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

[2022] SGHC 307

Originating Summons No 779 of 2021

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

Between

Syed Ibrahim Shaik Mohideen

… *Plaintiff*

And

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

… *Defendants*

JUDGMENT

[Companies — Statutory derivative action — Section 216A of the Companies Act (Cap 50, 2006 Rev Ed)]

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Syed Ibrahim Shaik Mohideen
v
Wavoo Abdusalam Shahul Hameed and others

[2022] SGHC 307

General Division of the High Court — Originating Summons No 779 of 2021
Goh Yihan JC
12 October 2022

7 December 2022 Judgment reserved.

Goh Yihan JC:

1 The plaintiff is Mr Syed Ibrahim Shaik Mohideen. He is a director and shareholder of the third defendant, Suvai Foods Pte Ltd ("the Company"). This is the plaintiff's application for leave pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") to bring an action in the name and on behalf of the Company against the first defendant, Mr Wavoo Abdusalam Shahul Hameed ("Wavoo"), and the second defendant, Ms Abdul Latiff Hajara Marliya ("Latiff"), for alleged breaches of their directors' duties to the Company.

2 I reserved my judgment at the end of the hearing before me. Having taken time to consider the matter carefully, I allow the plaintiff's application in part. I now explain my reasons for having come to this decision in this judgment.

General background facts

3 By way of background, the Company is engaged in the business of manufacturing food products, in particular, fresh Indian food products. The Company was incorporated by Wavoo and the plaintiff as equal shareholders and founding directors on 2 March 2012. Wavoo disputes this characterisation of the plaintiff being a co-founder and says that he is the "actual founder". However, nothing in the present application turns on this characterisation.

4 Regardless of whether he can be characterised as a "co-founder", the plaintiff was appointed as a director of the Company since its incorporation. However, the plaintiff was removed as a director pursuant to a member's resolution at the Annual General Meeting ("AGM") 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% of the shares.

5 In turn, Wavoo was appointed as a director of the Company since its incorporation. He remains a director to date. Wavoo is a minority shareholder of the Company with approximately 44% of the shares (8,840 of the 20,000 ordinary shares). Latiff was appointed as a director of the Company on 1 August 2019. This was pursuant to a director's resolution signed by the plaintiff and Wavoo. Latiff is also a minority shareholder of the Company with approximately 8% of the shares (1,560 of the 20,000 ordinary shares). Wavoo and Latiff are married to each other.

6 On 3 August 2021, the plaintiff commenced the present application for leave to commence a statutory derivative action on behalf of the Company against Wavoo and Latiff pursuant to s 216A of the Companies Act. The

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application was the culmination of a series of correspondences, which included the plaintiff's notice of his intention to commence the present application, between the parties which dated as far back as 3 February 2020. I shall refer to these correspondences later in this judgment as the defendants have suggested that the notice requirement under s 216A(3)(*a*) of the Companies Act is not met by these correspondences. In any event, the plaintiff's application was premised on Wavoo's and Latiff's alleged breaches of their directors' duties to the Company.

7 I should say that both parties made several allegations about each other's respective contributions to the Company. Some of these descended to the *minutiae*. For example, the defendants made extensive allegations about the plaintiff's supposed incompetence being exposed once a Ms K V Rajalakshmi ("Ms Raji") became employed as the Company's consultant and internal accountant around August 2019. Accordingly, the defendants say that the plaintiff felt threatened and thus laid "the groundwork for his witch hunt" against Wavoo and Latiff, "by attempting to force false information out of the [Company's] employees" to gather evidence to support his allegations in the present application.[1] While some of these may be legally and contextually relevant, most were not. The leave application is not the forum for parties to voice their displeasure at one another. I will therefore focus only on the relevant and material facts for this present application.

8 As against Wavoo, the plaintiff alleged the following breaches of duties:

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

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[1] Defendants' Written Submissions dated 5 October 2022 ("DWS") at pp 10–11.

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(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 former bank account with Oversea-Chinese Banking Corporation ("OCBC");

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

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

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

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For convenience, I shall refer to these alleged breaches by Wavoo as "Wavoo's Alleged Breaches".

9 As against Latiff, the plaintiff alleged that, since her appointment as a director of the Company, she had conspired with Wavoo to act against the Company's interests by engaging in and/or approving the conduct in [8(d)]–[8(g)] above. For convenience, I shall refer to these alleged breaches by Latiff as "Latiff's Alleged Breaches".

10 I shall refer to the more detailed facts when I discuss each of Wavoo's Alleged Breaches and Latiff's Alleged Breaches. Having now dealt with the general background facts, I turn to the generally applicable law.

The generally applicable law

11 The plaintiff's application is made pursuant to s 216A of the Companies Act ("s 216A"). Section 216A provides as follows:

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

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

For clarity, I have not referred to the latest version of the Companies Act, which came into operation on 31 December 2021, because the present application was filed before that date. However, apart from the substitution of the word "leave" with "permission" in the latest version of the Companies Act, s 216A remains identical across the two versions.

12 As I said in *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd and another* [2022] SGHC 187 ("*Malcolm Tan*") (at [5]), from a plain reading of s 216A, there are, broadly speaking, four legal requirements that the plaintiff must satisfy: (a) the plaintiff must first have standing to bring the application; (b) the plaintiff must have given the requisite notice to the directors of the defendants; (c) the plaintiff must show that he is acting in good faith; and (d) it appears to the court that it is *prima facie* in the interests of the defendants that the action be brought. I will now consider each requirement in turn.

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Whether the plaintiff has the requisite standing

The parties' submissions

13 Under s 216A(1) of the Companies Act, the complainant must have the requisite standing. Section 216A(1) defines "complainant" to mean the following:

(a) any member of the company;

(b) the Minister, in the case of a declared company under Part IX; or

(c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.

Accordingly, a "complainant" may be a member of the company, the Minister for Finance in respect of companies under investigation, and "any other person who, in the discretion of the Court, is a proper person to make an application" under the section.

14 Because this is usually an undisputed requirement, the plaintiff did not even make any formal submission on whether he has the requisite standing. In any case, I understand the plaintiff's implicit submission to be that he has standing since he is a director (at least, at the point of making the application) and shareholder of the Company.

15 Against this, the defendants make rather extensive submissions challenging the plaintiff's standing to commence the present application under s 216A. First, the defendants argue that the plaintiff is no longer a director since 23 August 2021, which was before he filed his affidavit in support of the present application. Accordingly, the defendants say that the plaintiff had commenced

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the present application as a *shareholder* of the Company. Consequently, whether the plaintiff has the requisite standing must be assessed in his capacity as a shareholder.

16 Second, on the plaintiff's capacity as a shareholder, which falls within the meaning of a "member" of the Company under s 216A(1)(*a*), the defendants argue that his status as a *majority* shareholder disqualifies him from having the standing under s 216A(1). This is because, so the defendants argue, s 216A is "only for the protection of *minority shareholders*".[2] The defendants say that this is consistent with the cases such as *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") (at [30]), with the legislative intent as gleaned from the relevant parliamentary debates, and supported by various academic views. Thus, being a majority shareholder, the plaintiff cannot seek the protection afforded under s 216A. Instead, he should have raised his grievances at the Company's general meetings for the directors' consideration, and/or vote at these meetings for the director(s) to be removed. However, the plaintiff did not do so even at the last AGM on 23 August 2021. Instead, the plaintiff has chosen to commence the present application under s 216A, which the defendants say cannot be allowed.

My decision: the plaintiff has the requisite standing

17 I disagree with the defendants' submissions that the plaintiff did not have the requisite standing.

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2 DWS at para 30.

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A complainant retains the standing to bring an application under s 216A so long as he or she possessed the standing to do so at the date of the application

18 In the first place, I disagree with the defendant's submission that the plaintiff did not bring this application in his capacity as a director because the plaintiff ceased to be a director after filing his application. I disagree with this submission because the plaintiff commenced the present application on 3 August 2021, when he was indisputably *still* a director of the Company (up until 23 August 2021).

19 More broadly, I do not think that a complainant for the purposes of s 216A(1) needs to continue to possess the capacity in which he or she brought the application in the first place. In my view, a complainant retains the standing to bring an application under s 216A so long as he or she possessed the capacity giving rise to the requisite standing *at the date of the application*. This remains the case regardless of whether he or she loses that capacity after having commenced the application. In other words, I do not think that s 216A prescribes a *continuing* requirement that the complainant *remains* as a member, Minister for Finance, or a "proper person" until the application is heard and decided. For ease of exposition, I shall term this as a "continuing requirement".

20 I say this for several reasons. First, there is nothing in the text of s 216A to suggest a continuing requirement. Indeed, s 216A(2) provides that a complainant "may apply to the Court for leave to bring an action". Read with s 216A(1), which defines the meaning of a "complainant", this clearly is concerned with the complainant's status as such *at the time* when he or she *makes* the application to court. Section 216A(2) does not say that the complainant must remain a complainant at the time of the hearing. Furthermore, s 216A(5), which deals with the orders that a court can make if it gave leave for

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an action to be brought in the name of the company, empowers the court to, among others, make "an order authorising the complainant *or any other person* to control the conduct of the action or arbitration" [emphasis added]. This suggests that s 216A does not contemplate that the complainant remains as such *at the conclusion of the hearing*, since the court can appoint "any other person" to control the conduct of the action.

21 Second, the interpretation that there is no continuing requirement is also consistent with the case law. At the outset, it is worth pointing out that it is uncontroversial that the meaning of a "proper person to make an application" under s 216A(1)(*c)* is not closed and can include an individual director (see the High Court decision of *Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471). But further to that proposition, it is not just current directors, but also the *former* directors of the company (such as those removed by shareholder resolution) who can have standing to seek leave to bring a derivative action against the current directors (see the High Court decision of *Jian Li Investments Holding Pte Ltd and others v Healthstats International Pte Ltd and others* [2019] 4 SLR 825 ("*Jian Li Investments*")). Thus, there is no continuing requirement under s 216A in relation to directors. This is a desirable proposition as a (former) director acting in good faith to bring the application against the current errant directors is often tactically removed from the board surreptitiously in order to stymie the application and prevent any further inquiry into the impropriety. But at the same time, in relation to such former directors, there should be a logical stopping point to the timeline. In my view, the key is to ask whether the former director is able to show that the wrongs alleged to have been committed against the company happened *during* the time while he was still a director.

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22 Third, quite apart from the statutory text and case law, there are good substantive reasons why s 216A should not be read as prescribing a continuing requirement. To begin with, the facts which gave rise to the application would, by definition, *already have occurred* when the complainant held his or her capacity. Put another way, the complainant is not bringing the application under s 216A in respect of *future* events, when he or she may have ceased to be one of the capacities spelt out in s 216A. Indeed, that would make no sense. Rather, the complainant is bringing the application based on his or her knowledge accumulated up to the point of application. Moreover, it would not be practical to insist that the complainant remains one of the capacities spelt out in s 216A(1) up to the time the application is heard and determined. For example, shareholders change all the time through buy-outs, and it could be that the wrongdoings against the company (committed during the time when one was still a shareholder) are only discovered much later which could have affected the value of the shares in retrospect (see, *eg*, the Malaysian High Court decision of *Mohd Shuaib Ishak v Celcom (M) Bhd* [2008] 5 MLJ 857). The shareholder could still claim loss *qua* shareholder (at the point of wrongdoing) in the action brought in the company's name. Further, as I have alluded to above at [21], there is also the scenario where a director who launches the application in good faith may be removed from the board purely on the basis of attempting to deny him of standing and further investigation into company affairs. The court should be astute to guard against these and must assess the situation holistically rather than adopt a blanket rejection of applications on the basis that the complainant is a former director (or shareholder).

23 Accordingly, I disagree with the defendants that the plaintiff is not bringing the present application in his capacity as a director of the Company. In my judgment, despite the plaintiff having ceased being a director since

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23 August 2021, it is material that he was a director at the point in time he brought the present application on 3 August 2021. Since a director would come under the catch-all provision of a "proper person" under s 216A(1)(*c*) (see, *eg*, the High Court decision of *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 at [23], though *cf* Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ("*Corporate Law*") at p 446, fn 196), it must follow that the plaintiff has the requisite standing for the present application.

A majority shareholder has the requisite standing to bring an application under s 216A

24 Notwithstanding my conclusion that the plaintiff has standing *qua* director, I will also consider the defendants' further submission that the plaintiff does not have the requisite standing because he is a majority, as opposed to minority, shareholder. I disagree with this submission as well for the following reasons. First, the text of s 216A does not differentiate between a majority or minority shareholder. Indeed, all that s 216A(1) refers to is "*any* member of a company" [emphasis added], which would encompass *both* majority and minority shareholders. The word "any" seems to suggest that no distinction is to be drawn between different types of shareholders, including between majority and minority shareholders.

25 Second, I do not agree that the authorities cited by the defendants show that s 216A is only available to minority shareholders. I start with the Court of Appeal decision of *Ang Thiam Swee*. The court in that case had (at [30]) cited the decision of the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [19] for the proposition that the purpose of the s 216A derivative action is to provide:

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> … a procedure for the protection of genuinely aggrieved minority interests and for doing justice to a company while ensuring that the company's directors are not unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat.

The court was considering how to assess the *bona fides* of the complainant bringing an application under s 216A. As such, I do not think that the court, in citing *Pang Yong Hock*, was intending to restrict the s 216A process to *only* minority shareholders.

26 To the contrary, in *Pang Yong Hock* itself, that case concerned an application brought by one faction of shareholders owning 50% of the shareholding of the company (with the other faction holding the other 50%). Despite this 50% shareholding, the Court of Appeal observed (at [36]) that the complainants were under the *same disability* as minority shareholders in that it would not have been possible for them to set the company in motion to bring an action against the errant directors. Even with 50% shareholding, there was insufficient control in *Pang Yong Hock* and any shareholder resolutions (*eg*, to reconstitute the board of directors) would be blocked.

27 The defendants' reliance on the parliamentary debates is also misplaced. I reproduce the relevant passages which the defendants seek to rely on (see *Singapore Parliamentary Debates*, *Official Report* (28 May 1993), vol 61 at col 293 (Dr Richard Hu Tsu Tau, Minister for Finance)):

> As Members would recall, the proposed new sections 216A and 216B provide for statutory derivative actions by minority shareholders on behalf of their companies. Only one representor has questioned the need for such a provision. The representor was concerned that the new statutory right might be open to abuse by minority shareholders.

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> The Committee recognised that the new sections would provide more effective avenue for minority shareholders to protect their interests and that of the company. Nevertheless, to meet some of the representor's concern, the statutory derivative action will only be available in respect of unlisted companies. The Committee is of the view that the proceedings and performance of public-listed companies are already monitored by the various regulatory authorities and disgruntled shareholders of such companies have an avenue in that they can sell their shares in the open market. To further deter frivolous applications, the Committee has also decided to give the Court the discretion to order the complainant to furnish security for costs.

As can be seen, there is nothing in the relevant passages which suggests that *only* minority shareholders have the standing to make an application under s 216A. There is a difference between saying that *one of the* purposes behind s 216A – even the *primary* purpose – is to enable minority shareholders to bring a statutory derivative action against the company and saying that the *only* purpose is to allow minority shareholders to do that. Indeed, if only minority shareholders have standing under s 216A, then it is unclear why s 216A(1) not only allows the Minister to bring an application but also encompasses a catch-all provision that permits a "proper person" to do so (which could include directors of the company).

28 Likewise, the defendants' reliance on academic views is also misplaced. They rely on an extract that I had relied on in *Malcolm Tan* at [9], where I had said this:

> As such, as Associate Professor Pearlie Koh has noted, the original impetus for s 216A was to strengthen the position of the minority shareholder by providing "more effective remedies to minority shareholder" (see Pearlie Koh, "For Better or For Worse – The Statutory Derivative Action in Singapore" (1995) 7 SAcLJ 74 at 81–84). Further, as stated in Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ("*Corporate Law*") at p 446, the "proper person" has to be in a position *analogous* to that of a minority shareholder [emphasis in original].

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However, with respect to the defendants in the present case, I was explaining how the catch-all provision in s 216A(1)(*c*), which allows a "proper person" to make an application under s 216A, should be construed. Thus, I had cited these academic views to support the proposition that a "proper person" under s 216A(1)(*c*) should be *analogous* to a minority shareholder. But at no point did I hold, nor did I understood these academic views to so hold, the view that *only* minority shareholders had the requisite standing under s 216A. Rather, it appears from *Pang Yong Hock* (at [36]), that the key concern is whether the complainant was unable to set the company in motion to bring the action against the errant persons *despite* their significant shareholding.

29 Accordingly, I find that, as a matter of law, the plaintiff has the requisite standing to bring an application under s 216A despite being the majority shareholder. More crucially, on the facts of the present case, even with the plaintiff holding 48% of the shares in the Company and technically being the majority shareholder, there would not be sufficient voting power to resolve the issue as the other faction resisting the application which consisted of Wavoo and Latiff (as husband and wife) held the other 52% of the Company's shares. Indeed, I agree with the plaintiff's oral submissions that while the plaintiff was the majority shareholder of the Company, he does not have actual control of the Company as he held less than 50% of the Company's shares and will be outvoted in any shareholder resolutions raised.[3] It therefore follows that, whether I regard the plaintiff as having the requisite standing as a director or a majority shareholder, he has standing to bring the present application.

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[3] Minute Sheet dated 12 October 2022 at pp 1–2.

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Whether the plaintiff has given the requisite notice

The parties' arguments

30 Section 216A(3)(*a*) of the Companies Act requires that 14 days' notice of an intention to apply for leave of court to commence a statutory derivative action on behalf of a company be given to its directors. The plaintiff purportedly issued the requisite notices on 30 July 2020 and 18 August 2020.

31 However, the defendants submit that the notices did not refer to a good number of the breaches enumerated by the plaintiff here. They therefore suggest that this is in breach of one of the mandatory requirements of s 216A(3)(*a*), in that the plaintiff must have given the directors of his intention to apply for leave if the directors did not take any action. In particular, the defendants say that the notices are defective in that:

(a) In breach of the need to provide sufficient particulars, the notices do not refer to several of the alleged breaches that were raised for the first time in the present application, namely, items (d) to (h) and (j) of the list of Wavoo's Alleged Breaches (at [8] above).

(b) In particular, the second notice was issued on 18 August 2020 but some of the allegations relied on by the plaintiff relate to events after 18 August 2020 or were not even raised in the notice. These relate to items (g) and (j) of Wavoo's Alleged Breaches (at [8] above).

32 Accordingly, the defendants submit that, by virtue of the defective notices, the plaintiff has deprived Wavoo and Latiff the chance to consider any information that would enable them to review the merits in respect of the allegations behind the related Wavoo's Alleged Breaches.

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My decision: the plaintiff has given the requisite notice

33 I reject the defendants' submission that the plaintiff has not given the requisite notice. First, it should be kept in mind that the plaintiff had issued *two* notices indicating his intention to make an application under s 216A. In this regard, it is true that the plaintiff's first notice dated 30 July 2020, while raising a long list of allegations against Wavoo and Latiff, did not specifically refer to items (d) to (h), and (j) of Wavoo's Alleged Breaches (at [8] above). These allegations are as follows:

> (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 former bank account with Oversea-Chinese Banking Corporation ("OCBC");
>
> (h) incorporating another Singapore company, Suvai Global Foods Pte Ltd; and
>
> (j) conspiring with Latiff to act against the Company's interests by engaging and/or approving the alleged conduct in (d) to (g) above.

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34 However, the plaintiff's second notice dated 18 August 2020 does, at the very least, refer to the alleged salary issues found at (d) to (e) of Wavoo's Alleged Breaches (at [8] above). This can be seen at paragraph 4(a) of the said notice, as follows:

> The Company's operating expenses, in particular, the reporting of salaries as S$649,477 is inaccurate as the actual sums paid as salaries was only S$352,147. The discrepancy is therefore S$297,330 and all of the S$297,330 should have been deposited in the Company's bank accounts. However, our client notes that at least S$40,000 to S$60,000 of the S$297,330 has not been deposited. Your client is asked to therefore account for this discrepancy failing which our client can only surmise that your client has pocketed these monies in breach of his duties.

35 As for the remaining items (f), (g), (h) and (j), I find that the second notice dated 18 August 2020 is sufficiently worded to encompass these. In particular, the letter had said (at paragraph 5) that the plaintiff "reserves the rights to point out additional discrepancies at a later stage". It is true that item (g), and correspondingly item (j) (being the allegation of a conspiracy to commit, among others, item (g)), had occurred *after* the notice dated 18 August 2020. However, by virtue of the plaintiff's express reservation of his right to point out further discrepancies, I find that the requisite notice had been given.

36 More broadly, I do not think that the notice requirement under s 216A(3)(*a*) requires a mirror listing of allegations in the notice and the issues that form the substance of the eventual application under s 216A. The starting point, as the learned authors of *Corporate Law* explain (at para 10.050), is that the notice requirement gives the company, acting through its board of directors, the opportunity to evaluate the complaint and consider its rights and appropriate course of action. It is not necessary that the notice be drafted with the precision of legislation, and the "[f]ailure to specify each and every cause of action in a

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notice does not invalidate the notice as a whole" (see *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2021, Issue 26) ("*Woon's Corporations Law*") Chapter J Shareholder Actions, at para 604):

> … However, it is not necessary that the notice be drafted with the precision of legislation; it is enough that it 'sufficiently specifies the cause of action and contains sufficient information to found an endorsement on a writ': *Re Northwest Forest Products Ltd* [1975] 4 WWR 724. Failure to specify each and every cause of action in a notice does not invalidate the notice as a whole: per Nemetz CJ in *Re Bellman and Western Approaches Ltd* (1981) 130 DLR (3d) 193. An amendment to the application which neither changes the fundamental nature of the application nor prejudices the defendant does not require notice to be given again: *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471;[2002] 2 SLR 198 (High Court, Singapore) at para 7. …

37 Further, as I said in *Malcolm Tan* (at [17]), what constitutes sufficient particulars to satisfy the notice requirement would depend on the facts of each case, but the contents of the notice must provide the directors with enough detail to make an informed decision on the next course of action. I would add that, in a case such as the present, where there is a long list of allegations, the directors would, in substance, be put on notice that, whether founded or not, there are likely to be allegations beyond those listed. Furthermore, one must also recognise the realities of the situation. If, as in the present application, the only directors of the company are the very ones whom the allegations in support of a potential application under s 216A are made against, then it would seem academic to insist on there being a mirror listing of the allegations so that the directors can, in effect, make a decision whether to authorise the company to sue themselves.

38 Finally, at its highest, even if I were to accept that there is a technical breach of the notice requirement in relation to the allegations not expressly

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referred to in the two notices, the fact remains that the directors of the Company have had the chance to review the allegations and have in fact responded in their reply affidavits. I therefore do not think it is satisfactory for the present application to be set aside on a procedural ground. This is because the plaintiff can simply refile another application containing the unmentioned allegations, which would result in the parties filing the same documents at another hearing date. This would truly be to favour form over substance for no good reason.

39 Accordingly, I am satisfied that the substantive purpose behind the notice requirement has been met and that the directors of the Company – namely, Wavoo and Latiff – have had more than the 14 days' notice and have, in effect, responded substantively to say that they are not going to *sue themselves* in the name of the Company.

Whether the plaintiff has acted in good faith

Overview

40 I turn to consider whether the plaintiff has acted in good faith. Ang Cheng Hock JC (as he then was) in the High Court decision of *Jian Li Investment* had neatly summarised the elements of the good faith requirement under s 216A(3)(*b*) (at [42] and [44]):

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

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

Thus, if the complainant honestly believed that a good cause of action with a reasonable prospect of success exists (*ie*, the complainant is acting in good faith), then it is more probable that the proposed action is indeed being brought for the company's purposes, which then fulfils the underlying rationale of the s 216A action. In light of this, I turn first to consider if the plaintiff has a reasonable belief that a good cause of action exists.

Whether the plaintiff has a reasonable belief that a good cause of action exists

Breach of trust relating to the Company's rights of ownership to its trade mark

41 The plaintiff explains that the Company had engaged Anupree Design to design the necessary artwork for the Company's house-mark ("the Mark"):



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The Mark has been used by the Company on product packaging and advertisements in Singapore since 2012.

42 The plaintiff alleges that Wavoo made an application with the Intellectual Property Office of Singapore ("IPOS") to register the Mark in his own personal name on 23 December 2015 without informing him (the plaintiff). Wavoo also went on to register the Mark in his personal name in several other countries without informing the plaintiff or anyone at the Company. The plaintiff therefore says that this constitutes a breach of express and/or constructive trust to the Company.

43 Wavoo's explanation is that he registered the Mark in his name with IPOS because he is the owner of the Mark. According to Wavoo, he was the one who had engaged the services of one Mr Mudaliar, who in turn, engaged the design and consulting firm (Anupree Design) in preparing the Mark. Indeed, Wavoo says that he is the only party involved in all pre-incorporation work as the founder of the Company, and hence Anupree Design issued the invoice for the draft designs of the Mark to Wavoo only.[4] Wavoo thereafter paid for the design. Indeed, Wavoo emphasises that the plaintiff had never communicated directly with Anupree Design.

44 In my judgment, the plaintiff has demonstrated a reasonable belief in a good cause of action in relation to the Mark. I say this for two reasons.

45 First, I find, applying a low threshold at this leave stage, that Wavoo had been acting *qua* director in his dealings with the Mark. While I accept that Wavoo was the one who engaged with Anupree Design, I observe from the

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[4] Affidavit of Wavoo Abdusalam Shahul Hameed dated 28 February 2022 at p 173.

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exhibited emails that Wavoo had forwarded his discussions with Anupree Design to the plaintiff.[5] In addition, the plaintiff had also used the Mark in relation to an advertisement in a newspaper.[6] This conduct would make sense only if the parties believed they were acting as directors to the Company. Indeed, if Wavoo believed that the Mark was his and his alone, there is no reason why he need to forward the emails to the plaintiff. Neither would the plaintiff act on his own, without Wavoo's apparent concurrence, to communicate with the media on the use of the Mark in an advertisement.

46 Second, I find it curious that Wavoo had registered the Mark belatedly in 2015 when the design was seemingly completed in 2012. While it is true that the Mark needed to be registered to be effective, that ought to have been done in the Company's name by this stage. Indeed, if Wavoo truly believed that the Mark was his, he should have registered the Mark in 2012. The delay shows that neither party believed that the Mark was theirs to begin with.

47 Accordingly, I find that the plaintiff has a reasonable belief in a good cause of action in Wavoo's breach of trust relating to the Company's rights of ownership to its trade mark.

Using the Company's confidential recipes and funds to establish two foreign companies

48 The plaintiff next alleges that in 2016, Wavoo brought a key employer of the Company, one Mathew Maneesh ("Maneesh"), who was familiar with all the Company's confidential recipes, on an overseas trip to Hong Kong to

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5 Affidavit of Syed Ibrahim Shaik Mohideen dated 1 October 2021 at pp 81–86 (SM-5).

6 Affidavit of Syed Ibrahim Shaik Mohideen dated 1 October 2021 at pp 85–86 (SM-5).

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establish Suvai Foods HK (Maya Foods Limited). The plaintiff says that Wavoo had done this without accounting to the Company for profits made by Suvai HK. The plaintiff also says that Wavoo did the same in April 2018, by bringing Maneesh to the UK to transfer the Company's confidential recipes to Suvai UK, without the Company's permission nor accounting to the Company for profits made.

49 Wavoo responded by saying that, as he had previously stated via a solicitor's letter dated 13 March 2020, that none of the Company's confidential recipes were used in the development of Suvai HK and/or Suvai UK. Wavoo says that the climates in Singapore, Hong Kong and the UK are all different, such that the formulas for products of Suvai HK and/or Suvai UK are completely different from the formulas for products of the Company. This is especially pertinent because the food products of those companies are highly perishable and have very short shelf lives.

50 In my judgment, the plaintiff has demonstrated a reasonable belief in a good cause of action in relation to Suvai HK and Suvai UK. I say this for two reasons.

51 First, the pertinent issue is whether Wavoo had made profits out of Suvai HK and Suvai UK due to his position within the Company. Wavoo will not be allowed to retain such profits unless the Company had been fully informed and consented to Wavoo's profit. This is a strict rule. The liability to account for the profit will arise because the profit was, in the proscribed circumstances, made. It is not relevant that the director had acted honestly or that the company had not suffered any damage, or even that the company itself would not have qualified for the benefit or made the profit (see the House of

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Lords decision of *Regal (Hastings) Ltd v Guilliver* [1967] 2 AC 134). The no-profit rule is aimed at "protecting the integrity of the fiduciary relationship from being tainted by the prospect of a conflict of interest, it is *stringently applied* and bites even where the company did not, or even could not, take up the opportunity – *liability arises from the mere fact that profit had been made*" [emphasis added] (see the High Court decision of *Higgins, Danial Patrick v Mulacek, Philippe Emanuel and others and another suit* [2016] 5 SLR 848 at [96]). In my view, the fact that Suvai HK and Suvai UK bear the "Suvai" name gives rise to an arguable case. These companies were set up several years after the Company was set up. It is conceivable that they would have benefited from the Company's market reputation in Singapore, given the connection between Singapore, Hong Kong and the UK markets.

52 Second, all three companies are in the *same* business of the manufacture of fresh Indian food products. This is a very specific market. While I can accept that the recipes for the products of Suvai HK and Suvai UK are *not identical* with the Singapore products, I find it difficult to accept that those recipes were not somehow *derived* from the Singapore products. I say this bearing in mind the low threshold that the plaintiff needs to cross at this leave stage. If all three companies are in the same business – and, if I may add, in a very specific market – then it seems to me at least arguable that the recipes across all three companies are related.

53 Accordingly, I find that the plaintiff has demonstrated a reasonable belief in a good cause of action in relation to Suvai HK and Suvai UK.

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Misusing the Company's resources, website, and funds to facilitate the business of Suvai HK and Suvai UK

54 The plaintiff alleges that from 2017 onwards, Wavoo made the unilateral decision to use the Company's monies to pay for advertising and marketing costs for Suvai HK and Suvai UK by online bank transfer. This marked a departure from Wavoo's previous practice of co-signing every cheque in respect of the Company's bills. The plaintiff also says that Wavoo removed him from various work-related WhatsApp group chats for the Company's operations, presumably for excluding the plaintiff from information relating to Suvai HK and Suvai UK.

55 Wavoo's response is to dispute that he was only authorised to make payment by cheques co-signed with the plaintiff. He also says that the plaintiff has not provided any evidence of the alleged transfers of monies to Suvai HK and Suvai UK. None of the Company's financial statements have recorded any of these alleged payments and Wavoo had utilised his personal funds in respect of expenses of Suvai HK and Suvai UK.

56 In my judgment, the plaintiff has not demonstrated a reasonable belief in a good cause of action in relation to this ground. I agree with Wavoo that there has simply been no evidence adduced by the plaintiff, even accounting for the low threshold at the leave stage.

Inflating the salaries of the Company's genuine and phantom employees and "clawing back" payments from them

57 The plaintiff says that from September 2019, Wavoo caused the Company to make inflated salary and other payments to genuine foreign employees of the Company. He then required those employees to return fixed

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proportions of these salary payments in the form of cash to himself, who then misappropriated those monies for himself. The plaintiff also says that Wavoo did the same with respect to inflated salary and other payments to phantom employees and requiring them to return fixed proportions of these payments in the form of cash to himself, who then misappropriated them. The plaintiff raises several specific examples, complete with the particulars of employees and the sums alleged received. The plaintiff apparently obtained some of this information through videos that he recorded of his conversations with the Company's employees, Mr Shajahan Abdul Jaleel and Maneesh. But it is not clear how the plaintiff managed to obtain the evidence of the other individuals.

58 In response, Wavoo says that the plaintiff had raised this complaint with the Ministry of Manpower before. However, the Ministry informed Wavoo on 16 June 2021 that they have concluded their investigations and would not be taking any action against the Company. Thus, Wavoo says that this shows that the plaintiff's complaints are unfounded. Were it otherwise, the Ministry would certainly have taken action against the Company. Wavoo also disputes the video recordings as being taken without the employees' consent and/or involving inaccurate communication.

59 In my judgment, the plaintiff has demonstrated a reasonable belief in a good cause of action in relation to this ground. I find, at least on the present unrebutted transcripts of the video recordings, that the plaintiff has demonstrated an arguable case. In this connection, I do not think that the fact that the Ministry of Manpower did not carry out further investigations means that these allegations never happened. This is because the Ministry was presumably employing a higher (criminal) standard of proof as opposed to the civil standard. Also, the Ministry of Manpower's letter does not absolve the

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Company of any responsibility; it simply informs Wavoo that the Ministry has decided not to take further action with no reason given as to why.[7]

Transferring monies from the Company to an Indian entity named Suvai Foods on the pretext of paying for supplies, and incorporating Suvai Global Foods Pte Ltd

60 The plaintiff next says that since 2019, Wavoo has been causing specified sums of monies totalling around $1.5m from the Company's OCBC bank account to be transferred to the bank account of an Indian entity called Suvai Foods. These payments were allegedly made on the pretext of paying for supplies such as rice, dal, paneer, and oils at inflated prices instead of buying such supplies from the Company's previous raw materials suppliers at much cheaper prices. Further, the plaintiff alleges that Wavoo incorporated a new Singapore company called Suvai Global Foods Pte Ltd on 11 February 2020 with identical principal business activities as the Company. The plaintiff says this was done to avoid conflicts of interest with the Company.

61 Wavoo's response is that he got to know some of the end suppliers of raw materials in India. He therefore found it cheaper to get the end suppliers in India to sell their raw materials to an Indian entity, Suvai Foods, and then to have Suvai Foods ship the raw materials to the Company. Wavoo also says that the mere incorporation of Suvai Global Foods Pte Ltd does not, in and of itself, constitute a breach of his duties.

62 In my judgment, the plaintiff has not demonstrated a reasonable belief in a good cause of action in relation to this ground. I find that Wavoo has

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7 Affidavit of Wavoo Abdusalam Shahul Hameed dated 28 February 2022 at p 360.

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provided a plausible explanation for the transfers. I also agree with Wavoo that the mere incorporation of a company is not a breach of his duties.

Conspiring with auditor to appoint Latiff as director of the Company

63 The plaintiff says that on 4 November 2019, Wavoo asked him to discuss the payment of Wavoo's salary for 2019. They met on 5 November 2019 with the newly appointed internal auditor, Ms Raji. The plaintiff alleges that he was forced to allow Latiff to become a director and accept the director's fee meant for Wavoo on his behalf. The plaintiff now says the appointment of Latiff was also a ploy by Wavoo to completely control the Company and to pass director's resolutions on behalf of the Company over the plaintiff's objections. The plaintiff finally says that Latiff has thereby also engaged in a conspiracy with Wavoo to act against the Company's interest.

64 I agree with Wavoo that the plaintiff does not make out a good ground here. This is because the resolutions and notices associated with the appointment of Latiff were duly signed by the plaintiff. I also do not think the plaintiff makes out the alleged conspiracy by Latiff (and Wavoo) to act against the Company's interests by engaging in and/or approving the conduct of Wavoo, as the elements of the conspiracy are lacking.

Summary

65 In summary, I find that the plaintiff has demonstrated a reasonable belief in good causes of action in respect in *some* of Wavoo's dealings with the Company. For completeness, these grounds are:

(a) Breach of trust relating to the Company's rights of ownership to the Mark.

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(b) Using the Company's confidential recipes and funds to establish two foreign companies.

(c) Inflating the salaries of the Company's genuine and phantom employees and "clawing back" payments from them.

66 The best way of demonstrating good faith by a plaintiff is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or none at all (see *Pang Yong Hock* at [20]). Accordingly, I find that the plaintiff has satisfied this first step of the "good faith" requirement in respect of only these allegations.

Whether the plaintiff is bringing this application for a collateral purpose

67 While Wavoo alleges that the plaintiff is bringing the present action due to his personal grievances with him and/or the Company, it is established law that the mere presence of a personal grievance, resentment, and hostility between factions does not invalidate the present action (see *Pang Yong Hock* at [20]; the High Court decision of *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426 ("*Teo Gek Luang*") at [20]). It is understandable, if a s 216A action is contemplated, that the personal relations between the parties would have broken down. While I do not agree with the plaintiff on all his grounds in support of his application, I do not find that he is bringing this action for a collateral purpose.

68 In this connection, the defendants had also alleged that the plaintiff had ulterior motives in commencing the application as his ultimate aim (and the collateral purpose) was really to extract a favourable share buy-out offer from the defendants. This was allegedly evidenced by a conversation between

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Ms Raji and the plaintiff in December 2020 where the plaintiff plucked a figure of $4m out of thin air as the valuation for his shares and expressed his desire to exit the company.[8] When Ms Raji suggested a valuation of the shares to be done by ascertaining the book value of the Company, the plaintiff rejected this valuation as the "book value is all depreciation" and he would not be able to get much. After this incident, the plaintiff then allegedly launched the application to pressure the defendants to offer the plaintiff a good buy-out. There were also other valuations offered by the defendants subsequently, but these were rejected by the plaintiff. The plaintiff contests this argument by stating that the buy-out offer would not address the issues of wrongdoings done to the Company because the valuation of the Company would be rendered inaccurate by the wrongdoings.[9]

69 In my view, the court should be slow to find that the application was not brought in good faith just because there may be a collateral purpose, so long as the company's and the complainant's interests are aligned. This was noted by the High Court in *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd and others* [2020] 5 SLR 1374 at [31]:

> … In relation to the plaintiff's alleged collateral purpose of pursuing a personal vendetta, the existence of a collateral purpose was not, in and of itself, a reason to find that the application for leave was not brought in good faith: see *Pang Yong Hock* at [20]. Good faith is less dependent on motives and more on the purpose of the proposed action: *Ang Thiam Swee* ([7] supra) at [16]. … A collateral purpose will establish bad faith only if it is at odds with or runs counter to the company's interests, that is, if the action is brought on the basis of "purely personal considerations" [emphasis added]: *Pang Yong Hock* at [20]. *Where, however, as it is in the present case, there is an alignment between the company's interests and the applicant's*

8 Minute Sheet dated 12 October 2022 at pp 8–10.

9 Minute Sheet dated 12 October 2022 at p 10.

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> *interests, even if the applicant is pursuing a personal vendetta, the existence of that personal motive is not a sufficient basis for finding a lack of good faith.* In the light of the objective merits of the claim, I found that the plaintiff possessed a reasonable belief that there is a good cause of action. Further, notwithstanding her dislike of WKY and OKS, her interests were sufficiently aligned with the interests of Trillion in the proposed action. She was not abusing the statutory remedy nor, by extension, the statutory corporate form.
>
> [emphasis added]

Thus, the existence of a collateral purpose is not, *in and of itself*, a reason to find that the application was not brought in good faith, so long as there was an *alignment* of the company's interest and the applicant's interest. A collateral purpose will establish bad faith only if it is at odds with or runs counter to the company's interests, or where the complainant's judgment was clouded by purely personal considerations (see *Ang Thiam Swee* at [13]).

70 In the present case, while the plaintiff may have been partly motivated to bring the application to seek a buy-out offer, that did not necessarily mean that there was a lack of good faith. The interests here would be aligned as the possible restoration of any company assets which have been improperly misappropriated will have an impact on the valuation of the plaintiff's shares (to which, what the plaintiff is really seeking is a *fair* valuation which accounts for the wrongdoing being reversed). As noted by the learned authors of *Corporate Law* (at para 10.62): "Where the complainant is seeking, by bringing the proposed action, to maximise the value of or restore value to his shares in the company, this is often taken as a *positive* indication of good faith as an action that benefits the company will ultimately benefit its shareholders. The complainant's interest in such cases are therefore aligned with the company's interests". Therefore, taking the circumstances as a whole and considering the fact that the plaintiff has successfully demonstrated a reasonable belief in a good

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cause of action for some of its claims, the plaintiff's purported self-interests in this case was not dispositive (see the High Court decision of *Chng Kheng Chye v Kaefer Prostar Pte Ltd and another* [2020] SGHC 180 at [27], though the court there eventually inferred that there was a lack of good faith due to the bare allegations being brought by the complainant).

71 As a result, I find that the plaintiff has shown that he has acted in good faith in bringing the present application in respect of the allegations I have identified above at [65].

Whether there was inordinate delay

72 For completeness, the defendants also say that the plaintiff had issued the notices only in 2020 despite Wavoo's Alleged Breaches taking place from 2016 to 2020. The defendants also say that the plaintiff allowed a further year to lapse before commencing the present application on 3 August 2021. The defendants therefore rely on my decision in *Malcolm Tan* to say that if the Alleged Breaches are as serious as the plaintiff makes them out to be, then he ought to have commenced the present application after such a lengthy delay.

73 I do not think that there is a problem with the plaintiff's conduct in this regard. In the first place, the facts in *Malcolm Tan* were quite extreme. In that case, the plaintiff's allegations against the directors related to incidents in 2017 but he only sent out the required notices in 2021. In the present case, the allegations had taken place over a period of time from 2016 to 2020 and the plaintiff issued the notices in 2020. There was thus no gap in time like in *Malcolm Tan* that calls for an explanation. Furthermore, unlike the correspondence that had passed between the parties in *Malcolm Tan*, the plaintiff in the present case had consistently maintained his right to commence

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an action against the Company and/or Wavoo and Latiff since 2020. Accordingly, I do not think that his delay in commencing the present application in 2021 despite sending the notices in 2020 is material – it is clear from the overall context that the plaintiff never intended to give up pursuing the claim against the Company and/or Wavoo and Latiff.

Whether it is *prima facie* in the interests of the Company that the action be brought

74 Turning to the final requirement that it is *prima facie* in the interests of the Company that the action be brought, there are two parts to this requirement.

Whether there is a reasonable basis for the complainant to believe that the action sought to be instituted is a legitimate or arguable one

75 First, this would mean showing the court that there is a reasonable basis for the complainant and that the action sought to be instituted was a legitimate or arguable one (see *Teo Gek Luang* at [18]). There must be a reasonable semblance of merit, and there is no need to show that the action is bound to succeed or likely to succeed. The analysis on this portion would overlap with the point above on needing to demonstrate good faith, as noted by the Court of Appeal in *Ang Thiam Swee* at [55]. The reason for this overlap *despite* the conceptually different requirements under s 216A(3)(*b*) (good faith) and s 216A(3)(*c*) (*prima facie* in the interest) was, with respect, elegantly explained by Vinodh Coomaraswamy J in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others* [2015] SGHC 145 (at [72]–[74]):

> 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.

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> Note that it is the *inquiries* which overlap. The concepts themselves and the statutory tests employing them are distinct.
>
> 73 It is because the inquiries overlap that a court is entitled – but not of course bound – to infer that an applicant is acting in good faith if it finds that the applicant's derivative action is "a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all": see *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [20]. By the same token, a court is entitled – though again not bound – to infer that an applicant lacks good faith if it finds the derivative action to be frivolous or vexatious: Ang Thiam Swee at [55].
>
> 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).
>
> [emphasis in original]

In essence, when a subjective state of mind is to be assessed, the court looks at the evidence from which it can *infer* good faith. The court may thus conclude from the objective fact that the action appears to be *prima facie* in interest of the company that the complainant is acting in good faith.

76 Given my conclusions above on the merits of the plaintiff's case and the legitimacy of *part* of their claims, I find that the plaintiff has succeeded on this first part only in respect of the allegations I have identified above at [65].

Whether it is in the practical and commercial interests of the Company for the action to be brought

77 Second, the court may also go further to examine whether it would be in the practical and commercial interests of the company for the action to be brought (see *Ang Thiam Swee* at [56]). This includes an assessment of whether "the company will stand to gain substantially in money or money's worth" (see the decision of the Court of Appeal in *Pang Yong Hock* at [17]). There may be

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many reasons why a company would not wish for commercial reasons to pursue an action, for example, the action may ruin good relations with customers or generate bad publicity (see *Pang Yong Hock* at [20]), the defendant would be unable to satisfy the judgment debt, or the relief obtained would not be worth the costs of the action (*eg*, where the company's financial position was already in a precarious state, see the High Court decision of *Lee Seng Eder v Wee Kim Chwee and others* [2014] 2 SLR 56 at [14]–[15]).

78 Here, the plaintiff says that the Company will ultimately benefit as Wavoo's and Latiff's breaches are grave. However, the plaintiff has not made any real substantive argument otherwise. The plaintiff seems to have assumed that just because there is an arguable case, it *must* be in the Company's practical and commercial interests for the proposed action to be brought. In response, the defendants say that because the Company is a small private family-held company, the proposed action under s 216A will have an adverse impact on it such as affecting its business reputation.

79 Considering Wavoo's potential breaches of duties, I agree that it is *prima facie* in the Company's interests for the action to be brought. When leave is sought to pursue an action for the recovery of company assets which have been improperly siphoned off, or to claim damages for wrongful usage of company property or opportunities, it would generally be relatively easy to show that the company will stand to gain substantially in money or money's worth (see the High Court analysis in *Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)* [2009] SGHC 223 ("*Law Chin Eng*") at [27]–[35]). I would add that there must be substance to the monetary claim which is sought in the interests of the company, and a bare

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assertion to a claim without deposing the necessary affidavit evidence would not pass muster (see *Law Chin Eng* at [28]).

80 On the present facts, the claim amounts are potentially substantial (relating to the usage of the Company's Mark, the confidential recipes, and funds, *etc*). The plaintiff has shown that there are real benefits to be gained which will justify the cost and efforts of the company pursuing the action against its directors. In this regard, I find the suggestions by the authors of *Woon's Corporations Law* (Chapter J Shareholder Actions at para 651) to be sensible: "Once the judge hearing the application has found that the complainant has given notice to the directors and that there is an arguable case against the proposed defendants, presumably the onus shifts to the directors to explain why it would not be in the interest of the company to pursue the action". In the present case, all that the defendants have raised are very general notions of how the litigation would adversely impact the Company and how its reputation would be affected, but these alone without further elaboration are insufficient to show that any adverse impacts would *outweigh* the benefits that could be gained.

Conclusion

81 For the reasons given above, I find that the plaintiff has satisfied the requirements of s 216A(3) against Wavoo in respect of some of the allegations made (see above at [65]). However, I do not find the same against Latiff.

82 In considering the plaintiff's prayers in the present case, I recognise that a court is entitled to restrict its leave to be granted only to allegations which have satisfied the requirements of s 216A. In this regard, I am guided by the following observations by the High Court in *Hiap Seng & Co Pte Ltd v Lau*

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Chin Hu and others [2011] SGHC 143 at [3]: "I did not grant the plaintiffs *carte blanche* authority to sue in the name of the company. I went through the plaintiffs' complaints against the defendants, and I granted the plaintiffs leave to bring an action in the name of and on behalf of the company for breaches of their directors' duties in five out of the list of complaints put up by the plaintiffs". As a result, I make the following orders:

(a) I grant prayers 1 and 2, for the plaintiff to be granted leave to bring a derivative action in the name of the Company but only against Wavoo and not Latiff, and only in respect of the three grounds set out at [65] above. I allow the plaintiff the authority to control the conduct of the action and any execution proceedings thereafter.

(b) I grant prayer 3 to the extent that the plaintiff's costs of the derivative action are to be paid by the funds of the Company.

(c) I do not grant prayer 4 in respect of the alleged UOB bank account. That is something left for the main action and not to be taken at this leave stage.

83 As for the costs of this application, if the parties are unable to agree on the appropriate costs order, they are to write in with their brief submissions, limited to five pages each, within 14 days of this judgment.

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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