I made the s 216A orders.

Res judicata and abuse of process

179 Reignwood submits that the s 216A orders are final and that SHSY should not be joined to the s 216A applications even if any part of its objective is to "reopen matters that have already been litigated".[68]

180 I accept that this is a powerful discretionary factor militating against joinder. The weight to be attached to this factor depends on: (a) why SHSY did not apply to be joined before I made the s 216A orders; (b) whether SHSY's *only* objective in seeking to be joined is reversing the s 216A orders; (c) if not,

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66 PWS at paras 67 to 68 and 76 to 77.

67 SWS at para 36.

68 PWS at para 67.

whether there is another way in which to allow SHSY to achieve its objective without this undesirable and unintended consequence of joinder, *eg,* a limited order allowing it only to be heard on specific interlocutory applications; and (d) the effect of reversing the s 216A orders on Reignwood and the Opus Tiger Companies, given that the Opus Tiger Companies themselves have never sought to have those orders reversed.

181 I now consider these other factors.

SHSY did not apply before the s 216A orders were made

182 A court will not allow a person to be joined to proceedings in order to reopen matters already litigated in those proceedings if that person "*chose* not to involve himself in the proceedings at an earlier stage": *Ernest Ferdinand* at [207]. This factor overlaps with the length of the person's delay in applying to be joined and the explanation for the delay: *Ernest Ferdinand* at [208]. The person's "*disappointed expectation* that a case would be decided differently is *not* a good explanation for delay": *Ernest Ferdinand* at [208].

183 Reignwood relies on this to argue that SHSY knew of the s 216A applications from January 2019 and chose not to involve itself in these applications at any time before I made the s 216A orders in May 2019.[69] SHSY's response is that it delayed in applying to be joined because Reignwood engaged in a pattern of conduct of "deliberately concealing" the s 216A applications from SHSY "to gain a tactical advantage in its dispute against SHSY".[70] Thus Reignwood misled SHSY into waiting to be served with the originating process

[69] PWS at para 68.

[70] SWS at paras 59 and 61.

in the PRC while Reignwood pressed on with the applications and secured the s 216A orders in SHSY's absence in Singapore.

184 In my view, SHSY's delay is a neutral factor which does not count either in favour of or against exercising the discretion to join SHSY to the s 216A applications. I say that for the following reasons.

185 Reignwood revealed to SHSY in January 2019 that it had brought a s 216A application against OT1 and SHSY.[71] It made this revelation when it filed its defence in the English litigation (see [133] above). It pleaded the s 216A application against OT1 as part of its case as follows:[72]

> On 10 December 2018 *the [plaintiff] filed an Originating Summons in the Singapore High Court against [Opus Tiger 1] … and [SHSY].* The [plaintiff] seeks the leave of that Court to bring a statutory derivative action for breach of the Contract in the name and on behalf of [Opus Tiger 1] against [SHSY] under s.216A of the Singaporean Companies Act (Cap.50). *If granted leave (which is anticipated will happen in or around March 2019),* the [plaintiff] will be permitted to commence [the arbitration proceedings] …
>
> [emphasis added]

SHSY accepts that this pleading "made [SHSY] aware of the existence of the OT1 application.[73]

186 SHSY explains, however, that it took no steps to participate in the OT1 application at that stage because: (a) Reignwood had named SHSY as the second defendant in the s 216A application; (b) therefore, SHSY was waiting to

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71 NAs dated 18 August 2020, at p 13, lines 14 to 19.

72 Cheng Huanmin's 1st Affidavit at p 34.

73 Cheng Huanmin's 1st Affidavit at para 30.

be served formally with the application in the PRC; and (c) SHSY knew that service in the PRC would take a long time to effect because it would have to be done through the judicial authorities of the PRC.[74]

187 As I have mentioned, Reignwood discontinued the s 216A applications against SHSY with leave on 7 January 2019.[75] It did not serve the notices of discontinuance on SHSY or inform SHSY of the discontinuances in any other way.[76]

188 Reignwood points out that,[77] even though SHSY claims it was waiting to be served with the s 216A application from January 2019, SHSY did ask Reignwood on 6 January 2019 for copies of the application and supporting affidavit.[78] Reignwood provided these documents to SHSY on 8 January 2019. This factor is, to my mind, immaterial. SHSY was still named as the second defendant on the face of those documents. This was consistent with Reignwood's description of the s 216A application against OT1 in its defence filed in the English litigation (see [184] above). However, by that time, Reignwood had already secured leave to discontinue the applications as against SHSY. Reignwood did not disclose this to SHSY.

189 I am prepared to accept that SHSY actually believed in January 2019, and on reasonable grounds, that: (a) it was still a party to the OT1 application;

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74 Cheng Huanmin's 1st Affidavit at paras 7, 30, 31; NAs dated 18 August 2020, at p 15, lines 12 to 15.

75 SHSY's Bundle of Documents at Tab 7.

76 SWS at para 49; Cheng Huanmin's 1st Affidavit at para 10.

77 PWS at para 71(c).

78 Cheng Huanmin's 1st Affidavit at p 50 to 51.

and (b) Reignwood was in the process of serving the application on SHSY through the judicial authorities of the PRC. I am prepared also to accept that SHSY did not know that Reignwood had discontinued the OT1 application as against SHSY until June 2019 when it inspected the court file. However, none of this suffices to explain SHSY's failure to bring its joinder application before May 2019.

190 In the defence filed in the English litigation (see [184] above), Reignwood disclosed to SHSY that it anticipated that the OT1 application would be heard, and that leave would be granted, in or around March 2019. As Reignwood points out,[79] SHSY is a sophisticated and substantial commercial party. It is not unused to litigation (see [25] above). Given that SHSY knew about the OT1 application in January 2019 and knew that Reignwood expected the OT1 application to be heard in March 2019, I would have expected SHSY to have asked Reignwood for an update on the application in or around March 2019 if not before. At the very least, I would have expected SHSY to appoint solicitors in Singapore no later than March 2019 to inspect the court file in the OT1 application to ascertain its status. SHSY did not inspect the court files in the s 216A applications until Reignwood gave SHSY copies of the s 216A orders in June 2019.[80]

191 Despite knowing of the s 216A orders from June 2019, SHSY did not apply to be joined until October 2019. SHSY says that it was waiting for the Opus Tiger Companies to file the Directions Applications. But, given that at least one of SHSY's objectives in applying to be joined to the s 216A

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79 NAs dated 18 August 2020, at p 27, lines 16 to 21.

80 Cheng Huanmin's 1st Affidavit at para 35.

applications is to reverse the s 216A orders, there was no reason for SHSY to wait for the Directions Applications to be filed before applying to be joined.

192 Having said that, it appears to me also that Reignwood was playing tactical games with SHSY. It first named SHSY as the second defendant in the s 216A application against OT1 and informed SHSY of that fact. It then discontinued the s 216A applications as against SHSY without informing SHSY of that fact. Reignwood secured the s 216A orders in May 2019, but did not inform SHSY of them until June 2019, just before the deadline for appeal was to expire. Reignwood did not give copies of the notices of discontinuance to SHSY until July 2019, eight months after the discontinuances took place.[81]

193 I mean no criticism of either party's conduct by these observations. They were merely jockeying for advantage as litigants, shareholders and creditors inevitably do. As was their prerogative, they were both acting within the strict letter of their procedural and legal rights. Reignwood had no duty to inform SHSY promptly or at all: (a) that it had brought four s 216A applications and not just one against OT1; (b) that it had discontinued all four applications as against SHSY in January 2019; or (c) that it had obtained the s 216A orders in May 2019. And SHSY was entitled to sit back and wait to be served with the OT1 application in the PRC even if it knew that Reignwood intended to have the application heard in March 2019 and even if SHSY received no updates from Reignwood as to the progress of the application around or after March 2019.

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[81] Cheng Huanmin's 1st Affidavit at p 484.

194 I make these observations only as a basis for my conclusion that I consider both parties' acts and omissions from January 2019 to October 2019 to be a neutral factor in the discretionary assessment, *ie*, a factor which does not weigh in either party's favour.

Prejudice, inconvenience and alternative forum

195 A factor which points against joinder is the prejudice and inconvenience that Reignwood would suffer if SHSY is now joined as a party to the s 216A applications. The prejudice and inconvenience operate on two levels.

196 First, joining a person to any proceedings causes prejudice and inconvenience to the parties to the proceedings. The joinder increases the length and the costs of the proceedings. In *Siow Doreen* ([154] above), Choo Han Teck J joined the *en bloc* buyer as a party to an appeal from the Strata Titles Board to the High Court. The most relevant factor was that the appeal "concerned a very narrow point (or two) of law". Choo Han Teck J therefore considered that the joinder was warranted even though it increased the number of parties the court would have to hear: at [6].

197 The prejudice and inconvenience are compounded when joining an intended defendant to a s 216A application in order to allow it to contest the four conditions precedent which a complainant must establish (see [122] above). That is especially so when the intended defendant's purpose is to contest the merits of the proposed derivative proceedings. Joining an intended defendant who is not an insider purely to contest the merits of the proposed derivative proceedings creates a real risk of complicating and lengthening a s 216A application with no countervailing benefit, given the very low threshold at which the merits are to be assessed. If allowed to do so, an intended defendant

has every incentive to maximise this first bite of the cherry by turning the s 216A application into an application to strike out the proposed derivative proceedings even before they are brought or, worse still, into a full dress rehearsal of the derivative proceedings. No doubt, a robust judge will be vigilant to prevent this from happening. But the risk exists nonetheless. That in turn poses a real risk of increasing costs and delay. It may also delay the commencement of the derivative proceedings themselves, contrary to the purpose of s 216A. As the Ontario Court of Appeal noted in *Lederer* ([112] above) at [15]:

> … the application procedure envisaged by [the Ontario equivalent of s 216A] is intended to be expeditious so that if litigation is necessary in the interest of the corporation its commencement will not be unduly delayed. This suggests that additional participants in a leave application beyond those envisaged by [the Ontario equivalent of s 216A] ought to be the exception, not the norm. …

198 SHSY submits that refusing joinder will cause it prejudice because it will have no opportunity to present "the full facts" as to whether the court should have granted Reignwood leave to commence the derivative proceedings.[82] It also submits that refusing leave will encourage litigants "to conceal proceedings from interested parties" to prevent full disclosure of the relevant facts to the court.[83] But s 216A does not require a complainant to notify an intended defendant of the s 216A applications, let alone to name it as a defendant. That is a deliberate legislative choice. Further, in a s 216A application, the court need not and should not determine "the full facts"; it need only determine whether

82 SWS at para 74.

83 SWS at para 74.

the complainant has established the four conditions precedent and whether it should sanction a departure from the fundamental principle of majority rule.

199 Second, joining SHSY as a party to the s 216A applications will cause prejudice or inconvenience to Reignwood. SHSY argues in response that, if it is joined as a party, it will take out the necessary applications to challenge the s 216A orders. And if its challenge fails, the s 216A orders will stand and Reignwood will suffer no prejudice.[84]

200 But the prejudice and inconvenience to Reignwood lie precisely in the possibility that SHSY's challenge succeeds. This is where the fact that SHSY has applied for joinder after the s 216A orders have been made becomes highly relevant. Reignwood has, since June 2019, proceeded on the basis that the s 216A orders are final and cannot be reversed even by appeal. On that basis, Reignwood has now commenced all four arbitrations. Reignwood has paid the filing fees for all four arbitrations. All four tribunals have been constituted. The OT1 arbitration is at the pleadings stage.[85] Although these points appear only from Reignwood's written submissions rather than in any affidavit, SHSY knows the procedural position in the arbitrations and does not contradict Reignwood.

201 As Reignwood submits,[86] if SHSY is now joined to the s 216A applications in order, at least in part, to appeal against the s 216A orders out of time, there is a risk that all of the time, money and other resources that

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84 SWS at para 73.

85 PWS at para 76(a).

86 PWS at para 76.

Reignwood has expended in progressing the arbitrations will be wasted. The potential prejudice to Reignwood is not addressed by allowing the joinder and leaving it to Reignwood to raise these arguments on SHSY's application for leave to appeal out of time. The mere risk of prejudice to Reignwood suffices to count against SHSY in the discretionary assessment.

202 For all of these reasons, even if I had been of the view that SHSY had managed to satisfy the non-discretionary requirements of O 15 r 6(2)(*b*), I would have declined it leave to be joined as a party to the s 216A applications on the discretionary assessment.

The inherent jurisdiction to order joinder

203 Quite apart from the power to join SHSY under O 15 r 6(2)(*b*), some authorities refer to the court's inherent jurisdiction to join a person to proceedings. For completeness, I shall briefly address whether SHSY's joinder applications can succeed under the court's inherent jurisdiction.

204 The court's inherent jurisdiction to prevent injustice and to prevent an abuse of the process of the court is preserved by O 92 r 4: *Wee Soon Kim* ([130] above) at [21]. Order 92 r 4 reads:

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

How the court should exercise its inherent jurisdiction "should not be circumscribed by rigid criteria or tests" but by the strict and essential touchstone of necessity: *Wee Soon Kim* at [27]; *Family Food Court* [2008] 4 SLR(R) 272 at [63]. The court's inherent jurisdiction should be invoked only in "exceptional

circumstances where there is a clear need for it and the justice of the case so demands": *ARW (HC)* ([165] above) at [66], citing *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 at [17]. An overly liberal approach to exercising the court's inherent jurisdiction runs the risk of undermining the entire purpose of the carefully constructed edifice of procedural rights, obligations, powers, discretions and safeguards set out in the Rules of Court.

205 I refuse to join SHSY to the s 216A applications in the exercise of my inherent jurisdiction. SHSY has not established that any exceptional circumstances exist. Further, the same list of factors I have relied on in explaining why SHSY cannot satisfy the non-discretionary requirements of O 15 r 6(2)(*b*) and why I would have exercised my discretion under O 15 r 6(2)(*b*) against joining SHSY demonstrates that exercising my inherent jurisdiction to join SHSY to the s 216A applications is in no sense necessary to prevent injustice.

206 Once again: (a) the sole issue to be adjudicated on the s 216A applications is no concern of SHSY; (b) SHSY is entitled to only one opportunity to defeat the derivative proceedings, and that opportunity comes in the arbitrations themselves; and (c) even creating a risk that the s 216A orders might be belatedly reversed is prejudicial to Reignwood, given that the sole issue on a s 216A application is of no concern to an intended defendant.

207 For all of these reasons, SHSY's application to be joined as a party to the s 216A applications cannot succeed even under the inherent jurisdiction.

Hearing SHSY on the Directions Applications

208 I have thus far rejected SHSY's application to be joined as a party to the s 216A applications either under O 15 r 6(2)(*b*) or in the exercise of the court's inherent jurisdiction.

209 I now consider whether it is appropriate to make a limited order granting SHSY leave only to be heard on the Directions Applications. That limited order would give SHSY a procedural right to present evidence and submissions on the Directions Applications but would not make it a party to the s 216A applications. That would avoid the undesirable and unintended consequences of joinder (see [75]–[76] above). In particular, this type of limited order ensures that SHSY cannot even attempt to reverse the s 216A orders. The fact that I have already made the s 216A orders therefore becomes an irrelevant consideration in the discretionary assessment as to whether to make this type of limited order.

210 There is no express power in the Rules of Court for me to make this type of limited order. I do not consider that O 15 r 6(2)(*b*) allows me to do so. It is true that the word "proceedings" in O 15 r 6(2) is wide enough to include interlocutory proceedings such as the Directions Applications. But the entire purpose of O 15 r 6 is to deal with misjoinder and nonjoinder of "parties". A person cannot be a "party" to an interlocutory application. A person can be a party only to the originating process in which that interlocutory application is brought.

211 I do consider, however, that the court's inherent jurisdiction as preserved by 92 r 4 extends to allowing a person who is not a party to an originating process to present evidence and submissions either on a particular interlocutory

application in that originating process or at the hearing which disposes of the originating process with finality, without making that person a party to the originating process. A limited order does not cut across or undermine any established procedure under the Rules of Court. Further, a limited order could assist the court in achieving rectitude of decision on the s 216A application without the undesirable and unintended consequences of a joinder. Indeed, the existence and exercise of this inherent jurisdiction may be the best procedural explanation for the basis on which intended defendants who are not shareholders, directors or "proper persons" have been permitted to present evidence and make submissions at the hearing of a s 216A application.

212 By the Directions Applications, the Opus Tiger Companies seek my directions on the proper scope of the s 216A orders. In particular, the Direction Applications pose the following questions:[87]

(a) Did Reignwood act within the scope of the s 216A orders in:

(i) purporting to accept, on the Opus Tiger Companies' behalf, SHSY's alleged repudiation of the Contracts; and

(ii) purporting to give, on the Opus Tiger Companies' behalf, notice as stipulated by the Contracts to change the companies' addresses for receipt of communications?

(b) Is Reignwood obliged to consult and inform the Opus Tiger Companies of those two acts and of any future steps in the conduct of the derivative actions?

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87 HC/SUM 5234/2019; HC/SUM 5235/2019; HC/SUM 5236/2019; HC/SUM 5237/2019; SWS at para 31.

213 SHSY approaches this more limited order by analogy, *mutatis mutandis*, with O 15 r 6(2)(*b*). It therefore submits that it should be heard on the Directions Applications under the just and convenient limb. It identifies the question or issue between it and the existing parties to be the scope of the s 216A orders. It says that the situation giving rise to the Directions Application sprang from the derivative proceedings against SHSY, and that it will be affected by my decision on the Directions Applications.[88]

214 It is true that the questions raised in the Directions Applications affect SHSY in that they arise from contracts to which SHSY is the counterparty. It is also true that Reignwood's conduct of the derivative proceedings will affect SHSY, and therefore the outcome of the Directions Applications may affect SHSY. But that does not give rise to a question or issue involving SHSY that relates to an existing question or issue in the Directions Applications.

215 The Directions Applications are an extension of the s 216A applications and the s 216A orders. Just as the sole issue which arises on a s 216A application is internal to the company, so too the questions and issues which arise on the Directions Applications as to the scope and implementation of the s 216A orders are internal to the company. As a result, these issues arise only between Reignwood and the Opus Tiger Companies. The questions and issues which arise on the Directions Application do not cross the contractual divide between the Opus Tiger Companies and SHSY. They are therefore no concern of SHSY's.

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88 NAs dated 18 August 2020, at p 40, lines 7 to 16.

216 Even if I were to look more broadly at whether to make a limited order – without reference even by analogy to O 15 r 6(2)(*b*) but as a matter of an overall unfettered discretion arising from my inherent jurisdiction – I would also decline to make the order. Whatever my decision on the Directions Applications may be, whether the steps which Reignwood takes in the name of the Opus Tiger Companies in conducting the derivative proceedings against SHSY fall within the scope of the s 216A orders is a matter internal to the Opus Tiger Companies. It therefore concerns only the closed class of insiders to the company: Reignwood, the Opus Tiger Companies, OOL (as a shareholder of Reignwood), the JPLs and other directors of the Opus Tiger Companies and possibly the other shareholders of OOL (as "proper persons" within the meaning of s 216A(1)(*c*)). Whether those steps fall within the scope of the s 216A order is no concern, in any legal or procedural sense, of SHSY's.

217 In that sense, SHSY is like any other defendant facing a claim by a corporate plaintiff or claimant. Whether the corporate claimant is acting beyond its powers and whether the directors controlling the conduct of the litigation are acting beyond the limits of their authority are all matters internal to the corporation. They are of no concern to the defendant.

Conclusion

218 For all of the foregoing reasons, I have decided that: (a) SHSY does not satisfy the non-discretionary requirements and fails the discretionary assessment for joinder as a party to the s 216A applications under Order 15 r 6(2)(*b*) and in the exercise of my inherent jurisdiction; and (b) it is not necessary for me to exercise my inherent jurisdiction to receive evidence and submissions from SHSY on the Directions Applications.

219 I have therefore dismissed SHSY's joinder applications in their entirety. The effect of my decision is, of course, to preclude SHSY from applying again to be joined as a party to the s 216A applications. But nothing in my decision precludes SHSY from applying under the court's inherent jurisdiction to be heard on an interlocutory application that arises after this decision. Reignwood does not suggest otherwise.[89]

220 I make one final point before concluding. Rule 9(3)(*a*) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) obliges every legal practitioner who conducts proceedings before a court "to inform the court…of every relevant decision…of which the legal practitioner is aware, whether that decision…supports or rebuts the legal practitioner's contentions…".

221 The obligation imposed by this rule is a wide one. It does not require the decision to be one that is binding on the court. It does not even require the decision to be a decision of a Singapore court. But the obligation applies only if the legal practitioner is aware of the decision. As such, a breach of the obligation is extremely difficult to detect, let alone to sanction. It is thus fair to say that the only real motivation for complying with this obligation is the legal practitioner's own professional conscience. In that sense, I have often wondered whether this rule is more honoured today in the breach than the observance. Nevertheless, the rule exists. And the rule exists not merely as a professional obligation: it also encapsulates one of the best traditions of the bar in extending its members' assistance to the court in administering justice.

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89 NAs dated 18 August 2020, at p 36, lines 5 to 8; NAs dated 23 September 2020, at p 22, line 24 to p 23, line 5.

222 In dismissing SHSY's joinder applications, I have derived support from the Canadian decisions of *Lederer* ([112] above) and *Pierce* ([116] above). It was Mr Daniel Chia, counsel for SHSY, who drew both decisions to my attention. He did so even though both decisions rebutted his contentions and even though neither decision was in any way binding on me. I commend Mr Chia for having followed his professional conscience and for having upheld the best traditions of the bar in doing so.

Vinodh Coomaraswamy
Judge of the High Court

Hing Shan Shan Blossom, Tan Yi Yin Amy, Teo Wei Ling and Kiu Yan Yu (Drew & Napier LLC) for the plaintiff;
Tnee Zixian, Keith, Chin Wan Yew, Rachel, and Darren Ng Zhen Qiang (Tan Kok Quan Partnership) for the defendants;
Daniel Chia Hsiung Wen, Ker Yanguang and Annette Liu Jia Ying (Morgan Lewis Stamford LLC) for Shanghai Shipyard Co Ltd.