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

[2022] SGHC 75

Originating Summons No 987 of 2021

Between

Mytsyk, Viktoriia

… *Plaintiff*

And

(1) Med Travel Pte Ltd
(2) Amunugama Anushka Bandara

… *Defendants*

ORAL JUDGMENT

[Companies — Statutory derivative action]

TABLE OF CONTENTS

Mytsyk, Viktoriia
v
Med Travel Pte Ltd and another

[2022] SGHC 75

General Division of the High Court — Originating Summons No 987 of 2021
Mavis Chionh Sze Chyi J
13 January 2022, 25 February 2022

31 March 2022 Judgment reserved.

Mavis Chionh Sze Chyi J:

The application

1 HC/OS 987/2021 ("OS 987") is an application by the plaintiff Viktoriia Mytsyk ("Ms Mytsyk") under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for leave to bring an action in the name of, and on behalf of, the first defendant Med Travel Pte Ltd ("Med Travel"), against the second defendant Amunugama Anushka Bandara ("Mr Anushka") for "various breaches of his director's duties to"[1] Med Travel. Ms Mytsyk has also asked that Med Travel "indemnify" her for "reasonable legal fees and disbursements".[2] Ms Mytsyk is represented by counsel; Mr Anushka acts in person.

---

[1] Originating Summons HC/OS 987/2021 filed 30 September 2021.

[2] Originating Summons HC/OS 987/2021 filed 30 September 2021.

The background

2 By way of background, Ms Mytsyk and Mr Anushka were previously married to each other. They lived together for several years with their own young children and the children from Ms Mytsyk's former marriage, prior to Ms Mytsyk commencing divorce proceedings in August 2019. Shortly after filing for divorce, Ms Mytsyk also started a civil suit against Mr Anushka and Med Travel. This is HC/S 1247/2019 ("S 1247"), in which Mr Anushka is the first defendant and Med Travel is the second defendant. Ms Mytsyk's co-plaintiffs in S 1247 are her father, one Hryhorii Liaskovskyi ("Mr Liaskovskyi"), and a company called Health & Help Pte Ltd, ("Health & Help") in which she is currently the sole shareholder and director on record. In S 1247, Ms Mytsyk – together with her co-plaintiffs – seek *inter alia* declarations that Mr Liaskovskyi is the true legal and beneficial owner of both Med Travel and Health & Help. Most of the facts stated below are gleaned from the pleadings in S 1247 which are exhibited in Mr Anushka's first affidavit in these proceedings.[3]

3 Although Ms Mytsyk and Mr Anushka were married on 5 April 2015, they had apparently started a romantic relationship sometime in 2011. It also appears that starting from sometime in 2012, Mr Anushka became involved in Health & Help, which is a company in the business of management consultancy services and translation services.[4] There is considerable disagreement between him and Ms Mytsyk as to the extent of his involvement in that company.

4 Med Travel was incorporated on 5 June 2012 and is involved in the business of "travel agencies and tour operators inbound and outbound (*eg*,

[3] Mr Anushka's 1st affidavit at Tabs A and B.

[4] Statement of Claim in S 1247 at para 3.

arrangement of travel and accommodation for medical tourists in Singapore and Southeast Asia)".[5] At the time of incorporation, Mr Anushka was its sole shareholder and director on record. On 20 November 2013, Mr Anushka transferred 50% of the shares in Med Travel to Mr Liaskovskyi. On 13 June 2016, Mr Liaskovskyi transferred this 50% shareholding to Ms Mytsyk. Ms Mytsyk was also appointed a director of Med Travel on 7 June 2018.

5 While Ms Mytsyk and Mr Anushka do not deny that the above facts are a matter of documentary record, each has his or her own narrative. It is Ms Mytsyk's case that Mr Anushka has never been more than a "nominee shareholder and director" of Med Travel: according to her, he has always held the shares of Med Travel on behalf of Mr Liaskovskyi who is the true beneficial owner of the company.[6] Ms Mytsyk alleges that Mr Anushka should have transferred 100% of these shares to Mr Liaskovskyi in November 2013 instead of transferring only 50%; and that Mr Anushka forged Mr Liaskovskyi's signature on the share transfer documents. Ms Mytsyk further alleges that Mr Anushka forged the documents relating to *her* appointment as a director of Med Travel, although she presently takes the position that she has since consented to and/or ratified the appointment.

6 Mr Anushka, for his part, denies these allegations. His position is that Med Travel forms part of what he claims is a "Family Business". It is Mr Anushka's case in S 1247 that the Family Business comprises Med Travel and Health & Help; that he and Ms Mytsyk are equal partners in the Family Business; and that they jointly own both companies as well as all assets in the companies' names. It is Mr Anushka's case that he and Ms Mytsyk had "an

[5] Statement of Claim in S 1247 at para 4.

[6] Ms Mytsyk's 1st affidavit at para 4; Ms Mytsyk's 2nd affidavit at para 6.

agreement or mutual understanding" as to how the two companies would be run and how their income and the payment of their family's expenses would be managed (the "Mutual Understanding").

7 Ms Mytsyk has denied that the two companies form a Family Business which she and Ms Anushka jointly owned and managed pursuant to a "Mutual Understanding".

The proposed statutory derivative action

8 In the first affidavit she filed in support of OS 987, Ms Mytsyk alleges the following breaches by Mr Anushka of director's duties he owed to Med Travel. First, she alleges that he has misappropriated company funds by withdrawing "all available funds from [Med Travel's] bank accounts totaling $477,000 on or around 1st October 2019".[7] Second, she alleges that Mr Anushka forged "financial documents".[8] Third, she alleges that Mr Anushka "unlawfully caused [Med Travel] to incur a debt it cannot afford to repay by purchasing a property at Novena Royal Square" ("the Property") when he knew that Med Travel "did not have sufficient funds to be able to purchase the said property and/or to service the financing charges for the purchase of the Property".[9] Fourth, she alleges that Mr Anushka unlawfully diverted income from Med Travel to his own company, in that "income" and "returns" due to Med Travel from a company called Murex were diverted by Mr Anushka to his own company A B Capital Pte Ltd instead.[10] Fifth, she alleges that Mr Anushka has

[7] Ms Mytsyk's 1st affidavit at paras 3(i)(a) and 6.

[8] Ms Mytsyk's 1st affidavit at para 3(i)(b) and paras 39–45.

[9] Ms Mytsyk's 1st affidavit at para 3(i)(c) and paras 17–23.

[10] Ms Mytsyk's 1st affidavit at para 3(i)(d) and paras 10–15.

unlawfully prevented Med Travel from carrying on business.[11] Sixth, she alleges that Mr Anushka has misused Med Travel funds for personal expenses such as the legal fees he incurred in the divorce proceedings and "unauthorised transportation costs".[12] Seventh, she alleges that Mr Anushka has been negligent in causing Med Travel "to incur numerous penalties as a result of late submission of GST payments".[13]

9 In respect of the allegation that Mr Anushka caused Med Travel to purchase the Property when he knew the company could not service the mortgage, Ms Mytsyk says in addition that at the time the mortgage loan was taken out, the mortgagee bank (RHB) had granted Med Travel overdraft facilities of $400,000. According to Ms Mytsyk, Mr Anushka has "misused" the overdraft facilities by drawing on them to meet Med Travel's monthly mortgage payments. According to Ms Mytsyk, Med Travel is now "overdrawn to the tune of $80,000 on the overdraft facilities" and "will sink further into debt" if Mr Anushka is not stopped.[14]

10 In respect of the allegation that Mr Anushka has unlawfully diverted to himself income due to Med Travel, Ms Mytsyk's third affidavit of 11 February 2022 raises the additional allegation that he has diverted to himself rental income due to Med Travel. In brief, she claims that having rented out the Property against her objections, Mr Anushka procured a tenancy agreement which provided for the rent to be paid into his personal account instead of Med Travel's account. She claims that though she eventually prevailed upon him to

[11] Ms Mytsyk's 1st affidavit at 46–57.

[12] Ms Mytsyk's 1st affidavit at paras 58 and 59.

[13] Ms Mytsyk's 1st affidavit at paras 61 and 62.

[14] Ms Mytsyk's 1st affidavit at paras 10–15.

have the rent paid into Med Travel's account, he has on multiple occasions since then reverted to getting the tenant to pay the rent into his personal account.[15]

11 Ms Mytsyk asserts that Mr Anushka "will not rectify his wrongdoings" and that Med Travel "will suffer irreparable damage" if "no legal action is brought to bear on [him]", and that it is therefore "in the interest of [Med Travel] for leave to be granted to launch a derivative action against [Mr Anushka]".[16]

The issue of *locus standi*

12 In contesting Ms Mytsyk's application for leave to bring a derivative action against him on Med Travel's behalf, Mr Anushka argued that to begin with, Ms Mytsyk has no *locus standi* to bring the application because she does not fall within the definition of a "complainant" in s 216A(1) of the Companies Act. According to Mr Anushka, Ms Mytsyk has failed to identify in her affidavit the capacity in which she is bringing the application. In any event, according to him, she cannot show that she has standing to bring the application as a shareholder of the company under s 216(1)(a) of the Companies Act, nor can she show that she is a "proper person" to bring the application, within the meaning of s 216(1)(c).

13 First of all, I do not think it is accurate to say that Ms Mytsyk has failed to identify in her affidavit the capacity in which she is bringing the present application. In her first affidavit in support of OS 987, Ms Mytsyk starts by stating that she is "the Plaintiff herein and a Director of Med Travel".[17] From this, I understand her to be saying that she brings the application in her capacity

[15] Ms Mytsyk's 3rd affidavit at paras 25–34.

[16] Ms Mytsyk's 1st affidavit at paras 68 and 69.

[17] Ms Mytsyk's 1st affidavit at para 1.

as a director of the company. Based on various assertions made in her first affidavit, it would also seem clear that Ms Mytsyk has no intention to rely on s 216A(1)(a) by bringing the application in the capacity of a shareholder. This is because in her first affidavit, she claims that it was Mr Liaskovskyi who "provided the share capital for [Med Travel]" when it was incorporated;[18] and that Mr Anushka was made "the nominee shareholder and director" of Med Travel upon his representation that he would "transfer all his shares later to Mr Hryhorii Liaskovskyi".[19] According to Ms Mytsyk, Mr Anushka had – despite repeated reminders – transferred only 50% of the shares to Mr Liaskovskyi, while "[retaining] the remaining 50% of the shares even though he was not supposed to"; and sometime later, he even "forged" Mr Liaskovskyi's signature so as to "fraudulently" transfer this 50% shareholding from Mr Liaskovskyi to Ms Mytsyk. Given these assertions, I understand it to be Ms Mytsyk's position that Mr Liaskovskyi is the rightful owner of *100%* of the shares in Med Travel – and not Ms Mytsyk or Mr Anushka; further, that insofar as half of these shares have been transferred to her name, this was a "fraudulent" transfer". Indeed, in her statement of claim in S 1247 which I alluded to earlier (and which is exhibited in Mr Anushka's first affidavit), Ms Mytsyk seeks *inter alia* a declaration that Mr Liaskovskyi is the *true legal and beneficial owner* of Med Travel. It is in this context that I conclude Ms Mytsyk has no intention to bring the present application in the capacity of a shareholder.

14 Pursuant to s 216A(1)(c) of the Companies Act, the court has the discretion to allow any person it regards as a "proper person" to apply for leave to bring a statutory derivative action. As I noted earlier, Ms Mytsyk has in her first affidavit made it clear that she takes the position she is not in reality the

[18] Ms Mytsyk's 1st affidavit at para 4.

[19] Ms Mytsyk's 1st affidavit at para 4.

owner of the shares registered in her name, since she claims they were "fraudulently transferred" to her when they actually belong to Mr Liaskovskyi.[20] I also note that she does not say anywhere in her affidavits that she is bringing OS 987 in the capacity of a nominee for Mr Liaskovskyi and on his behalf. As to whether a director of the company who is not concurrently a shareholder is a "proper person" to apply for leave under s 216A(1)(c), counsel for Ms Mytsyk did not make any submissions nor cite any authorities on this issue. Counsel appears to have taken it for granted that such a director must be a "proper person" for the purposes of s 216A(1)(c). I do not think the issue is so clear-cut.

15 In *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 ("*Urs Meisterhans*"), the plaintiff was a shareholder and former director of the defendant company on whose behalf he had applied for leave under s 216A to commence proceedings against two existing directors. The High Court dismissed the application on the basis that the intended proceedings were not shown to be *prima facie* in the interests of the company and that the plaintiff was not acting in good faith in making the application. In arriving at this conclusion, the court referred in passing to the issue of the category of persons whom the court would deem to be "a proper party" under s 216A(1)(c) and stated that such category of persons "would include a director of the company" (at [23]). This remark was, however, *obiter*, since the plaintiff in *Urs Meisterhans* was no longer a director of the company by the time he applied for leave under s 216A. As for the case of *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 ("*Agus Irawan*"), which the court in *Urs Meisterhans* referred to (at [23]), the plaintiff who applied for leave to commence a derivative action in the name of the defendant company in that case was a shareholder and former director of the defendant company.

[20] Ms Mytsyk's 1st affidavit at para 4.

16 When s 216A was introduced by way of amendment to the Companies Act, the *Report of the Select Committee on the Companies (Amendment) Bill (Bill no. 33/92)* (Parl 2 of 1993, 26 April 1993) ("the Select Committee Report") 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.

17 An examination of the Select Committee Report indicates that the above statement arose from responses to a representation to the Select Committee which queried whether the term "complainant" in the proposed new s 216A(1) might "specifically include" a debenture holder and a director. In the views expressed by members of the Select Committee in response to the representation, some reservations were expressed as to whether debenture holders and directors who were not shareholders should be expressly included as complainants under the proposed new s 216A(1). *Inter alia*, it appears to have been suggested that the purpose of the proposed new s 216A(1) was really to protect minority shareholders, or at least persons with "interest" or "financial interest" in the company. In light of these concerns, the Select Committee's eventual statement (see above at [16]) suggests that it concluded the most appropriate legislative solution was to provide the court with a "wide" discretion to extend the application of the new s 216A to any person whom it found to be a "proper person" to seek leave under the section – instead of providing for a blanket inclusion of all debenture holders and directors as "complainants" for the purposes of s 216A. In other words, depending on the circumstances of the case, the court may in its discretion permit the director of a company who is not

concurrently a shareholder of the company to bring an application for leave under s 216A(1)(c).

18 In *Ganesh Paulraj v A&T Offshore Pte Ltd and another* [2019] SGHC 180 ("*Ganesh Paulraj*"), the High Court was faced with an application for leave under s 216A(1)(c) by the beneficial owner of a company which owned 40% of the shares in the respondent company. In considering the scope of s 216A(1)(c), the court in *Ganesh Paulraj* held (at [12]) that the question was really whether the applicant had "*a clear interest and sufficient connection to the company*" to bring the leave application. On the facts before it, the court answered this question in the applicant's favour.

19 The High Court's formulation in *Ganesh Paulraj* of the guiding principle behind s 216A(1)(c) (in italics above) appears to reflect the concern expressed by the Select Committee that applicants who were not shareholders but who wished to invoke s 216A should be able to show some "financial interest" – or at the very least, an "interest" – in how the company is being managed. Applying the formulation adopted by the court in *Ganesh Paulraj* and on the basis of the undisputed facts in the present case, I am prepared to accept that Ms Mytsyk has "a clear interest and sufficient connection to the company" to bring the present application. Ms Mytsyk is one of two directors in a company where various breaches of directors' duties (mostly involving the misappropriation of company funds and the diversion of income due to the company) are being alleged against the other director – Mr Anushka; and the latter has vehemently denied these allegations. There is obviously no prospect of Mr Anushka agreeing to the company pursuing the allegations. Given the two parties' opposing positions on the true status of the shareholders of Med Travel, there is also obviously no prospect of either of the registered shareholders making a s 216A application in their capacity as shareholders. In these

circumstances, I am prepared to accept that in her capacity as director of Med Travel (and solely as such), Ms Mytsyk is a "proper person" to bring the application under s 216A(1)(c).

The issue of notice

20 Under s 216A(3)(a), Ms Mytsyk is required to have given the directors of Med Travel 14 days' notice of her intention to apply for leave to commence a statutory derivative action on behalf of the company. There is no dispute that her lawyers wrote to Mr Anushka on 4 August 2021 to give him notice[21] of her intention to seek leave to bring an action in Med Travel's name against him for "various fraud, breach of director's duties and misappropriation of company funds committed on Med Travel".[22] OS 987 was subsequently filed on 30 September 2021. I am satisfied that the requisite notice has been given under s 216A(3)(a). In any event, Mr Anushka did not raise any real challenge on the issue of notice.

s 216A(3)(b) and (c): The applicable principles

21 Having regard to s 216A(3)(b) and (c), the issues I next have to address are:

(a) whether Ms Mytsyk is acting in good faith; and

(b) whether it appears to be *prima facie* in the interests of the company that the action be brought, prosecuted, defended or discontinued.

[21] Ms Mytsyk's 1st affidavit at Tab R.

[22] Ms Mytsyk's 1st affidavit at para 3 of Tab R.

Good faith

22 In respect of (a) (*ie*, the requirement of good faith), the starting point is that the applicant bears the burden of establishing that he is acting in good faith: no presumption of good faith applies in favour of an applicant under s 216A (*per* the Court of Appeal ("CA") in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [23], cited by the High Court in cases such as *Jian Li Investments Holding Pte Ltd and others v Healthstats International Pte Ltd and others* [2019] 4 SLR 825 ("*Jian Li Investments*") at [41] and *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [2021] 3 SLR 1269 ("*Tiong Sze Yin Serene*") at [68]). In *Jian Li Investments*, the High Court summarised the applicable principles as follows:

> 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…
>
> 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].
>
> 45 As regards this second facet of the good faith requirement, it will not suffice to show dislike, ill-feeling or personal animosity between the parties as hostility between warring factions within a company is commonplace. However, if it can be shown that the applicant is "so motivated by

> vendetta, perceived or real, that his judgment will be clouded by purely personal considerations", then this would constitute a lack of good faith: *Pang Yong Hock* at [20]. A history of grievances against the majority shareholders or the board would make it easier to characterise the derivative action as having been brought for no other purpose other than the satisfaction of the applicant's private vendetta: *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313 at [41], cited with approval in *Ang Thiam Swee* at [13]. An applicant's good faith will also be in doubt if he appears set on damaging the company out of sheer spite or for the benefit of a competitor: *Pang Yong Hock* at [20]; *Wong Kai Wah v Wong Kai Yuan and another* [2014] SGHC 147 ("*Wong Kai Wah*") at [70].
>
> 46 In addition, any lack of good faith must relate to the commencement of the derivative action and not all past conduct of the applicant in general: *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 ("*Fong Wai Lyn Carolyn*") at [75] and [79]; *IGM Resources Corp v 979708 Alberta Ltd* [2004] AJ No 1462 at [36]…
>
> 47 In considering the requirement of good faith, a distinction between "motive" and "purpose" should be drawn. The element of good faith is "dependent less on the motives" behind the application and "more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests": *Ang Thiam Swee* at [16]. In other words, it is not the questionable motivations of the applicant *per se* that amounts to bad faith; instead bad faith may be established where questionable motivations constitute a personal purpose which will be pursued at the expense of or in lieu of the company's interests. In this sense, the requirements under s 216A(3)(*b*) and s 216A(3)*(c)* of the CA are quite clearly inter-linked: *Ang Thiam Swee* at [13] and [16], citing *Pang Yong Hock* at [20].
>
> 48 The good faith enquiry may also extend beyond the two main facets earlier identified, honest and reasonable belief in the merits, and purpose for bringing the application. It can also encompass considerations of the applicant's conduct in the proceedings: Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 6.043. For instance, the failure to be fully candid before the court would indicate a lack of good faith…

23 As to how an applicant can discharge the burden of establishing his good faith, the following observations by the High Court in *Petroships Investment*

Pte Ltd v Wealthplus Pte Ltd and others [2015] SGHC 145[23] ("*Petroships*" at [70]–[79]) are helpful:

> 70 …Good faith is a subjective state of mind. Like any state of mind, it is therefore incapable of proof by direct evidence other than self-serving assertions. *A bald assertion by an applicant that it is acting in good faith will meet an evidential burden only in the most technical of senses, and will only rarely suffice to discharge a legal burden of proof*: *Ang Thiam Siew* at [19].
>
> 71 *For all practical purposes, therefore, meeting the evidential burden on the issue of good faith requires the applicant to produce or point to evidence from which its good faith can be inferred.* This is an important point. *Ang Thiam Swee* establishes (at [29]) that the subjective test of good faith under s 216A(3)(*b*) must be kept analytically distinct from the objective test of whether it appears to be prima facie in the company's interests to bring the derivative action under s 216A(3)(*c*). However, that case also establishes in the same paragraph that there is a legitimate – though, of course, never inevitable – inferential pathway from a finding that the objective test in s 216A(3)(*c*) is satisfied to a finding that the subjective test in s 216A(3)(*b*) is also satisfied…
>
> 72 *Ang Thiam Swee* therefore accepts that the inquiry into an applicant's good faith can overlap with the inquiry into whether the derivative action appears to be *prima facie* in the interests of the company. That is because the latter test, if satisfied, is often a circumstance from which the former can be inferred. Note that it is the *inquiries* which overlap. The concepts themselves and the statutory tests employing them are distinct…
>
> 74 The result of all of this is that an applicant who meet its evidential burden on the "*prima facie* interests of the company" test in s 216A(3)(*c*) also meets in a practical sense, albeit incidentally, its evidential burden on the "good faith" test in s 216A(3)(*b*).

[23] The appeal against the High Court's decision was dismissed by the CA on the basis that the company in question had gone into liquidation one week after the application for leave under s 216A was filed; and the CA held that s 216A was unavailable once a company was in liquidation: *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and another matter* [2016] 2 SLR 1022 at [32]. The CA did not express any disagreement with the High Court's decision on the requirements under s 216A(3)(b) and s 216A(3)(c); and the High Court's judgment has since been cited in other High Court decisions such as *Jian Li Investments*.

> 78 *…(T)he respondent [to an application for leave under s 216A] does bear, in a practical sense, a burden on the issue of good faith, but it is only a tactical burden or the burden on the application. A challenge to an applicant's good faith which is to carry any realistic prospect of success must adduce or point to evidence capable of suggesting that the applicant is not acting in good faith…*
>
> 79 *Where a respondent meets its tactical burden, the applicant can no longer simply point to the merits of the derivative action and invite the court to draw an inference of good faith from that fact alone. An applicant who does no more than that will fail to discharge its legal burden of proof on the issue of good faith. If the court find that the applicant lacks good faith, its application will fail, no matter how strong the merits of the derivative action are.*
>
> [emphasis added]

"Prima facie in the interests of the company"

24 In respect of (b) (*ie*, the requirement that the intended derivation action be *"prima facie* in the interests of the company*"*), the applicable principles are also well-established, having been cited in numerous local judgments. In *Petroships*, the High Court summarised these principles as follows:

> 152 The question at this stage of the inquiry is whether it appears to be *prima facie* in the interests of Wealthplus for Petroships to bring the derivative action. The threshold test on this stage is directed towards the merits of the derivative action. The applicant must satisfy the court that the derivative action is legitimate and arguable: *Ang Thiam Swee* at [53] to [55]. The threshold test deliberately sets a low standard, precisely because it is only a *threshold* test. It operates to weed out "only the most obviously unmeritorious claims" (*Ang Thiam Swee* at [55]). But the statutory test under s 216A(3)(*c*) serves a broader purpose than just protecting the company from being compelled to pursue an obviously unmeritorious claim. The statutory test requires the court to consider the overall interests of the company in the round. This is one of the shortcomings of Petroships' submissions: it assumes that passing the threshold test is sufficient to satisfy the entirety of the test under s 216A(3)(*c*). That is not the correct approach.
>
> 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.
>
> 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.
>
> 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.
>
> 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.

On whether Ms Mytsyk has satisfied the good faith requirement under s 216A(3)(b)

On Mr Anushka's contention as to collateral purpose

25 Bearing the above principles in mind, I examine first the issue of whether Ms Mytsyk has established that she is acting in good faith. I note at the outset that Ms Mytsyk has *not* specifically addressed the issue of good faith in her affidavit evidence, apart from making the bare assertion that she "is acting in good faith".[24] Mr Anushka clearly disputes that she is. The chief argument he makes is that she has a collateral purpose in bringing OS 987, and that by pursuing such collateral purpose, she is abusing s 216A – and by extension, the company – as a vehicle for her own aims and interests (see the judgment of the CA in *Ang Thiam Swee* at [31]). In a nutshell, Mr Anushka's case is that she has brought this OS for the collateral purpose of advancing her own cause in S 1247 and "sabotaging" Med Travel's defence in S 1247.[25]

26 In support of his contention, Mr Anushka has in his first reply affidavit (*inter alia*) exhibited the pleadings in S 1247 and set out the events allegedly leading up to the dispute between him and Ms Mytsyk. It is his case that most of the matters put forward by Ms Mytsyk in OS 987 as the intended subject of the derivative action she seeks leave to commence are already the subject of ongoing litigation in S 1247, in which both he and Med Travel have already filed defences setting out their positions. There is therefore no good reason for Ms Mytsyk to file at this juncture a separate application for leave to bring a derivative action in Med Travel's name against him in respect of these same

[24] Ms Mytsyk's 1st affidavit at para 67.

[25] Mr Anushka's 1st affidavit at para 15.

matters: the only reason why she has done so is because she has so far failed in her earlier attempts to undermine Med Travel's defence in S 1247.[26]

27 To determine whether Mr Anushka has discharged the *tactical* burden of showing Ms Mytsyk is not acting in good faith, I examine first his submission that most of the matters put forward by Ms Mytsyk as the subject of the intended derivative action are already the subject of ongoing litigation in S 1247 and / or are likely to be the subject of factual findings by the trial court in S 1247. I emphasise that a finding that most (or even all) of the matters put forward by Ms Mytsyk are matters already in contention in S 1247 does not *per se* lead ineluctably to the conclusion that she is not acting in good faith in bringing OS 987 – but it is the first step in considering whether Mr Anushka can point to enough evidence capable of suggesting her lack of good faith.

28 I first outline in some further detail the salient points about the dispute in S 1247.

The dispute in S 1247

29 In S 1247, Ms Mytsyk and her co-plaintiffs (her father Mr Liaskovskyi, and the company Health & Help of which she is the sole shareholder and director) claim that despite Mr Liaskovskyi being the true owner of all shares in Health & Help and Med Travel, Mr Anushka fraudulently engineered the registration of these companies' shares such that the Health & Help shares ended up in Ms Mytsyk's sole name while the Med Travel shares ended up in Ms Mytsyk's and Mr Anushka's names. In addition, Mr Anushka is alleged to have committed various breaches of directors' duties owed to Health & Help, which include his allegedly causing the misappropriation of Health & Help's

[26] Mr Anushka's 1st affidavit at paras 16–29.

"Med Expert" software system by "[placing] the software as an asset belonging to Med Travel in its books", causing Health & Helpp to extend an interest-free loan of $1.38 million to Med Travel for the purchase of the Property in Med Travel's name when such loan held "no commercial benefit" for Health & Help and was not in its best interests, and causing Health & Help to enter into "questionable transactions and payments" including the payment of service fees to Med Travel.[27] In S 1247, Ms Mytsyk and her father seek (*inter alia*) declarations that the latter is the "true legal and beneficial owner" of all the shares of Health & Help and Med Travel and/or damages to be assessed against Mr Anushka.[28]

30 In respect of Med Travel (the second defendant in S 1247), Ms Mytsyk and her co-plaintiffs have pleaded that Mr Anushka's intentions in "entering into any transactions or conduct on behalf of Med Travel are imputed as Med Travel's intentions in entering into such transactions or conduct". As such, Mr Anushka is said to have "caused" Med Travel to "wrongfully convert" various properties or assets allegedly belonging to Health & Help – including the MedExpert software, the $1.38 million and/or the Property, and various amounts paid by Health & Help in respect of service fees.[29] Alternatively, Med Travel is alleged to have been "unjustly enriched" by – or to have been "knowingly in receipt of possession" of – these "properties of [Health & Help]" without the latter's consent. In S 1247, Health & Help seeks (*inter alia*) a declaration that Med Travel has "received" the above properties "as constructive trustee for [Health & Help]" as well as orders requiring Mr Anushka to "do all things necessary to enable [Med Travel] to deliver up these

[27] Statement of Claim in S 1247 at para 12.

[28] Statement of Claim in S 1247 at para 20, prayers 1 to 7.

[29] Statement of Claim in S 1247 at para 16.

properties" and to account for "all profits made by [Med Travel] for its use or possession of the properties".[30]

31 Mr Anushka presents a different narrative in S 1247 as to the nature of his and Ms Mytsyk's interests in the two companies and their dealings with the funds and other assets of these two companies. It is Mr Anushka's case in S 1247 that having regard to the relationship between him and Ms Mytsyk, there was an agreement or a "Mutual Understanding" between them that Med Travel and Health & Help formed a "Family Business" and/or a "quasi-partnership",[31] in which the two of them were "equal partners in the operation, management and ownership" of the two companies.[32] According to Mr Anushka, the cash reserves of the two companies were jointly owned by him and Ms Mytsyk; and it was part of their Mutual Understanding that "they would try and keep as much retained earnings in the Family Business" so that these monies "could be used for future investment and expansion".[33] This was why the bulk of the profits of the Family Business were kept in Health & Help's bank account and also in cash which was kept by Ms Mytsyk in her own and / or her father's personal bank accounts[34]. Mr Anushka alleged that for much of the duration of their marriage, he did not keep aside monies for his personal savings as "all his savings were maintained within the Family Business as company profits",[35] and he would instead withdraw a monthly sum from Health & Help's account to pay for all family expenses. Both he and Ms Mytsyk understood that they were working

[30] Statement of Claim in S 1247 at para 20, prayers 1 to 7.

[31] 1st Defendant's Defence & Counter-claim in S 1247 at para 22.

[32] 1st Defendant's Defence & Counter-claim in S 1247 at para 22.

[33] 1st Defendant's Defence & Counter-claim in S 1247 at para 19.

[34] 1st Defendant's Defence & Counter-claim in S 1247 at para 28(b).

[35] 1st Defendant's Defence & Counter-claim in S 1247 at para 30(d).

together to grow the Family Business so as to provide financial independence for their family.[36] It was towards this end that they both decided to invest the "significant cash reserves" held by Health & Help by purchasing the Property.[37]

32 According to Mr Anushka, it was Mr Mytsyk who breached the "Mutual Understanding" between them by *inter alia* taking "wrongful steps" to try to assign the legal and beneficial ownership of the shares in the Family Business to Mr Liaskovskyi and her elder daughter.[38] From July 2019, she also allegedly embarked on a "scorched earth campaign" to strip Med Travel of its value: for example, she stopped forwarding medical patients' booking inquiries and transport bookings to Med Travel and diverted the business to Health & Help instead.[39] In S 1247, Mr Anushka put forward a counter-claim (*inter alia*) against Ms Mytsyk for breach of the Mutual Understanding (which he termed a breach of contract);[40] and as one of the reliefs prayed for in his counter-claim, he sought an order for Ms Mytsyk to pay him "the value of the 50% of shares in [Health & Help] and Med Travel" (which he termed "The Buyout Value").[41]

33 As for Med Travel, it too has filed a defence in S 1247 denying the claims brought against it by Ms Mytsyk and her co-plaintiffs. In particular, Med Travel denies holding any assets or properties on constructive trust for Health & Help. *Inter alia*, Med Travel has asserted that it is the "legal and beneficial owner" of the Med Expert software; that the $1.38m loan it received from

---

[36] 1st Defendant's Defence & Counter-claim in S 1247 at paras 22(a) and 29.

[37] 1st Defendant's Defence & Counter-claim in S 1247 at para 20.

[38] 1st Defendant's Defence & Counter-claim in S 1247 at paras 30(e) and 64(b).

[39] 1st Defendant's Defence & Counter-claim in S 1247 at paras 30(m) and 64(d).

[40] 1st Defendant's Defence & Counter-claim in S 1247 at paras 62–64.

[41] 1st Defendant's Defence & Counter-claim in S 1247 at p 42, prayer (a); also the Appendix to his Defence and Counter-claim.

Health & Help was for the purpose of acquiring the Property as an investment in line with the Mutual Understanding between Mr Anushka and Ms Mytsyk; and that the service fees paid to it by Health & Help were "valid charges…for work done and services rendered" which were known to Ms Mytsyk.[42]

34 I now examine each of Mr Anushka's alleged breaches of director's duties put forward by Ms Mytsyk in OS 987 to ascertain whether these are actually matters which form the subject of the ongoing litigation in S 1247.

On the allegation of misappropriation of company funds

35 I consider first the allegation that Mr Anushka has misappropriated company funds by withdrawing "all available funds from [Med Travel's] bank accounts totaling $477,000 on or around 1st October 2019".

36 It should be noted at the outset that Mr Anushka has not denied withdrawing monies from Med Travel's account totaling this amount (or more precisely, totaling an amount of $476,368.05). Obviously, however, he disputes Ms Mytsyk's characterization of his actions as a misappropriation of company funds committed in breach of his fiduciary duties as Med Travel's director. He further contends that the issue of his withdrawal of these funds is already a matter in contention in S 1247. As seen from the above outline, Mr Anushka's defence to the claims brought against him in S 1247 centers on his assertion that Med Travel and Health & Help constitute a Family Business jointly owned by him and Ms Mytsyk – and that part of the mutual agreement between them was that "they would try and keep as much retained earnings in the Family Business" so as to use these monies "for future investment and expansion". Mr Anushka has further pleaded in his defence in S 1247 that when their relationship started

[42] 2nd Defendant's Defence in S 1247 at paras 10(b)–10(c).

unraveling in April / May 2019, he had informed Ms Mytsyk that he "wished to stop the existing financial arrangement" whereby "all his savings were maintained within the Family Business as company profits"; that he intended to "withdraw around $400,000 out of the Family Business to be kept as his personal savings"; and that "going forward [Ms Mytsyk] should contribute her fair share to the family expenses along with [him]".[43] According to Mr Anushka, it was shortly after this that Ms Mytsyk started taking various "wrongful steps" to breach the Mutual Understanding. As outlined above, in S 1247 Mr Anushka has counter-claimed against (*inter alia*) Ms Mytsyk for her alleged breach of their Mutual Understanding and seeks an order for her to pay him the value of 50% of the shares in the two companies. It is in this context that he has in his pleadings acknowledged his own withdrawal of the total amount of $476,368.05 from Med Travel's account between 5 August 2019 and 8 October 2019; and he has further pleaded that the Buyout Value (which he says is the amount Ms Mytsyk should pay him for his share of the Family Business) should be "reduced" by this amount – but only after setting off various payments which he claims to have made on Med Travel's behalf or which he asserts he is entitled to.[44]

37 Whether there was in fact a "Family Business" owned jointly by Mr Anushka and Ms Mytsyk pursuant to a "Mutual Understanding", whether Mr Anushka was entitled upon the latter's alleged breach of that "Mutual Understanding" to withdraw monies from Med Travel's account "to be kept as his personal savings", and whether he is correct to insist that the amount so withdrawn should now be accounted for by being factored into the computation of the Buyout Value he wants Ms Mytsyk to pay him – these are all matters

[43] 1st Defendant's Defence & Counter-claim in S 1247 at para 30(d).

[44] 1st Defendant's Defence & Counter-claim in S 1247 at paras 12–15 of the Appendix.

which remain to be seen in the trial of his counter-claim in S 1247. Given the case advanced by Mr Anushka in his counter-claim (which Ms Mytsyk and her co-plaintiffs dispute), it is likely that the trial court in S 1247 will have to make factual findings which impact on the issue of whether Mr Anushka's withdrawal of the $476,368.05 may be characterised as a "misappropriation" of company funds.

On the alleged forgery of "financial documents"

38 I consider next the allegation that Mr Anushka has forged "financial documents". In her first affidavit, Ms Mytsyk stated that he had "forged [her] signature on [Med Travel]'s Financial Statements for FY 2017 and FY 2018 without [her] permission nor knowledge". Looking at the complaints put forward in her affidavit, however, it seems clear that the alleged forgery of her signature on the FY 2017 and FY 2018 financial statements was never her actual concern. Practically speaking, if the contents of these financial statements were entirely accurate and true, there would seem to be no real reason for Med Travel to pursue legal action against Mr Anushka for "forging" Ms Mytsyk's signature on the statements. Indeed, an examination of Ms Mytsyk's affidavit evidence reveals that vis-à-vis the FY 2017 and FY 2018 financial statements, her real concern was with the service fees billed by Med Travel to Health & Help in those years. In gist, she claims that she never authorised the billing of such service fees: according to her, Mr Anushka "manufactured" the service fees billed in FY 2017 and FY 2018; and he also did the same thing in respect of services fees billed by Med Travel to Health & Help in FY 2014, FY 2015 and FY 2016.[45] By doing so, according to her, he "falsely inflated [Med Travel's] earnings and made it appear as if [Med Travel] had turned a profit when that

[45] Ms Mytsyk's 1st affidavit at paras 39–42.

was not the case" and thereby "exposed [Med Travel], *inter alia*, to additional corporate tax liabilities as well as other offences involving false accounting".[46]

39 Insofar as Ms Mytsyk's real complaint is about the service fees charged by Med Travel to Health & Help between FY 2014 and FY 2018, I accept Mr Anushka's argument that these service fees are already the subject of ongoing litigation in S 1247. This is because Ms Mytsyk and her co-plaintiffs in that suit have pleaded the payment of these service fees by Health & Help as one of the instances of Mr Anushka breaching director's duties he owed the company:[47] according to them, these service fee payments were "questionable" and "unjustifiable".[48] In respect of the same service fees, they have also pleaded that Med Travel received "as constructive trustee" the monies paid by Health & Help.[49] Given the position advanced by Ms Mytsyk and her co-plaintiffs in S 1247, the trial court will have to make findings as to whether the service fees charged by Med Travel were "justifiable".

40 I add that insofar as Ms Mytsyk has suggested that Mr Anushka does not deny the allegation of "forgery", this is incorrect. In her first affidavit, Ms Mytsyk exhibited her lawyers' letter of 4 August 2021 to Mr Anushka,[50] in which they informed the latter of her allegation that he had "fraudulently forged" her signature on Med Travel's "audited reports for the financial years of 2018 and 2019" (which Ms Mytsyk has since clarified was meant to be a reference to FY 2017 and 2018) and on documents relating to service fees billed

---

[46] Ms Mytsyk's 1st affidavit at para 43.

[47] Statement of Claim in S 1247 at para 12(d).

[48] Statement of Claim in S 1247 at para 12(d).

[49] Statement of Claim in S 1247 at para 17.

[50] Ms Mytsyk's 1st affidavit at Tab R, p 402 at para 3.2.

by Med Travel to Health & Help from FY 2014 to FY 2018. In replying to this letter on 16 August 2021, Mr Anushka stated that the allegations in the letter were "false, and known by [Ms Mytsyk] to be false"; and he also asserted that the documents supposedly relating to the service fee billings ("cross charge documents") were "non-existent".[51]

On the allegation that Mr Anushka has unlawfully caused Med Travel to incur a debt it cannot afford to repay by purchasing the Royal Square property

41 I consider next the allegation that Mr Anushka has "unlawfully caused [Med Travel] to incur a debt it cannot afford to repay by purchasing a property at Novena Royal Square" ("the Property") when he knew that Med Travel "did not have sufficient funds to be able to purchase the said property and/or to service the financing charges for the purchase of the Property". As I noted earlier, Ms Mytsyk has also alleged that having unilaterally caused Med Travel to take on a mortgage it could not afford, Mr Anushka has now drawn on its overdraft facilities to meet the monthly mortgage payment, thereby getting the company mired even deeper in debt.

42 In S 1247, the purchase of the Property by Med Travel was brought up by Ms Mytsyk and her co-plaintiffs in the context of their claim regarding the loan of $1.38 million by Health & Help to Med Travel for the purchase of the Property. They claim that it was Mr Anushka who insisted on Med Travel purchasing the Property under its name when Med Travel could not afford the purchase, and that Ms Mytsyk had vehemently objected to Health & Help lending Med Travel money to do so.

[51] Ms Mytsyk's 1st affidavit at Tab R, pp 409–410.

43 Mr Anushka of course has a different narrative about the transaction. As I alluded to above, Mr Anushka's defence in S 1247 is premised on his assertion that a "Mutual Understanding" existed between him and Ms Mytsyk, pursuant to which they jointly owned and managed Med Travel and Health & Help as their "Family Business". Cash and other assets in the two companies' names were treated as being part of the assets of this Family Business and handled accordingly, so as to build up a "nest egg" for the benefit of the couple and their family.[52] Because most of Health & Help's expenses were booked under Med Travel and paid by the latter, Health & Help was able to build up "significant cash reserves".[53] It was with a view to investing these cash reserves that Mr Anushka and Ms Mytsyk jointly decided to purchase the Property in Med Travel's name, with Med Travel taking on the mortgage in its name while Health & Help extended it a loan of $1.38 million for the down-payment. Indeed, according to Mr Anushka, it was Ms Mytsyk who had suggested purchasing the Property, and he had agreed to her suggestion after assessing that "the property could be rented out" and that there was the "additional possibility to use the investment to generate additional returns from a bunkering business owned by [him]". The "bunkering business" in question was the company Murex, which – in his pleadings in S 1247 – Mr Anushka described as a new business he had set up in 2018. According to Mr Anushka, he derived a monthly income from Murex, which he had transferred to Med Travel to enable Med Travel to meet the monthly mortgage payments for the Property. This was something Ms Mytsyk was aware of: in fact, this "additional revenue stream" for Med Travel was "(o)ne of the key reasons" why he and Ms Mytsyk had agreed to purchase the Property, as the additional revenue would have ensured

[52] 1st Defendant's Defence & Counter-claim in S 1247 at para 29(a).

[53] 1st Defendant's Defence & Counter-claim in S 1247 at paras 28(c) and 29.

that the mortgage payments were not a burden for the Family Business.[54] Ms Mytsyk was involved in the entire process for Med Travel's purchase of the Property and co-signed as personal guarantor for its mortgage loan together with him.

44 To explain further the arrangement with Murex, which Mr Anushka claimed was to be the source of monthly income for paying off the mortgage: Murex is a company incorporated on 17 May 2018, of which Mr Anushka is on record the sole shareholder and director.[55] In the affidavits she has filed in support of OS 987, Ms Mytsyk claims that Murex actually belongs to her "Russian clients"; that Mr Anushka is a mere "nominee" for these Russian clients; and that it was she who assisted the Russian clients in setting up Murex and who negotiated for Murex to pay Med Travel a "monthly fee of USD 7,500". According to Ms Mytsyk, this monthly US$7,500 payment by Murex had initially gone into Med Travel's account, but after she served the divorce papers on Mr Anushka, he kept the monies for himself and had his own company A B Capital Pte Ltd invoice Murex for the US$7,500 instead.[56]

45 For his part, Mr Anushka claims that Murex is *his* company, and that when he set it up, he had decided to draw from it monthly "personal remuneration" of US$7,500. Although this was his personal income, he had initially transferred the monies to Med Travel's account, because of the "Mutual Understanding" he had with Ms Mytsyk to keep as much of their earnings as possible within the "Family Business". Around August 2019, when Ms Mytsyk took steps to breach the "Mutual Understanding", he stopped transferring the

---

[54] 1st Defendant's Defence & Counter-claim in S 1247 at para 35(m).

[55] Mr Anushka's 1st affidavit at Tab I, pp 208–210.

[56] Ms Mytsyk's 1st affidavit at paras 13–14 and her 2nd affidavit at paras 17–20.

Murex payments into Med Travel's account.[57] He contends that Med Travel has had to draw on its overdraft facilities for the mortgage payments because although the company still has funds in excess of US$298,020 in its RHB USD account, Ms Mytsyk has refused to allow these funds to be used to pay the monthly mortgage instalments.[58]

46 I shall say more about Murex in the next few paragraphs. In respect of the present allegation that Mr Anushka unilaterally caused Med Travel to take on a mortgage it could not afford, I am of the view that this is a matter which is already in contention in S 1247. Although in S 1247 the purchase of the Property was brought up by Ms Mytsyk in the context of a claim relating to Health & Help's loan to Med Travel, the court hearing the trial of S 1247 will have to make findings on whether it was Mr Anushka who unilaterally insisted on Med Travel purchasing the Property in its name as Ms Mytsyk and her co-plaintiffs claim (thereby saddling the latter with a mortgage it could not afford) – or whether the purchase of the Property by Med Travel was jointly agreed by Mr Anushka and Ms Mytsyk as part of their plans for investing the cash reserves of the ""Family Business". As for the allegation about Mr Anushka getting Med Travel further indebted by drawing on its overdraft to meet mortgage payments, this is in my view ancillary to the issue of whether the mortgage was a liability which in the first place Ms Mytsyk and Mr Anushka had jointly agreed to have Med Travel assume.

[57] Mr Anushka's 1st affidavit at paras 45–50.

[58] Mr Anushka's 1st affidavit at paras 68–69.

On the allegation that Mr Anushka unlawfully diverted to himself income due to Med Travel

47 I next consider the allegation that Mr Anushka unlawfully diverted to himself income due to Med Travel. As noted above, it is alleged firstly that he diverted "income" and "returns" due to Med Travel from Murex, to his own company A B Capital Pte Ltd instead. It is also alleged that he diverted to himself rental income due to Med Travel from the tenant of the Property.

48 As to the allegation concerning Murex, I have summarised above the parties' differing positions on Murex. Ms Mytsyk claims that Mr Anushka is a mere nominee shareholder and director in Murex, and that she was the one who had negotiated for Murex to pay Med Travel a monthly US$7,500 fee. Mr Anushka claims that Murex is his company and that the monthly US$ 7,500 was his "personal income" which – prior to August 2019 – he had voluntarily transferred to Med Travel's account "as income to Med Travel" and "part of family income".[59] This is a narrative he has recounted in his pleadings in S 1247 in explaining why Ms Mytsyk was willing to agree to Med Travel purchasing the Property.[60] It will be remembered that Ms Mytsyk's position in S 1247 is that she objected to Med Travel taking on the Property (and the mortgage) because the company could not afford the financial liability; and that she signed the necessary documentation only after being coerced by Mr Anushka.[61] In the circumstances, while the trial court in S 1247 is not faced with a claim of wrong diversion of income by Mr Anushka, it will nevertheless have to make findings

[59] 1st Defendant's Defence & Counter-claim in S 1247 at para 35(m).

[60] 1st Defendant's Defence & Counter-claim in S 1247 at para 35(m).

[61] See Statement of Claim in S 1247 at para 12(c), also the Reply to 1st Defendant's Defence & Counter-claim at para 47.

on the veracity of his narrative as to the setting-up of Murex and the monthly US$7,500 payments.

49 As to the allegation that he has wrongfully diverted Med Travel's rental income to himself, I note first of all that in S 1247, Mr Anushka has alleged that because the two companies were really a Family Business belonging jointly to him and Ms Mytsyk, some of the monies from the profits of this Family Business were kept in cash by the latter in her personal bank accounts or her father's.[62] In other words, in S 1247 Mr Anushka appears to have posited that there was a practice of some of the Family Business' monies being kept in the personal bank accounts of one of its directors. I highlight this because it provides some context for the position he takes regarding rental payments he has received into his personal bank account.

50 Mr Anushka has acknowledged that whilst 8 months of rental income were credited directly into Med Travel's account, the balance 6 months of rental income have been paid into his personal account. According to Mr Anushka, it was necessary to do so because Ms Mytsyk was being "deliberately" obstructive in refusing to use the rental income to pay for expenses related to the Property (such as property tax and MCST fees). Mr Anushka's position is that from an early stage, he has already notified Ms Mytsyk that he would be getting the rental income paid into his personal account, and that he would pay off expenses related to the Property from that income before transferring any balance to Med Travel's account.[63]

---

[62] 1st Defendant's Defence & Counter-claim in S 1247 at para 28(b).

[63] Mr Anushka's 2nd affidavit at paras 29–33.

51 It should be noted that the above arrangement has from the outset been alluded to in Mr Anushka's pleadings in S 1247. In the Appendix to his Defence and Counter-claim, he has listed rental payments by the tenant of the Property as being monies received by him "on behalf of Med Travel"; and he has also listed payments of expenses related to the Property which he says were payments he made on Med Travel's behalf.[64] It is his position in S 1247 that monies received on behalf of Med Travel should be accounted for by way of a deduction from the Buyout Value he seeks in respect of his counter-claim, while the amounts he has paid on Med Travel's behalf should be added back to this Buyout Value.[65] Because Mr Anushka's defence and his counter-claim in S 1247 are premised on the two companies and their assets being owned jointly by him and Ms Mytsyk (a premise which the latter disputes), the trial court in S 1247 will have to determine whether there was in fact such an agreement; if so, whether it was breached by Ms Mytsyk as alleged; and if so, whether he should be entitled to seek from her an amount equivalent to "the value of 50% of [the] shares in" the two companies, after taking into account *inter alia* amounts he has received and amounts he has paid out on Med Travel's behalf. In other words, while the trial court in S 1247 will not be faced with a claim of wrong diversion of rental income by Mr Anushka, it will nevertheless have to determine how the rental payments received by Mr Anushka should be treated.

On the allegation that Mr Anushka has unlawfully prevented Med Travel from carrying on business

52 As to the allegation that Mr Anushka has unlawfully prevented Med Travel from carrying on business, it transpires from Ms Mytsyk's affidavit evidence that what she is really complaining about is the fact that Mr Anushka

---

[64] 1st Defendant's Defence & Counter-claim in S 1247 at paras 13 and 14 of Appendix.

[65] 1st Defendant's Defence & Counter-claim in S 1247 at para 15 of Appendix.

has "deprived" her of "access to [Med Travel's] major income earning software Med Expert".[66] It is Ms Mytsyk's position that Mr Anushka has acted wrongfully in barring her from accessing and using the Med Expert programme. According to her, without such access, she is "deprived of access to [Med Travel's] business records, documents and information and access to [Med Travel's] bank account"; and the company "is unable to do any business".[67]

53 In fact, the issue of whom may use the Med Expert software – and who owns it – is already raised in S 1247. In that suit, Ms Mytsyk and her co-plaintiffs have pleaded that the Med Expert software was actually "conceptualized by [her] for [Health & Help's] ownership and use", that Mr Anushka "caused the misappropriation" of this software programme by placing it "as an asset belonging to Med Travel in its books",[68] and that Med Travel holds the software programme "as constructive trustee" for Health & Help.[69] In addition to seeking a declaration to this effect, Ms Mytsyk and her co-plaintiffs in S 1247 have prayed for an order that Mr Anushka surrender "full access and control" of the Med Expert software to Health & Help. In the circumstances, it is clear that the issue of who may access and use the Med Expert software is already the subject of ongoing litigation in S 1247.

On the allegation that Mr Anushka has misused Med Travel funds for personal expenses

54 As to the allegation that Mr Anushka has misused Med Travel funds for personal expenses such as the legal fees he incurred in the divorce proceedings,

---

[66] Ms Mytsyk's 1st affidavit at para 51.

[67] Ms Mytsyk's 1st affidavit at para 54.

[68] Statement of Claim in S 1247 at para 12(b).

[69] Statement of Claim in S 1247 at para 17.

I note that these payments have actually been acknowledged by Mr Anushka himself in his pleadings in S 1247.[70] Mr Anushka does not, of course, agree that he has breached any fiduciary duties to Med Travel. As I noted earlier, he takes the position in S 1247 that Med Travel is part of the Family Business owned jointly by him and Ms Mytsyk pursuant to a Mutual Understanding; that it was pursuant to this Mutual Understanding that he kept all his savings "within the Family Business"; and that it was Ms Mytsyk who breached the Mutual Understanding, following which he took steps to withdraw a total of $476,368.05 from Med Travel's account. It will be remembered that in the counter-claim he has filed in S 1247, Mr Anushka is claiming that Ms Mytsyk should pay him 50% of the value of the shares in Med Travel and Health & Help, and that the amounts he has withdrawn from Med Travel should be accounted for by corresponding deductions from the Buyout Value, while the monies he has paid on its behalf should be added back to the Buyout Value. Ms Mytsyk does not agree. Whether there was in fact a Mutual Understanding between Mr Anushka and Ms Mytsyk as to their joint ownership of Med Travel and Health & Help; whether such Mutual Understanding was breached by Ms Mytsyk; whether Mr Anushka was entitled to withdraw monies from Med Travel's account for personal expenses; and whether he is correct to insist that the amounts so withdrawn should now be accounted for by being factored into the computation of the Buyout Value – these are matters which in my view the trial court in S 1247 is likely to have to consider in the trial of Mr Anushka's counter-claim in S 1247.

[70] 1st Defendant's Defence & Counter-claim in S 1247 at paras 12 and 14 of the Appendix.

On the allegation that Mr Anushka has negligently caused Med Travel to incur numerous penalties as a result of late submission of GST payments

55 The last allegation concerns the late submission of GST payments by Med Travel, which Ms Mytsyk claims was due to negligence on Mr Anushka's part. This last allegation does not feature in S 1247. Mr Anushka does not deny that there were some late submissions of GST payments, but says that they occurred when he was busy running "the entire backend of the Family Business" in the period between 2012 and 2019.[71] He also asserts that the resulting penalties came to a total of $742.25.

On whether Ms Mytsyk is bringing the intended derivative action for a collateral purpose

56 From the above, it would appear that save for the issue of late GST returns, the breaches of fiduciary and/or director's duties alleged against Mr Anushka in OS 987 already form part of the matters in contention in S 1247, in that findings will likely be made by the trial judge which impact on these allegations. Indeed, in respect of the issue of the service charges billed by Med Travel to Health & Help (namely, whether the service charges are "manufactured") as well as that of Ms Mytsyk's access to the Med Expert programme, these are specifically the subject of claims advanced by Ms Mytsyk and her co-plaintiffs in S 1247. It is against this backdrop that I consider Mr Anushka's submission that Ms Mytsyk's collateral purpose in the proposed derivative action is to advance her own cause in that suit and correspondingly, to "sabotage" Med Travel's defence in S 1247 – what he has called "her intractable conflict of interest".[72]

---

[71] Mr Anushka's 1st affidavit at paras 71 and 72.

[72] Mr Anushka's written submissions at paras 123–124.

57 First, given that many of the factual issues which arise from the allegations raised in OS 987 will likely be the subject of findings by the trial court in S 1247, the question which naturally comes to mind is why Ms Mytsyk insists that the derivative action must be launched against Mr Anushka at this juncture. Even if there is not strictly a duplicity of proceedings, there will likely be a fairly substantial amount of overlap between S 1247 and the intended derivative action, in terms of the factual issues to be determined. S 1247, having been commenced by Ms Mytsyk and her co-plaintiffs in early December 2019, should presumably be proceeding for trial in the near future. Ms Mytsyk's insistence on launching the proposed derivative action now is all the more disconcerting when one considers that she is asking that Med Travel indemnify her for the legal fees and disbursements she incurs in bringing the derivative action (*per* prayer 2 of OS 987). In other words, in addition to paying for its own defence in S 1247, Med Travel is now being asked to pay for Ms Mytsyk to bring a derivative action against Mr Anushka, involving issues which overlap with those raised in S 1247.

58 In his email of 16 August 2021 to Ms Mytsyk's lawyers,[73] Mr Anushka had suggested that if she believed Med Travel had a good claim against him (which he denied), she should nevertheless wait for her existing action in S 1247 to "proceed to finality" and let the proposed derivative action "be stayed until the conclusion" of that suit. Ms Mytsyk rejected this suggestion. According to Mr Anushka, in insisting on bringing a derivative action despite ongoing litigation in her own existing suit over many of the same matters, Ms Mytsyk is driven by her personal interests in S 1247. Having sued him for various breaches in S 1247 and having been stymied in her numerous attempts in that suit to get her hands on assets such as the Med Expert programme, Ms Mytsyk is now

[73] Ms Mytsyk's 1st affidavit at p 410.

(according to Mr Anushka) trying to achieve the same ends via a separate set of proceedings.

59 This brings me to the other, related point. As far as I can understand from Mr Anushka's arguments, it is his case that Ms Mytsyk's pursuit of her own interests cannot in any way be consistent with "doing justice" to Med Travel, because the case she wishes to advance in the statutory derivative action will effectively "sabotage" Med Travel's defence in S 1247.

60 Having examined the evidence before me, it does appear to me that if Ms Mytsyk is permitted to bring the proposed derivative action, the effect of some of the allegations she seeks to pursue in such action will be to undermine or subvert at least some aspects of Med Travel's defence in S 1247. For example, in respect of her allegation of forged financial documents, I have noted earlier that an examination of her affidavit evidence reveals that Ms Mytsyk's real complaint is about the service fees charged by Med Travel to Health & Help, which she claims were "manufactured" by Mr Anushka for the purpose of falsely inflating Med Travel's earnings. If Ms Mytsyk were to pursue this claim on behalf of Med Travel in a derivative action, it would necessarily mean Med Travel taking the position that the service fees were in fact "manufactured" – and thus "unjustifiable". This is precisely the same complaint about the service fees that Ms Mytsyk and her co-plaintiffs have advanced in S 1247, wherein they have asserted that Med Travel's receipt of the "unjustifiable" service fees is wrongful and that the company holds the monies paid as "constructive trustee" for Health & Help. On the face of it, therefore, the claim Ms Mytsyk proposes to pursue on behalf of Med Travel in the derivative action would involve in effect its capitulation to the plaintiffs' claim in S 1247 about its having charged service fees without any basis.

61 As another example, Ms Mytsyk claims that Mr Anushka's actions in denying her access to the Med Expert programme have prevented Med Travel from continuing to do business and that she must be granted access to the programme in order to stem the resulting losses. In her affidavits, Ms Mytsyk has not explained clearly how her own lack of access to the Med Expert programme has caused Med Travel's business to be impeded. Indeed, if what she says is true (*ie*, that the Med Expert programme contains all the personal records of Health & Help's clients), then it would appear to be Health & Help whose business is impeded and whose interests are at risk – rather than Med Travel's. Even more fundamentally, if Ms Mytsyk pursues in the intended derivative action this claim regarding her lack of access to Med Expert, the outcome she seeks will be for "full access" to and "control" of the programme to be given to her. This is the very outcome which she seeks vis-à-vis the Med Expert programme in S 1247, and which Med Expert – judging from the defence it has filed – obviously does not agree to.

62 There are two other things I should also point out. First, in the course of the ongoing litigation in S 1247, the lawyers for Ms Mytsyk and her co-plaintiffs have attempted to get Med Travel's lawyers to amend its defence, apparently so as to remove specific averments as to the true state of affairs vis-à-vis such disputed issues as access to the Med Expert programme, the purchase of the Property and the basis of service fees charged to Health & Help. On 11 February 2021, M/s Asia Ascent Law Corporation (the lawyers then acting for Ms Mytsyk and her co-plaintiffs) wrote to M/s Tembusu Law LLC (Med Travel's then lawyers),[74] purportedly to raise concerns about the scope of Mr Anushka's authority to instruct solicitors on behalf of Med Travel. In this letter, M/s Asia Ascent Law Corporation also purported to seek "confirmation" that

[74] Mr Anushka's 1st affidavit at pp 162–167.

M/s Tembusu Law LLC "shall" effect a number of specified amendments to Med Travel's defence. These specified amendments included the proposed deletion of large swathes of those paragraphs in Med Travel's defence which addressed the issues of the Med Expert programme, the purchase of the Property and the service fees. In these paragraphs, Med Expert had pleaded *inter alia* that the Med Expert programme was correctly documented as an asset in its accounts and that it was not obliged to surrender the software to the S 1247 plaintiffs; that it had purchased the Property as "an investment" in line with the Mutual Understanding and with Ms Mytsyk's knowledge and approval; and that Ms Mytsyk knew and had not objected to the arrangements for the charging of the service fees. *Per* M/s Asia Ascent Law Corporation's letter, all such averments were to be deleted and replaced instead with the bare statement that the corresponding passages in the statement of claim were "not admitted". If the specified amendments had been made, the substantive basis pleaded for sizeable chunks of Med Travel's defence in S 1247 would have been deleted.

63 As it turns out, Med Travel did not make the amendments requested. I bring this up because in my view, this letter shows that Ms Mytsyk has already attempted in S 1247 to prevent Med Travel from presenting a narrative on disputed issues which corroborated or coincided with Mr Anushka's narrative. These are the same disputed issues that she now seeks to make the subject of a derivative action against Mr Anushka; and as I have noted, if she is permitted to bring such derivative action, it will mean Med Travel adopting a narrative on the disputed issues which contradicts – indeed, undermines – its pleaded position in S 1247.

64 Second, and specifically in respect of the Med Expert software programme, it will be remembered that Ms Mytsyk and her co-plaintiffs have pleaded in S 1247 that Med Travel holds this programme as constructive trustee

for Health & Help (of which Ms Mytsyk is the sole shareholder and director). They have further pleaded that Mr Anushka should be ordered to take steps to surrender to Health & Help full access and control over this programme. In the course of the proceedings in S 1247, Ms Mytsyk and her co-plaintiffs applied in November 2020 for specific discovery against Mr Anushka of various items, including files and data maintained in the Med Expert software; and when they failed to get specific discovery of these files and data, they brought an appeal which also failed.[75] Now, if Ms Mytsyk is permitted to proceed with the proposed derivative action, one of the things she has made clear she will ask for is to be granted access to and control of the Med Expert programme.

65 I point out these two things because they appear to me to support Mr Anushka's contention that what Ms Mytsyk seeks to do in the proposed derivative action will end up "sabotaging" Med Travel's defence in S 1247, even as it advances her cause in that suit. Furthermore (and somewhat ironically), as I pointed out earlier, if Ms Mytsyk has her way, Med Travel will have to indemnify her for the legal fees and disbursements she incurs in bringing the derivative action.

66 In light of the above, I find that Mr Anushka has been able to point to enough evidence capable of suggesting that Ms Mytsyk is not acting in good faith. In other words, he has discharged the respondent's *tactical* burden of proof on the issue of good faith. As the High Court highlighted in *Petroships* (at [79]), where a respondent meets its tactical burden, the applicant can no longer simply point to the merits of the derivative action and invite the court to draw an inference of good faith from that fact alone: an applicant who does no

[75] Mr Anushka's 1st affidavit at paras 38–42.

more than that will fail to discharge its legal burden of proof on the issue of good faith.

67 Unfortunately for Ms Mytsyk, her affidavit evidence shows no signs of any attempt to demonstrate her good faith. In her first affidavit in OS 987, no mention at all was made of S 1247, even though it must have been obvious that most of the allegations of breaches she wanted to pursue in Med Travel's name were already matters in contention in S 1247. Even after Mr Anushka filed an affidavit asserting that issues such as the use of Med Expert and the purchase of the Property were already before the court in S 1247 and accusing her of trying to sabotage Med Travel's defence in that suit, Ms Mytsyk continued to shy away from addressing the question of good faith. In her second affidavit, she merely stated that S 1247 was "commenced to rectify [Mr Anushka's] wrongdoings and to allow [her] father to regain control of the 2 companies which are beneficially owned by him". She made no mention of the other aspects of the plaintiffs' claim in S 1247. In particular, she has been silent about their claim against Med Travel for wrongful conversion or receipt of assets such as monies paid by Health & Help for service fees and the Med Expert programme. Even in the third affidavit which she obtained leave to file, she has spent most of her time repeating the allegations made against Mr Anushka in her first affidavit, setting out further allegations and describing the abuse she says he visited on her and her children. Her bottom-line is that Mr Anushka is guilty of much misconduct and that the case she wishes to bring against him on Med Travel's behalf is a strong one. As the High Court cautioned in *Petroships*, however, an applicant under s 216A cannot discharge its burden of proof on the issue of good faith simply by pointing to the merits of the proposed derivative action.

68 Indeed, it would appear Ms Mytsyk's reluctance to deal with the issue of overlap between S 1247 and the proposed derivative action bespeaks a lack

of candour on her part in the present proceedings. The failure to be fully candid before the court has been held in various cases to indicate a lack of good faith: see for example *Wong Kai Wah v Wong Kai Yuan & anor* [2014] SGHC 147 ("*Wong Kai Wah*") at [66]; *Agus Irawan* at [9]; *Petroships* at [117] to [128]; and *Jian Li Investments* at [99(b)]. As the High Court observed of the plaintiff in *Agus Irawan*" (at [9]), good faith would have required the plaintiff to "set out the story in full from the beginning but he did not do so"; and the court found that he had not acted in good faith. In *Agus Irawan*, the plaintiff had applied for leave to bring a derivative action in the name of the third defendant company against the first and second defendants. It was alleged that the third defendant company was entitled to rebates given by the Australian Wheat Board but that it never received these rebates because the Australian Wheat Board paid the rebates to other parties on the instructions of the first defendant and a manager of the third defendant. Evidence was adduced by the defendants to show that in fact, the rebate had been paid through a company called Gismo Investments in which the plaintiff and his father were shareholders and directors. The plaintiff said he had been ignorant of this arrangement as the bank accounts of Gismo Investments had been operated by the first defendant alone, but the High Court found that this simply raised further questions as to why and how that was allowed to be so (at [9]). The court was not satisfied that the plaintiff had come before it in good faith, and his leave application was accordingly dismissed.

69 In the present case, Ms Mytsyk is one of the main protagonists in S 1247: she can hardly have been ignorant of the claims which she and her co-plaintiffs have advanced in that suit, or of the defences and counter-claim filed therein. Good faith would have required her to set out the story in full from the beginning, but she did not do so. I surmise that she did not do so because she did not want to invite scrutiny of the claims she has brought against Mr Anushka

and Med Travel in S 1247, versus the claims she now proposes to launch against Mr Anushka in a derivative action on behalf of Med Travel.

70 In arriving at the above conclusions, I do not find the allegation about Mr Anushka's late submission of GST payments adds anything to the mix. Ms Mytsyk has given only four examples of such late submissions; and while she claims in her affidavit that she is "quite sure" there are other examples, she provides no basis at all for this claim. On her own computation, the total penalties incurred by Med Travel in respect of these late submissions came to $742.25. It would appear to me this allegation was something of an afterthought, thrown in to add to the allegations reprised from S 1247.

Conclusion on the issue of good faith

71 For the reasons set out above, I find that Ms Mytsyk has failed to satisfy me on a balance of probabilities that she is acting in good faith. She has failed to discharge her legal burden of proof under s 216A(3)(b). In my view, in bringing this application, she is abusing the statutory remedy in s 216A – and by extension, also Med Travel – as a vehicle for her own aims and interests.

72 This finding suffices *per se* to dispose of Ms Mytsyk's application in OS 987. As the High Court in *Petroships* said of the unsuccessful applicant in that case (at [150]), "(n)o matter how strong the merits of its case might be, those merits cannot make up for a lack of good faith".

73 It is not necessary, in the circumstances, for me to address the issue of whether Ms Mytsyk can pass the next stage of the inquiry in s 216A(3)(c). In the interests of completeness, however, I will say something about the application of s 216A(3)(c) on the present facts.

On whether the intended derivative action appears prima facie to be in the interests of Med Travel pursuant to s 216A(3)(c)

74 Pursuant to s 216A(3)(c), the applicant only needs to show that the intended derivative action is legitimate and arguable. As the High Court noted in *Petroships*, the threshold test at this stage of the inquiry deliberately sets a low standard, precisely because it is only a threshold test that serves to weed out "only the most obviously unmeritorious claims" (*Petroships* (at [152], *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at 53] to [55]).

75 As the High Court in *Petroships* also noted, however, passing the threshold test is insufficient to satisfy the entirety of the test under s 216A(3)(c), because the statutory test under that provision requires the court to consider the overall interests of the company in the round. The court in *Petroships* (at [153]) endorsed Palmer J's judgment in *Swansson v R A Pratt Properties Pte Ltd & anor* [2002] 42 ACSR 313 ("*Swansson*"), holding that the inquiry under s 216A(3)(c) should be a multi-factorial process which examines a number of factors to determine if the derivative action is in the practical and commercial interests of the company. I have summarised these *Swansson* factors earlier (see above at [24]). Even if I am wrong on the issue of good faith and even if I assume that Ms Mytsyk can satisfy the threshold test, I nevertheless find she cannot show on a balance of probabilities that it is *prima facie* in Med Travel's interests for her to pursue the claims of alleged breaches by Mr Anushka via a derivative action. I have highlighted earlier that many of the allegations which she proposes to pursue in the derivative action overlap with issues already in contention in S 1247, and that some of the claims she proposes to pursue in the derivative action effectively undermine various aspects of the defence pleaded by Med Travel in that suit – while simultaneously requiring Med Travel to indemnify her legal costs in the derivative action. There is nothing in her

affidavits and / or her counsel's written submissions which explains away this disturbing conundrum.

Conclusion and final observations

76 For the reasons I have set out above, I dismiss OS 987.

77 There is one final point I wish to make. Much ink has been spilt by each party in detailing the poor behaviour of the other during their marriage, and much vitriol spewed not only in the affidavits filed but also in the submissions made and even in the letters sent to the court. I consider that the greater share of the responsibility for this unhealthy exchange must lie with Ms Mytsyk, who – in every affidavit she has filed in these proceedings – has brought up the "very abusive" relationship and "physical and verbal abuse" she claims to have suffered during her marriage to Mr Anushka. In fact, I have found virtually all the allegations about marital abuse to be irrelevant to the issues in contention in OS 987; and it is regrettable that Ms Mytsyk chose to focus her time and energy on ventilating these matters when such time and energy should have been more fruitfully spent coming to grips with the legal and evidential issues in the OS.

78 I will hear parties on costs.

Mavis Chionh Sze Chyi
Judge of the High Court

Lim Tean (Carson Law Chambers) (instructed),
Wong Li-Yen Dew (Dew Chambers) for the plaintiff;
The first defendant absent and unrepresented;
The second defendant in person.
