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

[2022] SGHC 187

Originating Summons No 96 of 2022

In the matter of Section 216A of the Companies Act (Cap.50)

And

In the matter of the application for leave to commence a derivative action by Malcolm Tan Chun Chuen for and on behalf of Beach Hotel Pte Ltd

And

In the matter of the application for leave to commence a derivative action by Malcolm Tan Chun Chuen for and on behalf of Wine Bonanza Pte Ltd

Between

Malcolm Tan Chun Chuen

… *Plaintiff*

And

(1) Beach Hotel Pte Ltd
(2) Wine Bonanza Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies — Statutory derivative action — Section 216A of the Companies Act 1967 (2020 Rev Ed)]

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v
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Goh Yihan JC:

Background

1 The plaintiff, Malcom Tan Chun Chuen, who says he is the beneficial owner of all of the issued shares in the 1st defendant, Beach Hotel Pte Ltd, and the 2nd defendant, Wine Bonanza Pte Ltd, applied for leave pursuant to s 216A of the Companies Act 1967 (2020 Rev Ed) (the "Companies Act") to bring actions in the names of the defendants against Mr Ronny Lee Tiang Luok ("Ronny") and Mr Loo Shi Guang Gabriel ("Gabriel") for their alleged breaches of directors' duties to the defendants. At the material time, the sole director of the 1st defendant is Mr Poh Choon Tat ("Mr Poh") and the sole director of the 2nd defendant is Mr Eric Yeo Jin Koon ("Eric").

2 While the plaintiff was represented by counsel, the defendants had not engaged counsel as of the hearing before me. In fact, the defendants did not

appear at the hearing. The defendants also have not tendered any submissions in respect of the plaintiff's current application, nor have they responded to the plaintiff's various correspondence about this matter. More specifically, I note that the defendants have not responded to the notice of the present hearing date and time, despite being informed that the court may proceed with the hearing of this matter in their absence. Accordingly, I therefore proceeded to hear the plaintiff in the absence of the defendants.

3 After hearing the plaintiff and having considered the various Affidavits and submissions filed in support of the application, I dismissed the plaintiff's application. Notwithstanding the defendants' absence and arguments against the plaintiff's application, I was not satisfied that the plaintiff has fulfilled the legal requirements for an application under s 216A of the Companies Act ("s 216A"). I now give the full reasons for my decision.

The legal requirements of an application under s 216A of the Companies Act

4 Section 216A of the Companies Act provides as follows:

> **Derivative or representative actions**
>
> **216A**.—(1) In this section and section 216B, "complainant" means —
>
> (*a*) any member of a company;
>
> (*b*) the Minister, in the case of a declared company under Part 9; or
>
> (*c*) any other person who, in the discretion of the Court, is a proper person to make an application under this section.
>
> (2) Subject to subsection (3), a complainant may apply to the Court for permission to bring an action or arbitration in the name and on behalf of the company or intervene in an action or arbitration to which the company is a party for the purpose of

> prosecuting, defending or discontinuing the action or arbitration on behalf of the company.
>
> (3) No action or arbitration may be brought and no intervention in an action or arbitration may be made under subsection (2) unless the Court is satisfied that —
>
> > (*a*) the complainant has given 14 days' notice to the directors of the company of the complainant's intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action or arbitration;
> >
> > (*b*) the complainant is acting in good faith; and
> >
> > (*c*) it appears to be prima facie in the interests of the company that the action or arbitration be brought, prosecuted, defended or discontinued.

5 From a plain reading of s 216A, there are, broadly speaking, four legal requirements that the plaintiff must satisfy: (a) the plaintiff must first have standing to bring the application; (b) the plaintiff must have given the requisite notice to the directors of the defendants; (c) the plaintiff must show that he is acting in good faith; and (d) it appears to the court that it is *prima facie* in the interests of the defendants that the action be brought.

The plaintiff has the requisite standing in respect of the 1st defendant but not the 2nd defendant

6 Under s 216A(1), the complainant applying under the section may be a member of the company, the Minister for Finance in respect of companies under investigation, and "any other person who, in the discretion of the Court, is a proper person to make an application" under the section.

7 I considered the plaintiff's standing in respect of each defendant in turn.

8 Turning first to the 1st defendant, the plaintiff is not a registered shareholder who is a member of the 1st defendant. However, the plaintiff says

that he is a beneficial owner of all the 100,000 issued shares of the 1st defendant. This is because, according to the plaintiff in his 1st Affidavit dated 26 January 2022, Gabriel, by a written declaration of trust made in December 2016, declared himself as the trustee holding on behalf of the plaintiff all 100,000 of the issued shares of the 1st defendant.[1] In respect of the 1st defendant, the plaintiff is therefore applying under the catch-all "proper person" category under s 216A(1)(*c*) of the Companies Act ("s 216A(1)(*c*)"). While the phrase "proper persons" is broad, it is axiomatic that it must be interpreted in the light of the rationale behind s 216A. In the recent High Court decision of *Mytsyk, Viktoriia v Med Travel Pte Ltd and another* [2022] SGHC 75, Mavis Chionh J had to consider the ambit of the "proper person" provision in s 216A(1)(*c*). The learned judge referred to the *Report of the Select Committee on the Companies (Amendment) Bill* (Bill No 33/92) (Parl 2 of 1993, 26 April 1993) ("*Select Committee Report on the Companies (Amendment) Bill 1993*"), which was written when s 216A was introduced into the Companies Act. In relation to the ambit of the "proper person" provision, the Report had stated (at [49]):

> The Committee holds the view that the proposed section 216A(1)(*c*) provides the Court with the discretion to extend the application of the section to any person who it thinks is a proper person to make the application under the section. In view of this wide power, the Committee thinks it not necessary to extend the application of the section to directors and debenture holders expressly.

9 As such, as Associate Professor Pearlie Koh has noted, the original impetus for s 216A was to strengthen the position of the minority shareholder by providing "more effective remedies to minority shareholder" (see Pearlie Koh, "For Better or For Worse – The Statutory Derivative Action in Singapore" (1995) 7 SAcLJ 74 at 81–84). Further, as stated in Hans Tjio, Pearlie Koh and

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[1] Affidavit of Malcom Tan dated 26 January 2022 at para 11.

Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ("*Corporate Law*") at p 446, the "proper person" has to be in a position *analogous* to that of a minority shareholder" [emphasis in original]. The learned authors argue the following (at para 10.042):

> … These would be persons who have a financial interest in the manner in which the affairs of the company are managed and hence the outcome of any litigation affecting the company, but who, like the minority shareholder, have limited ability to influence management. …

Accordingly, the learned authors opine those possible candidates include a person whose interests in the company are held via a nominee and a director of the subject company. Indeed, a nominee's interest in the company is clear and obvious.

10 In the present case, by way of the written declaration of trust, the plaintiff is plainly the beneficial owner of the 100,000 issued shares of the 1st defendant. As a beneficial owner, he, in the words of the learned authors of *Corporate Law*, clearly has a financial interest in the way the affairs of the 1st defendant are managed. This is similarly the case in the High Court decision of *Ganesh Paulraj v A&T Offshore Pte Ltd and another* [2019] SGHC 180 ("*Ganesh Paulraj*"), where Aedit Abdullah J held that the beneficial owner of a company which, in turn, owned 40% of the shares in the 1st respondent company had standing to bring the s 216A application (at [12]). By a parity of reasoning, there should therefore be no impediment to a direct beneficial owner of shares in the company itself seeking leave in the same way. Accordingly, I am of the view that the plaintiff has the requisite standing in his application in respect of the 1st defendant.

11 Turning then to the 2nd defendant, the plaintiff relied on a similar argument to make out his standing for his application. The plaintiff argued that

like the 1st defendant, Gabriel holds all 250,000 shares of the 2nd defendant on trust for him. However, unlike for the 1st defendant, the plaintiff did not exhibit any document showing that he is the beneficial owner of the said shares. Indeed, in his Affidavit dated 26 January 2022, the plaintiff referred to two documents in support of his beneficial ownership.[2] However, neither shows this to be the case. First, the plaintiff referred to a copy of the ACRA Business Profile of the 2nd defendant. This document shows the sole shareholder to be Gabriel, the director to be one Yeo Jin Koon Eric, and the secretary to be the plaintiff. Second, the plaintiff referred to a copy of the Register of Directors of the 2nd defendant. The plaintiff says that Gabriel and Ronny were appointed as his nominee directors. While the document does show Gabriel and Ronny to be directors of the 2nd defendant, there is no indication otherwise that they were, as the plaintiff says, his nominees. As such, neither of the documents exhibited substantiates the plaintiff's argument that he is the beneficial owner of all the 2nd defendant's issued shares.

12 Curiously, the plaintiff neglected to mention in his Affidavit that the trust arrangement about the 2nd defendant was by way of an alleged oral agreement. I inferred this from a letter from the plaintiff's solicitors dated 17 November 2017 to Gabriel and Ronny ("the 17 November Letter"),[3] where the solicitor's instructions were that "[t]he trust arrangements in respect of the rest of the Companies were by way of oral agreement". However, the plaintiff has provided no particulars of such an oral agreement in any of his Affidavits, save for the bare assertion that he holds all the issued shares in the 2nd defendant as a beneficial owner.

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2 Affidavit of Malcom Tan dated 26 January 2022 at paras 28 and 30.

3 Affidavit of Malcom Tan dated 26 January 2022 at p 124.

13 Because of the unsatisfactory evidence before me in relation to the plaintiff's assertion that he holds all the issued shares in the 2nd defendant as a beneficial owner, I wrote to the plaintiff's solicitors before the hearing asking them to address this at the hearing before me. Mr Mohammad Maiyaz Al Islam ("Mr Islam"), who appeared for the plaintiff, referred to the letter I mentioned above. He also referred me to a series of WhatsApp messages between the plaintiff and Ronny/Gabriel which showed that the plaintiff was very much the controlling figure in the 2nd defendant and that Ronny and Gabriel were both very compliant to him. As such, Mr Islam urged me to infer that there was an oral agreement between the parties for Gabriel to hold all 250,000 shares of the 2nd defendant on trust for the plaintiff.

14 In my judgment, the plaintiff has not made out his case that Gabriel held all 250,000 shares of the 2nd defendant on trust for him. First, there was no particulars provided as to the alleged oral agreement, such as when it was formed and its substantive contents. Second, the 17 November Letter was essentially the plaintiff's own assertion of such a trust arrangement. I also find it curious that the plaintiff did not refer to this document in the two Affidavits he had filed in support of this supposed trust arrangement. Third, even if I were to accept that the WhatsApp messages showed that the plaintiff was the controlling figure behind the 2nd defendant and that both Ronny and Gabriel were compliant towards him, this fact alone does not show the existence of an oral agreement in relation to the 250,000 shares being held on trust for the plaintiff.

15 For these reasons, while I find that the plaintiff has standing to bring the present application in respect of the 1st defendant, I am not satisfied that he has standing in respect of the 2nd defendant. Accordingly, at this point, I dismiss the aspects of his application with respect to the 2nd defendant. For

completeness, however, I also deal with the substantive requirements in s 216A with respect to the 2nd defendant on the assumption that the plaintiff had standing in relation to the 2nd defendant.

The plaintiff has given requisite notice to the directors

The requirement of 14 days' notice under s 216A(3)

16 Section 216A(3)(*a*) of the Companies Act requires that 14 days' notice of an intention to apply for leave of Court to commence a statutory derivative action on behalf of a company be given to its directors. As the learned authors of *Corporate Law* explain (at para 10.050), the objective of the notice requirement is to give the company, acting through its board of directors, the opportunity to evaluate the complaint and consider its rights and appropriate course of action. Thus, as Judith Prakash J (as she then was) held in the High Court decision of *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 ("*Carolyn Fong*") (at [14]):

> 14 … If the company would be willing to pursue the complaint on its own, the leave application would become redundant, and no further legal costs would be incurred or wasted in dealing with the issue of whether leave ought to be granted.

17 Accordingly, there are two considerations for the notice to be effective under s 216A(3)(*a*) (subject to s 216A(4)). First, as mentioned above, there must be the requisite 14 days' notice. The 14 days is simply the statutorily-prescribed minimum period for the directors to make a decision whether to act. Second, not only must it the directors be given the requisite 14 days' notice, the directors must *also* have given *sufficient particulars* in the notice to enable them to make an informed decision on the appropriate course of action to take. It should state what it is that the complainant wishes the directors to do and must sufficiently

specify the cause of action and contains sufficient information to found an endorsement on a writ (see *Halsbury's Laws of Singapore* vol 6 (LexisNexis, 2021) at para 70.235, citing *Re Northwest Forest Products Ltd* [1975] 4 WWR 724). What constitutes sufficient particulars would depend on the facts of each case. But, broadly speaking, the contents of the notice must provide the directors with enough detail, such as the facts of alleged relevant incidents that constitute grounds for legal action to be taken out by the company, to enable the directors to make an informed decision on the next course of action.

18 While this is not material in the present application, I note that s 216A(3)(*a*) is *silent* on whether the notice be written. This may be contrasted with s 237(2)(*e*)(i) of the Australian Corporations Act 2001 (Cth), which expressly provides that the analogous notice must be in writing and provide the reasons for applying, stating as such: "The Court must grant the application if it is satisfied that … at least 14 days before making the application, the applicant gave *written* notice to the company of the intention to apply for leave and of the reasons for applying" [emphasis added]. The reason for this difference in language and omission of the "written" requirement is likely because the Singapore legislation in this respect was not modelled after the Australian Corporations Act 2001 (Cth), but instead, followed the Canadian equivalent in the Ontario Business Corporations Act, RSO 1990, c B-16. The Canadian version does not mandate the need for *written* notice and provides in the relevant part (at s 246(2)): "No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days' notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court …". It is immediately clear that the language used therein is closer to s 216A(3)(*a*) of the Companies Act. This

transplantation from Canada is confirmed by the statements made in the *Select Committee Report on the Companies (Amendment) Bill 1993*:

> 50 Under section 216A, a complainant must give reasonable notice to the directors of the company should he decide to apply to the court for leave to bring a derivative action.
>
> 51 A representor expressed the view that it is desirable to specify the period of notice to be given to the company *as is the case in the Ontario Business Corporation Act. In line with that legislation*, the representor proposed that, in circumstances which do not permit the giving of a particular period of notice, provision be made to allow the court to give an interim order pending the giving of notice.
>
> 52 *The views of the representor were noted*. The relevant provision will be amended to require a complainant to give the company 14 days' notice, and to provide that where a complainant can establish to the satisfaction of the court that it is not expedient for such notice to be given, then the court may make such interim order as it thinks fit pending the complainant giving notice as required.
>
> [emphasis added]

It appeared that the select committee members of the Companies (Amendment) Bill (Bill No 33/92) were more concerned about the *period* of notice to be given, rather than the requirement of *writing*. Evidence of transplantation from Canada is also made clear in a discussion between some of the select committee and other stakeholders:

> Dr Richard Hu Tsu Tau
>
> 437. New sections 216A and 216B — ***we accept your proposal***. For subsection 3 (a), *you* would like a specific number of days' notice to be given? - (*Miss Rajamanickam*) We can, perhaps, consider this because the term "reasonable notice" will always be open to interpretation in any given case. No doubt, depending on the situation, it may give flexibility. ***We have had a look at the Ontario equivalent legislation, and it provides for 14 days' notice***. We thought that if there is scope to specify the notice, then it is in the interest of all parties who might invoke the section that they know that there is a specific period of notice to be given. But it is possible that the exigencies of the case may not permit the giving of a particular period of notice, in which case then the section would have to

> contain a provision to allow for that ***as in the Ontario section*** which allows the court to grant an interim order pending the giving of the notice.
>
> [italics in original; emphasis added in bold italics]

19 *Prima facie*, there is no need for written notice to be provided, as is the situation in Canada (it appears that the Canadian cases do not read into their legislation any requirement of writing). However, in my view, given the need for sufficient particulars, it would only suffice in most cases that the notice is written. This is because, unless the fact situation is so simple as to be conveyed accurately orally, a written account will always provide better particulars for the directors to decide on the appropriate course of action. For example, a letter might constitute valid notice if it complies with s 216A(3)(*a*) of the Companies Act in substance (conveying, *inter alia*, that the complainant intended to apply to court to seek leave if the directors did not take action) even though there is no express or implied reference to the notice requirement in the relevant provision (see the High Court decision of *Ozak Seiko Co Ltd v Ozak Seiko (S) Pte Ltd and another and other matters* [2019] SGHC 34 at [22]–[24]).

20 In the present case, the plaintiff, through his then-solicitors, served the requisite notices to the respective sole directors of the defendants, that is, Mr Poh and Eric, on 1 February 2021. Given that the plaintiff filed the present application only on 27 January 2022, which is almost a year after when the notices were given, he has, pursuant to the plain terms of s 216A(3)(*a*), given more than ample notice to the directors of his intention to apply for leave to commence a derivative action.

The gap in time between service of the requisite notices and the commencement of the present application

21 However, the plaintiff only took out the present application almost *a year* after the requisite notices were served on the respective directors of the defendants. At an initial hearing of the present application on 5 April 2022, it was observed that there was a "[b]it of a gap" between the date of service of the notices and the commencement of the present application.[4] The plaintiff has in a Supplementary Affidavit dated 26 April 2022 given the reasons for the gap in time. In essence, the plaintiff's explanation is that the original solicitor in charge of the matter has ceased practice with the original firm in March 2021. The second solicitor put in charge of the matter did not proceed with the application despite being instructed to do so. She ceased practice with the law firm, which had changed its name, in January 2022. The matter only proceeded presently when the third solicitor in charge of the matter made the present application.

22 While the plaintiff has provided a plausible explanation for the gap in time, the gap *itself* does give me pause. One reason is that the effluxion of time may be relevant in ascertaining the good faith requirement under s 216A(3)(*b*). I say more about that below. For present purposes, it is arguable that the passage of time may, even though the plaintiff has fulfilled the requirement of 14 days' notice, render the purpose of the notice requirement otiose. It will be recalled that the purpose of the notice requirement is to give the directors the time to evaluate and act on the complaints of the disgruntled shareholder (see *Carolyn Fong* at [18]). While the directors may have decided not to do anything in the immediate period after they received the complaint, this may not be true some time down the road as circumstances may have changed. Also, the passage of

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4 Minute Sheet in HC/S 96/2022 dated 5 April 2022 at p 1.

time may mean that the directors who received the notices in the first place may, quite legitimately, assume that the plaintiff is no longer pursuing the matter. The directors may therefore choose not to deal with the issue, only to be notified they must respond to court proceedings at the next correspondence some time down the road. While s 216A(3) of the Companies Act does not prescribe a maximum validity of the requisite notice, it may well be asked if, in order to give effect to the underlying rationale of the provision, such a period of validity may be read into the section.

23 That said, I do not need to comment further on this issue because on the present facts, I am satisfied that the directors, even if served with a fresh notice shortly before the filing of the present application, would not have used the notice period to make a meaningful evaluation of the plaintiff's complaints. I say this for a few reasons. First, as I mentioned above at [2], the two defendants have not made any attempt, through their representatives, to respond to the court papers that were served on them at their registered addresses on 11 February 2022. The defendants likewise did not respond to the plaintiff's subsequent letters dated 1 March 2022, 8 March 2022, 11 March 2022, 29 March 2022 and 20 April 2022, all of which gave the defendants details of the pre-trial conferences as well as the substantive hearing. Moreover, not only did the defendants not respond, but they also did not attend the three pre-trial conferences held on 3 March 2022, 17 March 2022 and 28 April 2022, either through a representative or a solicitor. In fact, the defendants have never responded to either the plaintiff's notice of his intention to commence the present proceedings, nor the various letters about the present proceedings. Therefore, similar to *Carolyn Fong*, I am convinced that even if the defendants' directors had been given a fresh notification under s 216A(3)(*a*), they would

have acted in the same (unresponsive) manner (see also D W Puchniak and Tan Cheng Han, "Company Law" (2011) 12 SAL Ann Rev 143 at 158–159).

24 On the present facts, therefore, the purpose of the requisite notice under s 216A(3) is met notwithstanding the relatively long passage of time between the service of the notices and the commencement of the present application. This is unlike a situation where, having been served with the requisite notice, the directors decided not to act, the complainant took no action for a long time, only then to serve on the company an application under s 216A without any fresh notice. In that situation, it may well be argued that the long passage of time has denied the directors the chance to consider the matter afresh in the light of the present circumstances.

25 For all the reasons above, I am satisfied that the plaintiff has satisfied the notice requirement under s 216A(3)(*a*) with respect to both defendants.

The plaintiff has not acted in good faith

26 As Abdullah J noted in *Ganesh Paulraj* (at [29]), Ang Cheng Hock JC (as he then was) in the High Court decision of *Jian Li Investment Holdings Pte Ltd and others v Healthstats International Pte Ltd and others* [2019] SGHC 38 summarised the elements of the good faith requirement under s 216A(3)(*b*) (at [42] and [43]):

> 42 There are two main facets to the "good faith" requirement: *Ang Thiam Swee* at [29]–[30]; *Maher v Honeysett and Maher Electrical Contractors* [2005] NSWSC 859 at [28]. The first relates to the merits of the proposed derivative action. The applicant must honestly or reasonably believe that a good cause of action exists for the company to prosecute. It follows as a corollary that an applicant may be found to lack good faith if it is shown that no reasonable person in his position, and knowing what he knows, could believe that the company had a good cause of action to prosecute: *Ang Thiam Swee* at [29].

> …
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> 44 Secondly, an applicant may be found to be lacking in good faith if it can be demonstrated that he is bringing the derivative action for a collateral purpose: *Ang Thiam Swee* at [30]. The onus is on the applicant to demonstrate that he or she is "genuinely aggrieved", and that any collateral purpose is sufficiently consistent with the purpose of "doing justice to a company" so that he or she is not abusing the statutory remedy and, by extension, also the company, as a vehicle for the applicant's own aims and interests: *Ang Thiam Swee* at [31], citing *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [19].

27 These elements of the good faith requirement must, as persuasively put by the authors of *Corporate Law* (at p 457), be understood with the underlying rationale of the s 216A action in mind. In this regard, the introduction of the s 216A procedure was intended to alleviate the difficulties associated with the rule in *Foss v Harbottle* (1843) 2 Hare 461, such that genuinely aggrieved minority interests may be protected, and justice be done to the company. I agree with the learned authors that, in this context, the requirement of good faith is intended to serve two overlapping purposes: (a) to ensure that the complainant is properly one in whom the "extraordinary power … to use corporate resources and to create a position of legal conflict between the corporation and others" (quoting the Newfoundland Supreme Court decision in *Tremblett v SCB Fisheries Ltd* (1993) 116 Nfld & PEIR 139 at [61]) should be vested; and (b) to ensure that the proposed action, when done under the control of the complainant, serves and advances corporate interests. Thus, if the complainant honestly believed that a good cause of action with a reasonable prospect of success exists (*ie*, the complainant is acting in good faith), then it is more probable that the proposed action is indeed being brought for the company's purposes, which then fulfils the underlying rationale of the s 216A action.

28 In my judgment, the plaintiff has not acted in good faith. I say this for two reasons, namely, first, it cannot be said that a reasonable person in his position could believe that the company had a good cause of action to prosecute. Second, I find that the long gap in time undermines the plaintiff's claim that he is making the present application in good faith. I refer not only to the time between the service of the requisite notice under s 216A(3)(*a*) and the commencement of the present application. As I will elaborate below, I also refer to the *even longer gap* between when the plaintiff first discovered the alleged problems to when he eventually decided to pursue a s 216A action some four years later.

The lack of merits in the proposed s 216A action

29 In my view, the plaintiff has not shown that a reasonable person in his position could believe that the company has a good cause of action to prosecute. I consider the plaintiff's various allegations against Ronny and Gabriel with respect to the 1st and 2nd defendants.

The plaintiff's allegations against Ronny with respect to the 1st defendant

30 In his first Affidavit dated 26 January 2022, the plaintiff alleges that Ronny had breached his duties as a director of the 1st defendant in the following ways:[5]

> (a) Ronny misappropriated and/or converted funds belonging to the 1st defendant when he made several withdrawals with no legitimate commercial purpose between October 2017 and November 2017. These withdrawals were not disclosed by Ronny to the plaintiff in his capacity

[5] Affidavit of Malcom Tan dated 26 January 2022 at paras 16–18, and 19.

as the beneficial owner of all of the 100,000 issued shares of the 1st defendant. The plaintiff had discovered these withdrawals in November 2017.

(b) Ronny was also complicit or negligent in allowing Gabriel's breaches of the 1st defendant, which I describe below.

31 At an initial hearing of the present application, the plaintiff was directed to elaborate on his first Affidavit, particularly on the issues of good faith and in the interests of the company. In response to this direction, the plaintiff filed a Supplemental Affidavit dated 26 April 2022. The plaintiff has therefore had his chance to provide further particulars in support of his case. However, this Supplemental Affidavit does little to elaborate on the matter. In particular, the plaintiff simply refers to the same paragraphs in his original Affidavit and repeats the same allegations with no further substantiation of the allegations. Instead, all that the plaintiff has done additionally is to append a litany of duties (11 in total) allegedly breached by Ronny when he supposedly made the unauthorised withdrawals.[6] I am not sure if this was what the judge who heard this application previously had in mind when he asked for the original Affidavit to be "fortified".[7]

32 Even accounting for the fact that I am to apply a low threshold in evaluating the merits of the plaintiff's allegations at this stage of the proceedings to consider, among others, that the plaintiff may not have the full facts, I am not convinced that the plaintiff has satisfied this standard. First, the plaintiff has made a series of *bare* allegations without any elaboration whatsoever. He has

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6 Supplemental Affidavit of Malcom Tan dated 26 April 2022 at para 7.

7 Minute Sheet in HC/S 96/2022 dated 5 April 2022 at p 1.

not explained *why* the withdrawals were not for a legitimate commercial purpose. In fact, a close examination of the withdrawals in the relevant bank statements[8] shows that there are explanations appended to the withdrawals. For example, the withdrawal of $2,500 on 16 November 2017 is labelled to be for "legal cost". Similarly, the withdrawal of $7,000 on 18 November 2017 is labelled to be for "loan return bh". Despite these explanations, the plaintiff has not explained why he nonetheless thinks that these withdrawals were not for a legitimate commercial purpose.

33 The plaintiff's allegation that Ronny was complicit in Gabriel's breaches suffers from a similar lack of particulars. Apart from the litany of duties breached (10 this time), the plaintiff has not provided further details in his supplementary Affidavit.[9] I have no hesitation in finding that the plaintiff has not shown a meritorious case based on his bare assertions.

34 In the absence of further particulars from the plaintiff, I am not satisfied that the plaintiff has shown a meritorious case against Ronny in respect of the 1st defendant.

The plaintiff's allegations against Gabriel with respect to the 1st defendant

35 In relation to Gabriel, the plaintiff alleges that he had breached his duties as a director of the 1st defendant in the following ways:[10]

(a) Gabriel neglected, failed, refused and/or omitted to follow up or act on a Capability Development Grant ("CDG") for an amount of

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8 Affidavit of Malcom Tan dated 26 January 2022 at pp 57–59.

9 Supplemental Affidavit of Malcom Tan dated 26 April 2022 at para 7.

10 Affidavit of Malcom Tan dated 26 January 2022 at paras 20–25.

$132,900 which the 1st defendant had been awarded by Enterprise Singapore in July 2017, thereby resulting in the withdrawal and/or loss of the same.

(b) Gabriel had removed the Point of Sale Machine ("the POS") from the 1st defendant's premises without the plaintiff's approval in his capacity as the beneficial owner of all of the 100,000 units of issued shares of the 1st defendant. There appears to be no legitimate commercial purpose for the removal and Gabriel has therefore misappropriated and/or converted property belonging to the 1st defendant.

(c) Gabriel was also complicit or negligent in allowing Ronny's breaches of the 1st defendant, which I described above.

36 Similar to his allegations against Ronny in relation to the 1st defendant, the plaintiff simply repeated his allegations against Gabriel in his Supplementary Affidavit. The only additions he made were the litany of duties (six in respect of the CDG, 11 in respect of the POS, and 10 in respect of being complicit or negligent with Ronny) alleged to have been breached by Gabriel in the process.[11] I do not think that the plaintiff fares any better in showing a meritorious case in relation to Gabriel.

37 First, while it is true that the 1st defendant was offered the CDG, it is not at all clear, even applying a low threshold, that Gabriel "neglected, failed, refused and/or omitted to follow up or act".[12] This is because the modern view of the company considers both the general meeting (comprising of shareholders)

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11 Supplemental Affidavit of Malcom Tan dated 26 April 2022 at para 7.

12 Affidavit of Malcom Tan dated 26 January 2022 at para 20.

and the board of directors as respectively deriving from the company's constitution, the original authority to commit the company to juristic acts (see *Corporate Law* at p 281). As such, subject to certain matters that are required by the Companies Act to be resolved by the general meeting, the law leaves it to the incorporators to decide, by appropriate provision in the constitution, which decisions are to be undertaken by the board and general meeting. The plaintiff, despite being a former shareholder of the 1st defendant, has failed to refer to the 1st defendant's constitution in advancing his case. Since he bears the burden in respect of the present application, I find that, in the absence of further particulars such as the constitution, the plaintiff has failed to advance a meritorious case as to why Gabriel's alleged conduct in relation to the CDG warrants a s 216A action. In any event, it would be unusual for a company to delegate decisions such as whether to take up a grant to the general meeting. Such a delegation would paralyse the day-to-day operations of a company.

38 Second, it is similarly not clear why, on the plaintiff's case, Gabriel required the plaintiff's permission to remove the POS from the 1st defendant's premises. The plaintiff was not, at the material time, a shareholder of the 1st defendant but only the beneficial owner of its shares. Unless and until a beneficial owner of shares registers himself as a member of the company, he does not enjoy the same rights as a member of the company. As such, I do not think that Gabriel required the plaintiff's permission at all.

39 Third, the plaintiff's allegation that Gabriel was complicit in Ronny's breaches suffers from a similar lack of particulars. Apart from the litany of duties breached (10 this time), the plaintiff has not provided further details in

his supplementary Affidavit.[13] I have no hesitation in finding that the plaintiff has not shown a meritorious case based on his bare assertions.

40 In the absence of further particulars from the plaintiff, I am not satisfied that the plaintiff has shown a meritorious case against Gabriel in respect of the 1st defendant.

The plaintiff's allegations against Ronny with respect to the 2nd defendant

41 In his first Affidavit dated 26 January 2022, the plaintiff alleges that Ronny had breached his duties as a director of the 2nd defendant in the following way:[14]

> (a) Ronny misappropriated and/or converted funds of some $26,680 belonging to the 2nd defendant when he made several withdrawals with no legitimate commercial purpose in November 2017. These withdrawals were not disclosed by Ronny to the plaintiff in his capacity as the beneficial owner of all of the 250,000 issued shares of the 1st defendant. The plaintiff had discovered these withdrawals in November 2017.

The plaintiff does not add any material elaboration in his supplementary Affidavit. Like how he had approached his allegations in relation to the 1st defendant, he has simply repeated the same allegation against Ronny before listing 11 breaches of duties arising from this alleged misappropriation. Once again, I do not think this is what the court hearing the application previously meant when it directed the plaintiff to "fortify" the Affidavit.

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13 Supplemental Affidavit of Malcom Tan dated 26 April 2022 at para 7.

14 Affidavit of Malcom Tan dated 26 January 2022 at paras 32–33.

42 In my judgment, in the absence of further particulars from the plaintiff, I am not satisfied that the plaintiff has shown a meritorious case against Ronny in respect of the 2nd defendant. First, the plaintiff has made a series of *bare* allegations without any elaboration whatsoever. He has not explained *why* the withdrawals were not for a legitimate commercial purpose. In fact, like the case with the 1st defendant, a close examination of the withdrawals in the relevant bank statements[15] shows that there are explanations appended to the withdrawals.

The plaintiff's allegations against Gabriel with respect to the 2nd defendant

43 The plaintiff's allegation against Gabriel with respect to the 2nd defendant is that Gabriel had been complicit or negligent in relation to Ronny's alleged misappropriation of the company funds from the 2nd defendant.[16] The plaintiff offers no further elaboration save for adding the long list of breaches (10 in total) flowing from this complicity or negligence.[17] For similar reasons above, I am not satisfied that the plaintiff has shown a meritorious case against Gabriel in relation to the 2nd defendant.

44 For all these reasons, I do not think that the plaintiff has shown that a reasonable person in his position could believe that the company has a good cause of action to prosecute. To repeat myself, in saying this I am aware that the court should apply a lower threshold at this stage of the proceedings to consider that the applicant concerned may not have the full knowledge of the company. However, even applying that low threshold, I remain unmoved by the plaintiff's allegations. Furthermore, by the plaintiff's own case, he was the ultimate

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15 Affidavit of Malcom Tan dated 26 January 2022 at pp 94–98.

16 Affidavit of Malcom Tan dated 26 January 2022 at [34].

17 Supplemental Affidavit of Malcom Tan dated 26 April 2022 at [7].

financier of the two defendants and maintained a close control of them.[18] It is hard to believe therefore that the plaintiff cannot furnish further particulars to substantiate his case.

The plaintiff's delay in commencing the present application

45 Moreover, I am concerned by the plaintiff's delay in commencing the present application. While the complainant's delay in making the application may not evidence a lack of good faith (see the High Court decision of *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426 ("*Teo Gek Luang*") at [20]), an inordinate delay might. The plaintiff's various allegations against Ronny and Gabriel relate to incidents that happened in 2017. If the problems were as serious to the company's interests as the plaintiff alleges, then I find it odd that the plaintiff has not taken out the present application as soon as possible. Instead, the plaintiff only sent the requisite notification pursuant to s 216A(3)(*a*) in February 2021. What is more, the plaintiff then allowed a further year to lapse before commencing the present application. While I hear his explanation that the previous solicitors in charge of the file had ceased practice with the law firm concerned, it is again puzzling why the plaintiff would allow the matter to drag on if it were as serious as he contended.

46 I note that the plaintiff says that on 17 November 2017, he had instructed his solicitors at Keystone Law Corporation to write to Ronny and Gabriel in relation to the breaches outlined above but that the correspondence went unanswered. I have read the 17 November Letter.[19] It says nothing about the breaches. The material paragraph is the fourth paragraph, which alludes to

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18 Affidavit of Malcom Tan dated 26 January 2022 at paras 8 and 28–29.

19 Affidavit of Malcom Tan dated 26 January 2022 at pp 124–125 .

various WhatsApp messages sent by Ronny and Gabriel to the plaintiff in November 2017, saying that they "wanted out", which the plaintiff took to mean that they wished to resign from the business of the companies. The plaintiff further says that Ronny and Gabriel, by virtue of "wanting out", have revoked the relevant agreement. However, nothing in the letter corresponds to what the plaintiff says it does in his Affidavit. Indeed, if the allegations are as serious as the plaintiff says, I find it puzzling why the plaintiff omitted any reference to those allegations in the 17 November Letter, when the various incidents would have been fresh in the plaintiff's mind.

47 At the hearing before me, Mr Islam said that he needed to take further instructions from the plaintiff for the delay. But he submitted that this might be because the plaintiff wanted to sort matters out without resorting to legal proceedings. I ascribe no weight to this submission being one of evidence from the Bar. Also, the plaintiff has had the chance to supplement his original Affidavit considering the concern expressed earlier in the initial hearing about the gap in time (see [21] above). He has failed to do so.

48 Taking the evidence holistically, including the plaintiff's delay in commencing the present application, I find that the plaintiff has not demonstrated that he is acting in good faith. This is sufficient for me to dismiss the plaintiff's application and I do so.

The plaintiff has not shown that it is *prima facie* in the interests of the company for the proposed action to be brought

49 For completeness, I deal briefly with the third requirement centring on the company's interests. There are two parts to this requirement.

50 First, this would mean showing the court that there is a reasonable basis for the complainant and that the action sought to be instituted was a legitimate or arguable one (see *Teo Gek Luang* at [18]). There must be a reasonable semblance of merit, and there is no need to show that the action is bound to succeed or likely to succeed (see the decision of the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [53], citing the High Court decision of *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471). The analysis on this portion would overlap with the point above on needing to demonstrate good faith, as noted by the Court of Appeal in *Ang Thiam Swee* at [55]: "There is an obvious overlap here with the requirement of good faith, in that an applicant with a frivolous or vexatious claim will also typically be unable to demonstrate an honest belief in the merits of the proposed statutory derivative action or the absence of a collateral purpose amounting to an abuse of process."

51 Given my conclusions above on the merits of the plaintiff's case, I find that the plaintiff has not succeeded on the first part of the test.

52 Second, the court may also go further to examine whether it would be in the practical and commercial interests of the company for the action to be brought (see *Ang Thiam Swee* at [56]). This includes an assessment of whether "the company will stand to gain substantially in money or money's worth" (see the decision of the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [17]). In relation to the required evidence as to whether it is in the practical and commercial interests of the company, the High Court in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2015] SGHC 145 held that (at [153]):

> 153 In addition to the threshold test on the merits, the test under s 216A(3)(c) comprises a consideration of whether the

derivative action is in the practical and commercial interests of the company and of the alternative remedies available to the applicant: *Ang Thiam Swee* at [56]. This is a multifactorial inquiry. In order to satisfy the court that the derivative action is in the practical and commercial interests of the company, Palmer J held in *Swansson* that the applicant ought to put evidence on at least the following factors before the court:

> 57 First, there should be evidence as to the character of the company: different considerations may well apply depending on whether the company is a small, private company whose few shareholders are the members of a family or whether it is a large public listed company. If the company is a closely held family company, it may be relevant to take into account the effect of the proposed litigation on the purpose for which the company was established and on the family members who are the shareholders. If the company is a public listed company, such considerations will be irrelevant. Again, the company may be a joint venture company in which the venturers are deadlocked so that the proposed derivative action is seen as being for the purpose of vindicating one side's position rather than the other's in a way which will not achieve a useful result: see e.g. *Talisman Technologies Inc v Queensland Electronic Switching Pty Ltd* [2001] QSC 324.
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> 58 Second, there should be evidence of the business, if any, of the company so that the effects of the proposed litigation on its proper conduct may be appreciated.
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> 59 Third, there should be evidence enabling the Court to form a conclusion whether the substance of the redress which the applicant seeks to achieve is available by a means which does not require the company to be brought into litigation against its will. So, for example, if the applicant can achieve the desired result in proceedings in his or her own name it is not in the best interests of the company to be involved in litigation at all. This was the case in *Talisman Technologies* in which it appeared from the evidence that the most desirable outcome for the applicant was to obtain an order for specific performance of a contract, which it could do in a suit in which the company did not need to be a party.
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> 60 Fourth, there should be evidence as to the ability of the defendant to meet at least a substantial part of any judgment in favour of the company in the proposed derivative action so that the Court may ascertain whether the action would be of any practical benefit to the company.

53 As such, even if I were convinced of the merits of the plaintiff's case, the plaintiff has failed to adduce any evidence as to why it would be in the company's interest to bring the s 216A action. There was, for instance, no evidence offered as to the character of the company, and the company's business (so that the impact of the litigation might be assessed). As such, I find that the plaintiff has likewise not satisfied this second part of the requirement under s 216A(3)(*c*) of the Companies Act.

Conclusion

54 For all the above reasons, I dismissed the plaintiff's application with no order as to costs.

Goh Yihan
Judicial Commissioner

Mohammad Maiyaz Al Islam (Magna Law LLC) for the plaintiff;
The first defendant and second defendant absent and unrepresented.