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

[2022] SGHC 228

Originating Summons No 779 of 2021 (Summons No 2371 of 2022)

Between

Syed Ibrahim Shaik Mohideen

… *Plaintiff*

And

(1) Wavoo Abdusalam Shahul Hameed
(2) Abdul Latiff Hajara Marliya
(3) Suvai Foods Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Companies — Statutory derivative action — Cross-examination at the leave stage]

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Syed Ibrahim Shaik Mohideen
v
Wavoo Abdusalam Shahul Hameed and others

[2022] SGHC 228

General Division of the High Court — Originating Summons No 779 of 2021 (Summons No 2371 of 2022)
Goh Yihan JC
2 September 2022

20 September 2022

Goh Yihan JC:

1 This is the first and second defendants' application for leave to cross-examine the plaintiff on his affidavits filed in HC/OS 779/2021 ("OS 779"). For convenience, I shall term the first and second defendants as "the applicants", unless the context requires otherwise. OS 779 is the plaintiff's application for leave to commence a statutory derivative action against the first and second defendants in the name of the third defendant, pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) (the "Companies Act"). The underlying basis behind the present application was that, so the applicants alleged, there were material disputes of fact arising from the plaintiff's evidence in OS 779 which warrant the court taking a closer look at that evidence.

2 At the end of the hearing before me on 2 September 2022, I dismissed the application with costs. But because the application raises a relatively

undiscussed question about when it would be appropriate to order the cross-examination of the deponent of a supporting affidavit in an application for leave to commence a statutory derivative action, I now provide the full reasons for my decision.

The factual background

3 The third defendant is Suvai Foods Pte Ltd, a company incorporated in Singapore on 2 March 2012 ("the Company"). The Company is engaged in the business of manufacturing food products, in particular fresh Indian food products. The plaintiff was a co-founder of the Company and was appointed a director of the Company from its incorporation until he was removed pursuant to a members' resolution at the Annual General Meeting on 23 August 2021. Since 12 April 2021, the plaintiff has been a majority shareholder of the Company. He holds 9,600 of the 20,000 ordinary shares in the Company, or approximately 48%.

4 The first defendant is also a co-founder of the Company and remains a director. He is a minority shareholder of the Company with about 44% of the issued shares since 12 April 2021. The second defendant has been a director of the Company since 1 August 2019. She is also a minority shareholder with about 8% of the issued shares.

5 The plaintiff commenced OS 779 for leave to commence a statutory derivative action on behalf of the Company against the first and second defendants pursuant to s 216A of the Companies Act. The plaintiff's application was premised on the first and second defendants' alleged breaches of fiduciary

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duties in their capacities as directors. As against the first defendant, the plaintiff alleged the following breaches:

(a) breach of trust relating to the Company's rights of ownership to its trade mark;

(b) using the Company's confidential recipes and funds to establish two foreign companies, Suvai Foods (UK) Limited ("Suvai UK") and Suvai Foods HK (Maya Foods Limited) ("Suvai HK");

(c) misusing the Company's resources, website, and funds to facilitate the business of Suvai UK and Suvai HK, without accounting to the Company for the profits made;

(d) inflating the salaries of the Company's genuine employees and "clawing back" payments from them;

(e) inflating the salaries of the Company's phantom employees and "clawing back" payments from them;

(f) transferring monies from the Company to an Indian entity named Suvai Foods on the pretext of paying for supplies;

(g) diverting the Company's revenue to a new bank account with United Overseas Bank since January 2021, instead of depositing them into the Company's old bank account with Oversea-Chinese Banking Corporation;

(h) incorporating another Singapore company, Suvai Global Foods Pte Ltd;

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(i) conspiring with Ms K V Rajalakshmi to appoint the second defendant as a director of the Company, for the purposes of paying the second defendant's director fees of $85,895 in 2019; and

(j) conspiring with the second defendant to act against the Company's interests by engaging and/or approving the alleged conduct in (d) to (g) above.

6 As against the second defendant, the plaintiff alleged that, since her appointment as a director of the Company, she had conspired with the first defendant to act against the Company's interests by engaging in [5(d)]–[5(g)] above.

7 On 12 May 2022, the applicants informed the plaintiff of their intention to cross-examine him and requested for his consent or comments. Despite attempts by the applicants to follow up with the plaintiff on 24 May 2022 and 2 June 2022, the plaintiff did not reply until 8 June 2022. The plaintiff's eventual reply was that he would oppose the applicants' application to cross-examine him. The applicants therefore proceeded to file the present application.

The applicants' grounds for the present application

8 The essence of the applicants' grounds for the present application was that there were material disputes of facts arising from the plaintiff's evidence in OS 779. The applicants submitted that *their* evidence warranted the court taking a closer look at the plaintiff's evidence. Referencing the requirements for an application for leave under s 216A of the Companies Act, the applicants said that there were material disputes of facts arising from the plaintiff's evidence in

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terms of the so-called notice, good faith, and interest requirements (see the High Court decision of *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd and another* [2022] SGHC 187 at [4]–[5]).

9 More specifically, the applicants pointed to several "factual gaps" in the plaintiff's narrative of the relevant events. According to them, these factual gaps had either been contradicted by the applicants' affidavits or raised issues of fact that are relevant and necessary to the disputed issues in OS 779. Where these factual gaps gave rise to issues of fact, they can be divided into events before the filing of OS 779, and events after the filing of OS 779. The applicants said that the resolution of these factual gaps would greatly assist the court's assessment of the plaintiff's case in OS 779 as these gaps related to his account of material events.

10 At the hearing before me, Mr Ashton Tan ("Mr Tan"), who appeared for the applicants, further elaborated on the applicants' case for leave to be granted for cross-examination. First, as to the supposed factual gaps in the plaintiff's evidence, Mr Tan explained that if I was satisfied that the evidence turns one way or the other in favour of either the plaintiff or the applicants, then I need not order cross-examination. This is because the evidence would lead to a clear conclusion in that case. However, if the evidence was finely balanced to give rise to a material dispute of fact, then I should order cross-examination. Second, Mr Tan also explained that I should order cross-examination of the plaintiff because his credibility was questionable. Mr Tan said that the plaintiff had corresponded perfectly in English before but had then said in his supporting affidavit in respect of OS 779 that he was not comfortable with the language. This, Mr Tan explained, cast doubts on the plaintiff's credibility. The plaintiff

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should therefore be cross-examined so that the court dealing with OS 779 can evaluate the plaintiff's credibility.

11 Having considered the background and the essence of the applicants' grounds in the present application, I turned to consider the applicable principles to determine when it would be appropriate to order the cross-examination of the deponent of a supporting affidavit in an application for leave to commence a statutory derivative action.

The applicable principles to determine when to order cross-examination in an application for leave to commence a statutory derivative action

The court's discretion to order cross-examination in an originating summons

Overview of the court's general discretion

12 It is trite that the court has a general discretion to order the cross-examination of the deponent of an affidavit in an originating summons. This is clear from O 38 r 2(2) of the Rules of Court (2014 Rev Ed) (the "ROC"), which provides as such:

> In any cause or matter begun by originating summons … evidence shall be given by affidavit … but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

13 Similarly, O 28 r 4(3) of the ROC provides as follows:

> … the Court shall, at as early a stage of the proceedings on the originating summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the

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> originating summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that … the originating summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents …

14 The combined effect of O 38 r 2(2) and O 28 r 4(3) is that, unlike the case of proceedings commenced by writ where the default position would be that a deponent of an affidavit of evidence-in-chief is to be cross-examined at trial (see O 38 r 2(1)), a party who wishes to cross-examine a deponent in proceedings commenced by originating summons or summons would have to make an application to court for cross-examination.

15 The discretion whether to allow such cross-examination lies with the court. Indeed, the ambit of such discretion is quite wide. For example, in a case cited by the applicants, the High Court decision of *Tan Sock Hian v Eng Liat Kiang* [1995] 1 SLR(R) 730 ("*Tan Sock Hian*"), the husband had entered an appearance in the wife's divorce petition and indicated that he would contest it. The husband applied for leave to cross-examine the wife on her affidavit filed in support of her interlocutory application for interim maintenance. Judith Prakash JC (as she then was) dismissed the husband's application for cross-examination. Among many reasons, Prakash JC held that an order for cross-examination should not be lightly granted in relation to an interlocutory matter as it would in effect allow the parties to have a rehearsal before trial (at [14]). Moreover, the learned judge held that it would have been oppressive to allow the wife to be cross-examined since she was 68 years old at the time of the application and was not in the best of health. The breadth of the matters considered by Prakash JC in the exercise of her discretion to order cross-examination shows that the discretion contemplated under O 38 r 2(2) and O 28 r 4(3) of the ROC is quite wide.

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16 While not relevant to the present application, the effect of O 38 r 2(2) and O 28 r 4(3) of the ROC appears to have been combined in O 15 rr 7(5) and 7(6) of the Rules of Court 2021 ("ROC 2021"). O 15 r 7(5) of the ROC 2021 provides that the default position is that originating applications (previously known as originating summonses) and summonses must be decided based on the evidence adduced by affidavits and on oral or written submissions, without oral evidence or cross-examination. This thereby replicates part of O 38 r 2(2) of the ROC. Further, O 15 r 7(6) of the ROC 2021 provides that where the court is of the view that there are disputes of fact in the affidavits, the court may order, among others, the makers of the affidavits to be cross-examined. This therefore replicates O 28 r 4(3) of the ROC. In particular, the discretion contemplated by O 38 r 2(2) and O 28 r 4(3) of the ROC is similarly replicated in O 15 r 7(6) of the ROC 2021, which provides that the court "may" order for cross-examination. In my view, the case law on the exercise of such discretion under O 38 r 2(2) and O 28 r 4(3) of the ROC should, subject to the overriding Ideals contained in O 3 r 1 of the ROC 2021, continue to be applicable in respect of O 15 r 7(6) of the ROC 2021.

The general factors affecting the exercise of such discretion

17 While I have said that the discretion contemplated under O 38 r 2(2) and O 28 r 4(3) of the ROC is quite wide, it is also trite that every discretion must be exercised consistently and properly in accordance with the rationale that underlies that discretion. This must mean that there are some *general* factors that should guide the consistent and proper exercise of the discretion. Of course, these factors must necessarily be *general* in nature and not unduly affect the exercise of the discretion.

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18 In my view, the foremost factor is the *raison d'être* behind the originating summons process. The entire *raison d'être* for the originating summons process is to provide a convenient and speedy avenue for litigants to obtain a declaration of their respective rights from the court (see the English Court of Appeal decision of *Punton and another v Ministry of Pensions and National Insurance* [1963] 1 WLR 186 at 192). Therefore, apart from those instances specifically provided for under written law, the originating summons process is primarily utilised for matters where the dispute can be resolved by considering the interpretation of a statutory provision, or the construction of objective documentary evidence, such as wills, contracts, trusts, and settlement agreements. In such cases, the dispute at hand can be resolved conveniently and speedily through the originating summons process, without the need to consider oral evidence. Parties can therefore obtain judgment in respect of their rights. Indeed, it is trite that where there are substantial factual disputes which will render the originating summons a writ all but in name, it should be converted to a writ (see the decision of the Court of Appeal in *Woon Brothers Investments Pte Ltd v Management Corporation Strata Title Plan No 461 and others* [2011] 4 SLR 777 at [29] and [32]). Accordingly, a court exercising discretion in considering whether to order cross-examination should consider the *raison d'être behind* the originating summons process, which is to ensure a quick resolution of the dispute between the parties concerned. This very *raison d'être* should mean that courts shall, as a default rule, generally shy away from ordering cross-examination in an originating summons.

19 The consideration of the *raison d'être* behind the originating summons process must of course be *contextualised* to the application at hand. Hence, the second factor that should guide the consistent and proper exercise of the discretion to order cross-examination in an originating summons is the *nature*

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of the application at hand. There will be different considerations depending on the application concerned. For example, in *Tan Sock Hian*, the court was concerned with an application for cross-examination in a summons for interim maintenance pending the hearing of the divorce petition. While this summons was not an originating summons, the court's context-sensitive consideration of the *nature* of the application at hand can still be discerned. As I alluded to above (at [15]), Prakash JC dismissed the application for cross-examination because she thought this would have allowed the parties a rehearsal ahead of the trial. In my respectful view, the learned judge had cognisance of the *nature* of the application being in the overall context of *a pending trial*. Thus, the learned judge had clearly considered the consequences of any order for cross-examination in the light of the overall context in that situation. Similarly, as I will discuss below, it is important to pay heed to the *nature* of an application for *leave* to commence a statutory derivative action, as opposed to the eventual *action* that will be brought in the name of the company, should such leave be granted.

20 Finally, the third factor that should guide the consistent and proper exercise of the discretion to order cross-examination in an originating summons is the presence (or absence) of disputes of facts in the affidavits. This is a factor that is expressly identified in O 28 r 4(3) of the ROC, as well as O 15 r 7(6) of the ROC 2021. However, this obviously cannot be taken too far. There is, by the very premise of a dispute, likely to be disputes of facts in the affidavits. It cannot be that the mere presence of factual disputes will compel a court to order cross-examination. Thus, Steven Chong J (as he then was) had held in the High Court decision of *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd and another matter* [2016] 4 SLR 1336 ("*Jiangsu*") (at [42]) that "there must be good reasons beyond the existence of factual disputes to allow oral evidence

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and cross-examination" in an originating summons. This is also illustrated by the High Court decision of *AQZ v ARA* [2015] 2 SLR 972, albeit in the context an application to set aside an arbitration award (where the parties would already have examined the witnesses once fully before the arbitral tribunal). In that case, Judith Prakash J (as she then was) held that the existence of substantial disputes of fact as to whether a party had entered into the relevant arbitration agreement is not by itself a sufficient reason to allow oral evidence or cross-examination (at [55]).

21 With these general factors in mind, concerning (a) the *raison d'être* behind the originating summons process; (b) the *nature* of the application at hand; and (c) the presence (or absence) of disputes of facts in the application, I turned to consider the more *specific* situation concerning the court's discretion to order cross-examination in an application for leave to commence a statutory derivative action.

The court's discretion to order cross-examination in an application for leave to commence a statutory derivative action

Overview of the court's discretion in this context

22 O 88 r 2(1) of the ROC provides that every application under the Companies Act, except for applications under s 216 or s 394, "must be made by originating summons". An application for leave to commence a statutory derivative action under s 216A of the Companies Act must therefore be made by originating summons. Consequentially, O 38 r 2(2) and O 28 r 4(3) of the ROC are engaged and a court hearing such an application for leave will have the discretion to order the cross-examination of the deponent of a supporting

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affidavit. This much is trite and undisputed. However, the key question posed in the present application is *how* should this discretion be exercised?

The specific factors affecting the exercise of such discretion

(1) The nature of an application for leave to commence a statutory derivative action

23 In my view, the first factor that affects the exercise of such discretion is the *nature* of an application for leave to commence a statutory derivative action. This is the contextualisation of considering the *raison d'être* behind the originating summons process. Thus, while the court has the general discretion to order cross-examination in an originating summons pursuant to O 38 r 2(2) and O 28 r 4(3) of the ROC, that discretion must be appropriately applied in the context of an application for leave to commence a statutory derivative action. This requires the court to consider the *nature* of such an application and condition the exercise of its discretion on this basis.

24 The starting point is that an application for leave to commence a statutory derivative action under s 216A of the Companies Act is *not* a trial of the alleged wrongdoing. Applications under s 216A are for leave. Given the nature of such an application, a lower standard of proof is applied to test the allegations made. All that is needed is a *prima facie* case at this stage. Thus, as noted in Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) (at p 481), the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") stated that to satisfy the requirement in s 216A(3)(*c*) of the Companies Act – which is the substantive requirement of the leave application – the applicant must (at [53]) "cross the threshold of convincing the court that the company's claim would be legitimate

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and arguable". The court also noted that (at [55]) it is "plain that at this interlocutory stage, the standard of proof required is low, and only the most obviously unmeritorious claims will be culled". Similarly, in the High Court decision of *Yeo Sing San v Sanmugam Murali and another* [2016] SGHC 14 (at [23]), Aedit Abdullah JC (as he then was) held that "[t]he application for leave is only to provide a form of filtering, and it is clear that such filtering can only be at a broad level at this stage".

25 The nature of an application for leave to commence a statutory derivative action brings with it at least two consequences in relation to the need for cross-examination. First, there is no need at the application for leave stage to show that the intended action will or is likely to succeed (see *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 at [25]) but what needs to be shown instead is that the claim is "legitimate and arguable" (see *Ang Thiam Swee* at [53]). Thus, as stated in *Minority Shareholders' Rights and Remedies* (at p 483), the court is not required to make an extensive inquiry into the merits of the claim. Rather, it suffices for the court to rely on the affidavit evidence filed. Choo Han Teck JC (as he then was) put this very clearly in the High Court decision of *Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471 ("*Agus Irawan*") (at [6]):

> … Hence, Mr Lim sought leave to file a further affidavit in response to this, and also to have the plaintiff cross-examined. *I do not see any need to expand or broaden the case at this stage. At this stage the court need not and ought not be drawn into an adjudication on the disputed facts. That is what a* prima facie *legitimate or arguable case is all about. Leave to cross-examine in such situations ought to be sparingly granted.* I need only consider the grounds and points of challenge raised by the defendants to see if they are sufficient in themselves to destroy the credibility of the plaintiff's propounded case without a full scale hearing to determine who was truthful and who was not.
>
> [emphasis added]

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Choo JC's explanation of the law was cited with approval by the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 (at [17]). Accordingly, given that the court is not required to conduct an extensive examination of the evidence, it will be the exceptional case that oral examination is ordered at the application for leave stage.

26 Second, given its nature and purpose, if an application for leave to commence a statutory derivative action is successful, then there will be a *full action* taken out in the name of the company concerned based on the various facts raised in the affidavits filed for the leave application. This brings back the concern raised by Prakash JC in *Tan Sock Hian* about not giving parties a rehearsal ahead of the trial. Indeed, if the court hearing the application for leave takes too robust an examination of the evidence, such as by ordering cross-examination, then that effectively gives the parties the benefit of a rehearsal ahead of any trial that may eventually be brought in the name of the company concerned. This would not only be duplicative but may also lead to oppressive effects. Accordingly, similar to Prakash JC in *Tan Sock Hian*, I would regard that cross-examination should only be allowed in the exceptional case in what is akin to an interlocutory matter (see *Tan Sock Hian* at [14]).

27 As such, taken holistically, the very *nature* (and purpose) of an application for leave to commence a statutory derivative action must mean that cross-examination is only ever ordered on request in the most exceptional of circumstances. In fact, this would be even more exceptional than an order for cross-examination in other originating summonses.

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(2) The inevitable existence of disputes of facts

28 The second factor that affects the exercise of discretion is simply that it is inevitable that there will be disputes of facts, some material, in the competing affidavit evidence. This is inevitable because, if the parties are in agreement as to what happened in relation to the company concerned, there would be no application for leave to commence the statutory derivative action in the first place.

29 Accordingly, similarly to Chong J in *Jiangsu*, I regarded that there must be good reasons beyond the existence of factual disputes to allow oral evidence and cross-examination. Otherwise, by the very premise of an application for leave to commence a statutory derivative action – which is that the parties are in dispute as to whether it is in the company's best interests to bring such an action – there will *always* be disputes of facts that will lead to cross-examination being ordered. This, considering the nature of an application for leave, simply cannot be the case.

(3) Exceedingly difficult for a court to order cross-examination

30 Taken in the round, these two specific factors must mean that it is exceedingly difficult for the court to exercise its discretion to order cross-examination in respect of an application for leave to commence a statutory derivative action. Indeed, as I alluded to during the hearing before me, there have only been three local cases – reported and unreported – which have dealt with an application to cross-examine in the present context. Out of the three cases, there was only one case where cross-examination was ordered. This global picture must surely tell us that it will be exceedingly difficult for a court

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to order cross-examination in an application for leave to commence a statutory derivative action.

31 While decisions from other jurisdictions are never determinative of our local laws, it is helpful to note that my view, that it will be exceedingly difficult for a court to order cross-examination here, is consistent with the approaches taken in other common law jurisdictions. For example, in the United Kingdom, s 260 of their Companies Act 2006 (c 46) (UK) sets out the statutory regime to bring a derivative action. The statutory regime in the UK is quite different from ours but there is similarly an application for leave stage. The design of their regime is such that no witnesses are heard or cross-examined at this stage (see Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) at p 250). Similarly, in Australia, it appears that cross-examination on the merits of any proposed derivative action will usually be permitted only with leave of the court and only to a limited extent as "the court will not normally enter into the merits of the proposed derivative action to any great degree" (see the Supreme Court of New South Wales decision of *Swansson v R A Pratt Properties Pty Ltd and another* [2002] 42 ACSR 313 at [25], applying s 237(1) of the Corporations Act 2001 (Cth)). Again, while the Australian regime is not identical with ours, the gist of the statutory derivative action remains the same. In that vein, it is helpful to note that cross-examination is likewise not easily ordered.

(4) Necessity is not a relevant factor

32 Having concluded that it will be exceedingly difficult for a court to order cross-examination in an application for leave to commence a statutory derivative action, I turned to consider the applicants' argument that I should be guided by the test of "necessity" in deciding whether to order cross-

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examination. The applicants referred to several cases in support of their argument.

33 First, the applicants referred to the High Court decision of *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others* [2020] 5 SLR 1374 ("*Kathryn Ma*") for support that the test for cross-examination is one of necessity. However, I did not see how the case stands for that proposition. In that case, the court declined to order cross-examination because the plaintiff had discharged her burden of proving good faith. More specifically, Valerie Thean J had said this (at [42]):

> After considering the various issues, I decided that cross-examination was not necessary. It was clear from the affidavits that each party filed in support of their own applications and in response to the other's applications that the relationship between the plaintiff and the directors was extremely acrimonious. The burden of proving good faith was borne by the plaintiff. In the present case, I was satisfied that she had discharged that burden by affidavit and argument …

34 While Thean J did regard that it was "not necessary" for cross-examination to take place in that case, this does not mean that the test to determine cross-examination is one of "necessity". To begin with, a test of "necessity" begs the further question: necessary in what context? By itself, "necessity" is a value-neutral concept that can only derive meaning from a consideration of the context in which it is being used. Thus, having regard to the context of an application for leave to commence a statutory derivative action, it will be, for the reasons I have given above, very difficult to think of a case where it is "necessary" to order a cross-examination.

35 Second, the applicants cited *Agus Irawan* in support of a "necessity" test. However, I read *Agus Irawan*, especially at [6], as holding that it will be a

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very rare instance where cross-examination is granted. I cannot see any way else to read Choo JC's statement of the legal principle (at [6]): "[t]hat is what a *prima facie* legitimate or arguable case is all about. Leave to cross-examine in such situations ought to be sparingly granted."

36 Third, the applicants cited the High Court decision of *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others* [2015] SGHC 145 ("*Petroships*") in support of a "necessity" test. This was the only local case the parties could find that had allowed cross-examination. However, the court in that case did not explain *why* it had allowed for cross-examination. I therefore found the case to be of limited assistance in shedding light on when cross-examination should be ordered in the present context. In any event, as Mr Alvin Lim, who appeared for the plaintiff, alluded to, both parties in *Petroships* were cross-examined by each other. This hinted that the cross-examination was by consent although there is no need to confirm this point.

37 For all these reasons, I disagreed with the applicants that the test in deciding whether to order cross-examination is one of "necessity". In contrast, considering the discussion above, I held that it will be exceedingly difficult for a court to order cross-examination in an application for leave to commence a statutory derivative action. In fact, I would suggest that an order for cross-examination is antithetical to the very nature of an application for leave to commence a statutory derivative action. But I did not discount the possibility that cross-examination can still be ordered, although I cannot conceive of a concrete situation when this might be so.

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Application of the principles to the present application

38 With these principles in mind, I turned to apply the three considerations of (a) the nature of an application for leave to commence a statutory derivative action; (b) the inevitable existence of disputes of facts in such applications; and (c) that it would be exceedingly difficult for a court to order cross-examination, to the present application. My application was necessarily brief because I did not want to prejudge (or be seen to prejudge) the merits of OS 779 itself.

39 In summary, I was of the view that the applicants' application for cross-examination in OS 779 should be dismissed. First, cross-examination at this point is not needed considering the nature of an application for leave to commence a statutory derivative action. As Choo JC stated in *Agus Irawan*, the court need not and should not be drawn into an adjudication of the disputed facts at the leave application stage. Yet, this is what the present application, if granted, would amount to.

40 Second, if I granted the applicants' request to cross-examine the plaintiff, I would effectively be allowing them a rehearsal ahead of any future trial brought in the name of the Company against the applicants. As Prakash JC alluded to in *Tan Sock Hian*, this would not only be duplicative but may also lead to oppressive effects.

41 Third, the applicants' reason for the present application was essentially to dispute the plaintiff's version of events because they did not agree with that version. As I stated earlier, it is inevitable that there will be disputes of facts, some substantial, at the leave application stage. This cannot be enough for cross-examination to be ordered. In my view, the applicants had not shown anything beyond mere disputes of facts to warrant the order of cross-examination.

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42 For completeness, I also did not think it proper to order cross-examination to ascertain the plaintiff's credibility just because the plaintiff (apparently) had taken different positions on certain matters. It seemed like a stretch to say that the plaintiff was not credible on that basis alone.

43 Above all, even if there remained the exceptional possibility of cross-examination being ordered at this leave application stage, I did not think that the applicants' grounds, which amounted to no more than a run-of-the-mill dispute of the facts set out in competing affidavits, fell within any such exception. Indeed, if I were to allow the applicants to cross-examine in this case, it is hard to see how the courts can deny future requests for cross-examinations in most applications for leave to commence a statutory derivative action. This cannot be the case.

Conclusion

44 For all the reasons above, I therefore dismissed the present application with costs.

Goh Yihan
Judicial Commissioner

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Lim Jun Hao Alvin (Withers KhattarWong LLP) for the plaintiff;
Joseph Lopez, Tan Zhi Min Ashton, Kyle Yew Chang Mao and Chia Wei Chen Pearline (Joseph Lopez LLP) for the first and second defendants;
The third defendant unrepresented and absent.

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