

**IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2026] SGHC(A) 20

Appellate Division of the High Court / Civil Appeal No 54 of 2025

Between

Vivaz Group Holdings Pte Ltd

... Appellant

And

TripleOne (Cambodia)
Investment Pte Ltd

... Respondent

And

Lee Kok Heng Jeremiah

... Non-Party

In the matter of Originating Application No 1330 of 2024

Between

Vivaz Group Holdings Pte Ltd

... Applicant

And

TripleOne (Cambodia)
Investment Pte Ltd

... Respondent

And

Lee Kok Heng Jeremiah

...Non-Party

JUDGMENT

[Companies — Statutory derivative action — Section 216A of the Companies Act 1967 (2020 Rev Ed) — Whether complainant was acting in good faith]

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Vivaz Group Holdings Pte Ltd
v
TripleOne (Cambodia) Investment Pte Ltd
(Lee Kok Heng Jeremiah, non-party)

[2026] SGHC(A) 20

Appellate Division of the High Court — Civil Appeal No 54 of 2025
Woo Bih Li JAD, Debbie Ong Siew Ling JAD and See Kee Oon JAD
15 May 2026

30 July 2026

Judgment reserved.

See Kee Oon JAD (delivering the judgment of the court):

1 This appeal arises out of HC/OA 1330/2024 (“OA 1330”), which was an application by the appellant, Vivaz Group Holdings Pte Ltd (“Vivaz”), under s 216A of the Companies Act 1967 (2020 Rev Ed) (“Companies Act”) to commence a derivative action in the name and on behalf of the respondent, TripleOne (Cambodia) Investment Pte Ltd (“Company”), against three identified parties (including the non-party, Mr Lee Kok Heng Jeremiah (“Mr Lee”)). In OA 1330, Vivaz contended that the Company’s primary asset, being shares in its subsidiary One Eleven Investment Pte Ltd (“OEI”), was wrongfully disposed of by way of a transfer to TPC Properties Pte Ltd (“TPC Properties”). Vivaz, which is a registered shareholder of the Company, claims to have been kept in the dark about the aforementioned transfer.

2 OA 1330 was dismissed by a Judge of the General Division of the High Court (“Judge”). The Judge concluded that Vivaz knew more than it had let on with respect to the transfer of the Company’s shareholding in OEI, and the surrounding web of transactions. Vivaz’s lack of candour meant that the application was not made in good faith, and a derivative action could not be allowed.

3 Having heard the parties’ submissions, we dismiss Vivaz’s appeal against the Judge’s decision. In this judgment, we explain our reasons for doing so.

Facts

4 The factual background to OA 1330 is set out in the Judge’s grounds of decision in *Vivaz Group Holdings Pte Ltd v TripleOne Cambodia Investment Pte Ltd (Lee Kok Heng Jeremiah, non-party)* [2025] SGHC 176 (“GD”) at [5]–[19]. We set out the pertinent facts below.

The Company

5 The Company was incorporated in Singapore in 2013 as a holding company. The Company was the sole shareholder of OEI, which was in turn the 49% shareholder of One Eleven Development Co Ltd (‘OED’). OED, in turn, owned a hotel development in Cambodia known as Lumiere Hotel (“Hotel 228”). The Company had no assets of significant value other than Hotel 228 (GD at [6]).

6 Although OEI officially held 49% of the shares in OED, with the remaining 51% held by its Cambodian partner, Camtrip Investment Co Ltd (“Camtrip”), it is not disputed that 41% of the shareholding in OED was held

by Camtrip as nominee shareholder on behalf of OEI. According to the parties, this arrangement was adopted to work around Cambodian law which prohibited foreign entities from having sole or majority ownership in Cambodian property. This effectively meant that OEI was the beneficial owner of a 90% shareholding in OED.

7 The relevant directors (or former directors) of the Company are as follows (GD at [7]):

- (a) The non-party, Mr Lee, who has been a director since 26 January 2015 and remains the sole remaining director at the time of the proceedings.
- (b) Mr Poh Boon Hua (“Mr Amos Poh”), a director of the Company from 4 January 2017 to 19 October 2020. He is a potential defendant in Vivaz’s proposed derivative action.
- (c) One of Vivaz’s directors, Mr Wong Chun Mun (“Mr Wong”), a director of the Company from 29 June 2017 to 17 December 2020.
- (d) Mr Wu Yanwu (“Mr Wu”), a director of the Company from 29 June 2017 to 18 November 2024.

8 From 2014 to 2017, various investors (including Vivaz) purchased shares in the Company. A table listing the shareholders of the Company prior to the occurrence of pertinent events is set out at [8] of the GD. A simplified version of the table is reproduced below:

Party	Registered shareholding	Shareholders of the entity (where applicable and relevant)
Vivaz	35%	Mr Wong and Ms Quek Lay Wah (“Ms Quek”) each held 50% of Vivaz’s shares and were Vivaz’s directors.
Threepohco Private Limited (“Threepohco”)	24.76%	Mr Amos Poh, Mr Poh Wen Yi (“Mr Poh WY”), Mr Poh Wen Si (“Mr Adrel Poh”) collectively held 85% of Threepohco’s shares. At the hearing of OA 1330, Mr Amos Poh and Mr Poh WY were both undischarged bankrupts.
Galaxy Ace Investment Limited (“Galaxy”)	20%	Mr Wu was the sole shareholder of Galaxy.
Golden Light Investments Pte Ltd (“Golden Light”)	10%	Threepohco and Mr Adrel Poh.
Assets Leader Limited (“Assets Leader”)	10%	Identity of shareholders was not material to the present application.
Mr Lee	0.12%	Not applicable.
Mr Sok Hang Chaw (“Mr Sok”)	0.12%	Not applicable.
Kingsland (KH) Development Co Ltd (“Kingsland”)	0%	Kingsland Global Ltd (“Kingsland Global”), a public company limited by shares in which Mr Lee was a director.

9 Although Vivaz’s registered shareholding in the Company remained at 35%, there were two transactions which affected Vivaz’s beneficial ownership of shares in the Company (GD at [9]–[10]):

(a) The first was a share purchase agreement entered into between Kingsland and Vivaz on 29 May 2017, by which Kingsland agreed to purchase 25% of the Company’s shares from Vivaz for a composite sum of US\$3,570,000. However, the true arrangement between the various shareholders was instead for the 25% shareholding to comprise 10.7% from Vivaz, 10.7% from Threepohco and 3.6% from Golden Light’s shares in the Company. This true arrangement was not documented in the share purchase agreement.

(b) The second was an agreement for the transfer of loans entered into between Vivaz and Threepohco dated 31 December 2018 (“Threepohco-Vivaz Transfer of Loan Agreement”). Vivaz had apparently taken loans from New Union Capital Pte Ltd (“NUCAP”) in 2016 and 2017 (collectively, the “NUCAP Loans”) and subsequently defaulted on the interest payments. The Threepohco-Vivaz Transfer of Loan Agreement provided that, in consideration for the transfer of the NUCAP Loans to Threepohco, Threepohco was to “own shares of [the Company] which amount[ed to] S\$7,350,000” (*ie*, 35% of the Company’s shares). Vivaz later clarified that there was a “mistake” in the Threepohco-Vivaz Transfer of Loan Agreement and that Threepohco was instead only to “attain [Vivaz’s] 24.3% shares of the Company worth S\$5,103,000, instead of S\$7,350,000”.

10 There was apparently also a third series of transactions that led to Threepohco becoming the true beneficial owner of the shares held by Assets

Leader, Mr Sok, and Mr Lee (amounting to 10%, 0.12% and 0.12% of shares in the Company respectively). The parties did not adduce any supporting documentation or specifics of this third series of transactions (GD at [11]).

Kingsland-Vivaz SSA

11 A share sale agreement concerning Kingsland’s beneficial shareholding in the Company (the “Kingsland-Vivaz SSA”) was ostensibly entered into between Kingsland and Vivaz on 11 June 2019. The Kingsland-Vivaz SSA was for the sale of Kingsland’s “rights, title and interest in the [25% of the Company’s shares which it was the beneficial owner of] to Vivaz for the sum of US\$4,000,000”. Parties agree that Vivaz did not in fact pay the sum set out in the Kingsland-Vivaz SSA but only paid just over US\$3.2m (GD at [14]).

12 It was not disputed that the moneys that were due were transferred to Kingsland and the transaction was completed. However, the parties disagreed on the beneficial owner of the 25% shares of the Company. Vivaz contended that it held 25% beneficial ownership over the Company pursuant to the Kingsland-Vivaz SSA. Mr Lee contended that Vivaz had in fact purchased the shares as part of a three-party resolution between Vivaz, Threepohco and OED. Under this resolution, Vivaz was to purchase and hold the shares on OED’s behalf such that the true beneficial owner was OED (GD at [15]).

The Impugned Transaction

13 Vivaz’s claim of wrongful disposal of assets was made in reference to a transfer of all of the Company’s shares in OEI to TPC Properties, a company fully owned by Threepohco, on 24 September 2019 (the “Impugned

Transaction”). The Impugned Transaction was effected pursuant to (GD at [12]):

- (a) a board of directors’ resolution of the Company signed by Mr Amos Poh in his capacity as a director of the Company; and
- (b) a board of directors’ resolution of TPC Properties signed by Mr Adrel Poh in his capacity as a director of TPC Properties.

14 Subsequently, in or about March 2020, TPC Properties transferred OEI’s 49% shareholding in OED to Mr Lee’s nominee, My Square Metre (KH) Co Ltd (“MSQM (KH)”). At the material time, Mr Lee was the primary beneficial owner of MSQM (KH), holding 86% of the shares in My Square Metre Pte Ltd (“My Square Metre”), the sole shareholder of MSQM (KH). Thereafter, in or around 2022, the shares in OED were transferred from MSQM (KH) to MSQM ZTH Co Ltd (“MSQM ZTH”), of which an entity represented by Mr Lee held 49% of shares and a company represented by one Mr Horng Pheap held the remaining 51% (GD at [13]).

The discovery of the Impugned Transaction

15 In Ms Quek’s first affidavit dated 20 December 2024 (“Ms Quek’s First Affidavit”), she explained that Vivaz began to suspect that something was awry “[s]ometime in or around 2023”, when its directors noticed certain documents uploaded to a Dropbox folder which was previously used by Mr Wong and Mr Lee for matters relating to the Company. Of particular note was a document reflecting plans for the sale of Hotel 228. According to Ms Quek, this document also showed that MSQM (KH) and one “ZTH Co Ltd” were 49% and 51% shareholders of Hotel 228 respectively. This “came as a shock” to herself and

Mr Wong as they had not been informed that Hotel 228 was or was to be sold, despite their 25% shareholding in the Company.

16 This prompted Vivaz’s directors to reach out to Threepohco to ask if it was aware of the sale. In response, Mr Poh WY informed them that Hotel 228 had been “transferred out”.

17 On 10 April 2024, Vivaz conducted a search on OED’s shareholders, which revealed that 100% of its shares were owned by MSQM ZTH. Vivaz then conducted a search on MSQM ZTH. On 2 July 2024, Vivaz found that Mr Lee and Mr Horng Pheap were the directors of MSQM ZTH and that Mr Lee beneficially owned 49% of MSQM ZTH’s shares.

18 On 5 July 2024, Vivaz sent its first notice pursuant to s 216A of the Companies Act (“s 216A notice”) to the Company. In this notice, Vivaz explained its discovery that “OEI was no longer a shareholder in OED” and demanded that the directors of the Company take immediate action to commence proceedings against MSQM ZTH, Mr Lee, and Mr Horng Pheap (GD at [16]).

19 Subsequently, on 26 July 2024, Vivaz requested for a meeting of the shareholders of the Company. The shareholders’ meeting was held on 7 August 2024, and was attended by (GD at [17]):

- (a) Mr Lee, in his capacity as a director of the Company;
- (b) Ms Quek and Mr Wong, in their capacity as directors of Vivaz;
- (c) Mr Poh WY and Mr Adrel Poh, as representatives of Threepohco;

- (d) Mr Kaka, on behalf of Mr Wu as a representative of Galaxy; and
- (e) Mr Horng Pheap.

20 At the meeting, Vivaz was informed of the Impugned Transaction and shown the directors' resolutions executing the transfer. Vivaz claimed that it was taken "completely by surprise" as it had never been informed of the Impugned Transfer or the directors' resolution, despite Mr Wong's status as a director of the Company at the material time.

21 In Ms Quek's second affidavit dated 26 March 2025 ("Ms Quek's Second Affidavit"), she claimed that during a meeting between Mr Lee and Mr Wong in or around March 2024 (prior to Vivaz sending its first s 216A notice), Mr Lee had "alluded to the fact that the Company's sole asset, its shares in OEI, had been transferred to another party", and that *this* instance "was the very first time [she and Mr Wong] had heard that the Company's sole asset had potentially been transferred to another party". According to Ms Quek, during a subsequent meeting between Mr Lee, Mr Wong and herself on or about 11 July 2024, Mr Lee "mentioned [that there were] certain signed Shareholder's Resolution and Director's Board Resolution of the Company" in response to queries from Mr Wong and Ms Quek regarding the alleged transfer of the Company's shares in OEI. However, Mr Lee refused to share those documents with Mr Wong and Ms Quek on the basis that he could only do so in the presence of all the other shareholders. Ms Quek explained that "[i]t was in this context that [Vivaz] called for the shareholders' meeting on 26 July 2024, to be held on 7 August 2024".

Procedural history

22 On 21 November 2024, Vivaz sent its second s 216A notice, demanding that the Company’s directors commence legal proceedings against MSQM ZTH, Mr Lee and Mr Horng Pheap in respect of the alleged wrongful disposal of the OEI shares which diminished the value of the Company and its shares (GD at [18]).

23 On 20 December 2024, Vivaz filed OA 1330. While Mr Lee was not a party to OA 1330, he was permitted to participate and was effectively the party opposing OA 1330.

24 On 10 June 2025, the Judge dismissed OA 1330.

25 On 7 July 2025, Vivaz filed the present appeal against the Judge’s decision in OA 1330. The Company was named as the sole respondent, and Mr Lee was not named as a respondent though he was effectively the party opposing OA 1330.

26 On 30 September 2025, Mr Lee filed AD/SUM 45/2025 (“SUM 45”) to intervene as a non-party in this appeal. While Vivaz indicated that it had no issues with Mr Lee intervening, the summons was not made by consent.

27 On 13 October 2025, Vivaz filed AD/SUM 47/2025 (“SUM 47”) for extension of time to serve the requisite documents in support of its appeal.

28 On 30 October 2025, the Appellate Division of the High Court allowed both SUM 45 and SUM 47 and ordered costs in the cause in respect of both applications.

Summary of arguments below

29 Vivaz alleged that it had not been informed (and was in fact unaware) of the Impugned Transaction and had only discovered the change of beneficial ownership through its own investigations. Consequently, Vivaz claimed that Mr Lee and/or Mr Amos Poh had wrongfully converted, disposed and/or sold the Company's shares in OEI to TPC Properties. Mr Lee had also wrongfully caused and/or facilitated the transfer of the Company's beneficial interest in OED from TPC Properties to MSQM ZTH, an entity that he had beneficial ownership in. These transactions had hollowed the Company of its sole meaningful asset (*ie*, Hotel 228), and Vivaz sought to commence proceedings to reinstate the Company's value (GD at [21]).

30 Mr Lee alleged that Vivaz had knowledge of and had agreed to the Impugned Transaction (and a series of other transactions, including the Threepohco-Vivaz Transfer of Loan Agreement) as part of a broader resolution reached with Threepohco in view of Vivaz's financial woes (the "Threepohco-Vivaz Resolution"). According to Mr Lee, the Threepohco-Vivaz Resolution also bore a secondary aim of facilitating Vivaz's shift towards hotel management and operations. The Threepohco-Vivaz Resolution was purportedly reached sometime between June and September 2018, the details of which were allegedly as follows (GD at [22]):

- (a) Threepohco would take over the NUCAP Loans from Vivaz and Vivaz would cease to have any beneficial ownership and/or management control over the Company.
- (b) Vivaz was granted the right to manage Hotel 228 at a bare-building rental rate that was considerably below market rate. Vivaz was

also to take over all the furniture, fittings and equipment (“FF&E”) of Hotel 228 for the sum of US\$4m, a sum payable to OED (“Hotel 228 FF&E Consideration”). Vivaz was also granted the right to manage certain other developments which are not relevant to the present case.

(c) To facilitate Vivaz’s exit from ownership over Hotel 228, a restructuring was undertaken such that TPC Properties would take over as the parent company of OEI in place of the Company. The Impugned Transaction took place pursuant to this restructuring. As the sole shareholder of TPC Properties, Threepohco would make the necessary arrangements with the investors Threepohco had brought into the Company (*ie*, Galaxy, Golden Light and Assets Leader) to ensure that they would continue to have beneficial ownership over Hotel 228 after the Impugned Transaction was carried out.

(d) As part of this restructuring, OED was to use the Hotel 228 FF&E Consideration to purchase Kingsland’s 25% shareholding in the Company. However, to simplify matters and to limit Kingsland’s and OED’s liability for any capital gains tax in Cambodia, Threepohco and Vivaz instead agreed for Vivaz to pay the Hotel 228 FF&E Consideration directly to Kingsland, although the 25% shareholding was still to be beneficially owned by OED. This arrangement was regularised by way of the Kingsland-Vivaz SSA (see [11]–[12] above).

31 Mr Lee further alleged that as a result of the COVID-19 pandemic, Hotel 228’s business was adversely impacted such that TPC Properties could not afford to upkeep Hotel 228 and Threepohco could not meet the interest payments due under the NUCAP Loans. In light of its financial difficulties, Threepohco approached Mr Lee for help to take over ownership of a strata-titled

property in order to appease its investors. This culminated in an asset swap arrangement between Mr Lee and Threepohco (the “Mr Lee-Threepohco Asset Swap”), the details of which were as follows (GD at [23]):

- (a) 49% of shares in OED held by OEI were to be transferred to Mr Lee’s nominee, MSQM (KH); and
- (b) 50% of shares in Macalland Holdings Pte Ltd (“Macalland”), which were beneficially owned by Mr Lee through another entity, were to be transferred to TPC Properties. This would allow TPC Properties to have ultimate beneficial ownership over a strata-titled service apartment in Cambodia named Lumiere Residence (“Hotel 118”).

Decision below

32 The Judge dismissed OA 1330 on the grounds that Vivaz had not discharged its burden of demonstrating good faith under s 216A(3)(b) of the Companies Act. We briefly summarise the Judge’s reasons in so far as they are relevant to the issues before us.

33 The Judge found that, on the evidence, Vivaz did know of the Impugned Transaction and other surrounding transactions at the material time, and had not been candid about what it knew (GD at [31]–[32]):

- (a) The Judge found that Vivaz was broadly aware of the Impugned Transaction based on two pieces of documentary evidence: (i) an email sent on 31 July 2019 from Mr Poh WY to Vivaz’s directors seeking certain clarifications for the purpose of “preparing TPC Properties Pte Ltd (Lumiere Hotel Private Limited) for the take over of One Eleven Investment Co., Ltd. (OEI)” (*ie*, the Impugned Transaction); and (ii) an

email sent on 4 January 2022 by Mr Lee to Vivaz’s directors (amongst others) setting out the parties’ respective indirect shares in OED (GD at [33] and [37]).

(b) The Judge found that three pieces of documentary evidence supported Mr Lee’s case that Vivaz had knowledge that the true subject of the transaction encapsulated in the Kingsland-Vivaz SSA was not the 25% shareholding in the Company: (a) an email sent by Mr Lee to Ms Quek on 15 May 2020 requesting Vivaz’s assistance with providing a list of Hotel 228’s FF&E; (b) three WhatsApp messages sent by Ms Quek in a group chat named “118/228/PPGT Settlement” in 2023 referencing Hotel 228’s FF&E; and (c) WhatsApp messages between Ms Quek and Mr Lee in a group chat named “LHM” on 16 March 2022 (GD at [45]–[49]).

(c) While the Judge stated that he would have found that Vivaz was not acting in good faith based on the Impugned Transaction and the Kingsland-Vivaz SSA, for completeness, he found that Vivaz had knowledge of the Mr Lee-Threepohco Asset Swap based on: (a) a WhatsApp message sent by Mr Lee in the “LHM” group chat on 25 January 2021 stating that the shares in Macalland were to be transferred to TPC Properties; and (b) a WhatsApp message from Ms Quek in the same group chat on 17 March 2022 suggesting that following the Mr Lee-Threepohco Asset Swap, “TPC” would have taken over (GD at [53]–[55]).

34 The Judge then found that Vivaz had clearly brought OA 1330 for a collateral purpose that was not consistent with the purpose of doing justice to the Company given Vivaz’s lack of candour (GD at [71]–[73]). Further, given

his finding that Vivaz had knowledge of the Impugned Transaction by 2019, there had been an inordinate delay in bringing OA 1330 (GD at [74]–[77]).

35 Accordingly, the Judge found that Vivaz had not acted in good faith in bringing OA 1330 due to its failure to come to court with utmost candour and honesty. It had brought this application for a collateral purpose at the expense of the Company’s interests, and there was inordinate delay in making the application (GD at [78]).

The parties’ positions on appeal

36 On appeal, Vivaz contends that the Judge had erred in dismissing its application.

37 Vivaz takes issue with the Judge’s finding that it had not been candid about what it knew and the transactions that it had entered into with the various parties. The evidence did not demonstrate that Vivaz had been dishonest about its knowledge of or the circumstances surrounding the Impugned Transaction. Further, the Judge had engaged in the adjudication of multiple factual disputes which should have been reserved for the trial proper, rather than determined at the leave stage.

38 Vivaz also argues that the Judge erred in finding that Vivaz lacked good faith. In this regard, Vivaz argues that:

- (a) the Judge erred in finding that Vivaz had commenced OA 1330 for a collateral purpose;
- (b) the Judge erred in finding that Vivaz lacked good faith based on Vivaz’s lack of candour alone;

- (c) the Judge erred in imposing a duty of “full and frank disclosure” on Vivaz; and
- (d) the Judge erred in finding that there was an inordinate delay in commencing OA 1330.

39 Mr Lee, in turn, argues that the Judge was correct in finding that Vivaz lacked candour. He agrees with the Judge’s findings in relation to the Impugned Transaction, the Kingsland-Vivaz SSA and the Mr Lee-Threepohco Asset Swap.

40 Mr Lee also argues that the Judge was correct in finding that Vivaz had not acted in good faith in bringing OA 1330 due to its failure to come to court with utmost candour and honesty, that it had brought this application for a collateral purpose at the expense of the Company’s interests, and that there was inordinate delay in making the application.

Issues to be determined

41 Based on the parties’ arguments, two broad issues arise for our determination:

- (a) whether the Judge was correct to find that Vivaz had not been honest about what it knew of the Impugned Transactions and/or the circumstances surrounding the Impugned Transactions; and
- (b) if so, whether the Judge was correct to find that Vivaz had not established that it had brought the application in OA 1330 in good faith.

The applicable legal principles

42 Section 216A(3) of the Companies Act stipulates that for a derivative action to be brought, three requirements must be satisfied:

(3) No action or arbitration may be brought and no intervention in an action or arbitration may be made under subsection (2) unless the Court is satisfied that —

(a) the complainant has given 14 days’ notice to the directors of the company of the complainant’s intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action or arbitration;

(b) the complainant is acting in good faith; and

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

43 The focal point of this appeal is s 216A(3)(b) of the Companies Act, which provides that the court may not grant permission to bring an action in the name and on behalf of a company unless the court is satisfied that the applicant is acting in good faith. The burden is on the *applicant* to satisfy the court on the balance of probabilities that it was acting in good faith: *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2015] SGHC 145 at [66]–[67], citing *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 (“*Ang Thiam Swee*”) at [23].

44 The requirement of good faith under s 216A(3)(b) of the Companies Act is intended to serve two overlapping purposes: first, to ensure that the complainant is properly one in whom the “extraordinary power ... to use corporate resources and to create a position of legal conflict between the corporation and others” should be vested; and second, to ensure that the proposed action, when commenced under the control of the complainant, serves and advances corporate interests: *Tan Chun Chuen Malcolm v Beach Hotel Pte*

Ltd [2023] 3 SLR 1312 (“*Malcolm Tan*”) at [27]. The requirement of good faith is distinct from the requirement that bringing the proposed derivative action be in the interests of the company under s 216A(3)(c) of the Companies Act – while the latter is intended to ensure that the proposed action is one brought in the interests of the company, the former ensures that the action is brought by one who would use it to advance the company's interests.

45 The elements of the requirement of good faith under s 216A(3)(b) of the Companies Act were summarised by Ang Cheng Hock JC (as he then was) in *Jian Li Investments Holding Pte Ltd v Healthstats International Pte Ltd* [2019] 4 SLR 825 as follows (at [42], [44] and [48]):

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

...

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

...

48 The good faith enquiry may also extend beyond the two main facets earlier identified, honest and reasonable belief in the merits, and purpose for bringing the application. It can also

encompass considerations of the applicant's conduct in the proceedings: Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at para 6.043. For instance, the failure to be fully candid before the court would indicate a lack of good faith. ...

46 The Judge's finding that Vivaz had not brought OA 1330 in good faith was primarily premised on his finding that Vivaz had been less than honest about what it knew of the Impugned Transaction. Accordingly, it is helpful to set out, at the outset, the relevance of an applicant's lack of candour to establishing his good faith (or lack thereof).

47 In our view, that an applicant has not been entirely candid in bringing his application for leave does not, in itself, preclude a finding that he has satisfied the good faith requirement under s 216A(3)(b) of the Companies Act. Keeping in mind the purpose of the requirement of good faith (at [44] above), an applicant's lack of candour is only relevant where it supports an inference that the applicant is not a proper party to represent the company's interests. In a case where despite an applicant's lack of candour, the court is nevertheless satisfied that the proposed action, when commenced under the control of the applicant, will advance the company's interests, there would be grounds for finding that the good faith requirement under s 216A(3)(b) is satisfied.

48 An example of this would be the case of *Raveendran Rakesh v Jason Mike Nathan* [2021] SGDC 73 ("*Raveendran*"). In that case, the applicant sought leave to bring an action in the name of Global Care Medical Pte Ltd ("Global Care") against the first respondent, Mr Jason Mike Nathan. The applicant and Mr Nathan were the only directors of Global Care. In bringing the application, the applicant failed to disclose that he had incorporated a competing company, New Path, to take over Global Care's sole remaining clinic

(the “Clinic”). The District Judge found that while it was reasonable to infer that the applicant had obscured the facts about New Path to “avoid awkward questions about whether he was placing himself in a position where his duty to [Global Care] might conflict with his interest in having New Path take over [the Clinic]”, nevertheless, the fact was that New Path ended up having nothing to do with the Clinic. As any potential conflict had not materialised, the applicant’s lack of candour in this regard did not suggest that the application was calculated to aid the applicant’s venture with New Path at the expense of Global Care (*Raveendran* at [60]). Looking at the circumstances of the case in a holistic manner, the District Judge was satisfied that the applicant honestly and reasonably believed that Global Care had a good cause of action, and that the applicant’s main purposes in bringing the application were to ascertain what had happened to Global Care’s monies and to hold Mr Nathan liable for any loss caused by his wrongdoing (*Raveendran* at [60]).

49 Such an approach is consistent with that adopted in relation to cases where the applicant seeks to bring the derivative action for a collateral purpose. In such cases, “it is not the questionable motivations of the applicant *per se* which amount to bad faith; instead, bad faith may be established where these questionable motivations constitute a personal *purpose* which indicates that the company’s interests will not be served” [emphasis in original] (*Ang Thiam Swee* at [13]).

The applicable standard for determining issues of fact at the leave stage

50 A finding that the applicant has not been candid will often turn on the determination of a disputed question of fact. This poses difficulties as the court at the leave stage “need not and ought not be drawn into an adjudication on the disputed facts” (*Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471

(“*Agus Irawan*”) at [6]; cited with approval by the Court of Appeal in *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1 at [17], [19] and [23]).

51 As such, though the court’s analysis of the factual issues may arise in the context of determining whether the applicant has established good faith on a balance of probabilities, the applicable standard for those factual issues remains whether the applicant has made out his case on a *prima facie* basis. In other words, the court “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” (*Agus Irawan* at [6]).

Issue 1: Whether the Judge erred in finding a lack of candour on the part of Vivaz

52 The Judge found that Vivaz had been less than candid in multiple aspects, namely, regarding its knowledge of the Impugned Transaction, the details of the transaction that had taken place pursuant to the Kingsland-Vivaz SSA, and its knowledge of the Mr Lee-Threepohco Asset Swap.

Vivaz’s knowledge of the Impugned Transaction

53 The Judge found that Vivaz had been “broadly aware” of the Impugned Transaction based on two pieces of documentary evidence:

- (a) first, an email sent on 31 July 2019 from Mr Poh WY to Vivaz’s directors (“31 July 2019 Email”) seeking certain clarifications for the purpose of “preparing TPC Properties Pte Ltd (Lumiere Hotel Private

Limited) for the take over of One Eleven Investment Co., Ltd. (OEI)”
(ie, the Impugned Transaction); and

(b) second, an email sent on 4 January 2022 from Mr Lee to Vivaz’s directors (amongst others) that set out the parties’ respective indirect shares in OED (“4 January 2022 Email”).

The 31 July 2019 Email

54 The 31 July 2019 Email was sent by Mr Poh WY, one of the directors of Threepohco, to Vivaz’s directors Mr Wong and Ms Quek. The full text of this email is as follows:

Hi Celine and Alan,

As we are quickly approaching the previously discussed **deadline of 1st August 2019**, we need get the subject matter cleared up.

As we are preparing **TPC Properties Pte Ltd (Lumiere Hotel Private Limited)** for the take over of *One Eleven Investment Co., Ltd. (OEI)*, part of the requirement for the take over would be notifying existing shareholders on the change of holding structure plus getting them to sign off. This would prove difficult as they have been asking about the profit share.

Can we have an answer to the following:

1. Confirmation of Total “Profit” to be distributed, FY2017, FY2018.
2. Total Rental payable from Jan 2019 to July 2019 - USD 185,640
3. Interest incurred on rental arrears USD 16,243.50 from Jan to July
4. USD 4,000,000 for fit-out Reimbursement

NOTE: Any further delay, there might be situation that shareholder(s) dispute the rental agreement and request for the profit share till date instead of end Dec 2018

Prompt reply much appreciated.

Regards, Wen Yi

[emphasis in original in bold; emphasis added in italics]

55 Ms Quek replied later that same day with the following email:

Hi WY

Noted. We will settle the rental. As for the finalization of FY2017 and FY2018, we are waiting for Amos's confirmation on the breakdown and invoices of the kitchen items.

Thank you.

...

56 The Judge found that Vivaz's contemporaneous act of providing a substantive reply, without raising any query or seeking clarification about the proposed takeover of OEI, was itself compelling probative evidence that Vivaz apprehended, and accepted, the underlying rationale set out in the 31 July 2019 Email for why such information was required (*ie*, to provide the necessary information to facilitate the Impugned Transaction). Had Vivaz been genuinely unaware of what the 31 July 2019 Email meant by its reference to preparing TPC Properties for the takeover of OEI, the natural course of action would have been to question the basis of the request, rather than to substantively respond to it (GD at [35]).

57 On appeal, Vivaz argues that the Judge erred in attributing significance to Ms Quek's reply. Vivaz's directors were unaware of what was meant by the reference to "preparing [TPC Properties] for the take over of [OEI]", as this was a period of uncertainty following the sudden withdrawal of investment by one of its potential investors, Epicentre Holdings Limited ("Epicentre"). It was for this reason that Ms Quek only responded to the questions posed to her and not to Mr Poh WY's statement regarding the takeover of OEI.

58 We do not accept Vivaz’s argument that Ms Quek had only responded to the questions posed to her in her email reply. This glosses over the fact that Mr Poh WY had sought those answers *for the express purpose* of facilitating the referenced takeover of OEI by TPC Properties. That Ms Quek had responded substantively to questions that were expressly framed in the context of the takeover, without raising any query or objection as to the takeover itself, is strongly suggestive of her awareness of the takeover. This is especially so as, by Vivaz’s own account, at the time the 31 July 2019 Email was sent, it had already committed to purchasing Kingsland’s 25% shareholding in the Company for US\$4m pursuant to the Kingsland-Vivaz SSA. The reference in the 31 July 2019 Email to a “change in holding structure” makes clear that the takeover of OEI by TPC Properties referred to a takeover of the Company’s *shares in OEI*. It is an incredible assertion that Vivaz, having just purchased shares in the Company, would not have been concerned about or sought any clarification regarding a potential takeover of the Company’s primary asset if it was unaware of the Impugned Transaction.

59 Vivaz also argues that the 31 July 2019 Email is equivocal on the issue of Vivaz’s knowledge of the Impugned Transaction, as it pre-dates the Impugned Transaction by approximately two months, and the potential takeover of OEI by TPC Properties was never revisited after the 31 July 2019 Email. Further, the necessary shareholder approvals required under s 160 of the Companies Act – which was acknowledged by the 31 July 2019 Email itself – were never obtained. Moreover, Vivaz’s conduct in continuing to pay instalments under the Kingsland-Vivaz SSA even after the 31 July 2019 Email was wholly inconsistent with the position that it was aware of the Impugned Transaction. We address each argument in turn.

60 First, we accept that the 31 July 2019 Email pre-dates the Impugned Transaction, and therefore cannot serve to demonstrate that Vivaz was aware that the Impugned Transaction was eventually carried out in September 2019. In any event, however, it is not Vivaz’s case that it was aware of a proposed takeover of the Company’s shares in OEI by TPC Properties but was never informed that the takeover had eventually materialised. Rather, Vivaz claims that it had *no knowledge of any such plan* and was “unaware of what TPC was stating, nor did [it] know what it meant” by the reference to the takeover of OEI by TPC Properties in the 31 July 2019 Email. When given the opportunity to clarify Vivaz’s position on this issue during the hearing of the appeal, counsel for Vivaz maintained that Vivaz was uninvolved in (and thereby unaware of) any discussions pertaining to TPC Properties taking over the Company’s shares in OEI.

61 This argument also fails to address the fundamental point that if Vivaz was aware of a *potential* takeover of OEI by TPC Properties but remained silent and raised no queries or objections, this calls into question whether its decision to challenge the takeover only years later, after it had been finalised, was made in good faith.

62 Second, even if the disposal of the Company’s shares was done without the approval of the shareholders at a general meeting, we agree with the Judge that this was at best of tangential relevance. The central issue in this case is not whether formalistic requirements under the law were followed, but whether Vivaz was aware of the Impugned Transaction at the material time (GD at [68]). Vivaz’s contentions in this regard do not detract from the clear inference to be drawn from the 31 July 2019 Email that Vivaz was aware of the Impugned Transaction.

63 Third, while we agree with Vivaz, in principle, that its conduct of continuing to pay instalments for a 25% shareholding in the Company under the Kingsland-Vivaz SSA could *suggest* that it was unaware of the Impugned Transaction, this also does not diminish the compelling evidence in the 31 July 2019 Email that Vivaz was in fact aware of the Impugned Transaction. The continued payments are capable of alternative explanations – indeed, Mr Lee claims that the payments were not for shares in the Company, but instead for Hotel 228’s FFE (see above at [12] and [30(d)]). What cannot be explained away, is the clear reference to the takeover in the 31 July 2019 Email and Vivaz’s failure to seek clarification or express any concern about the matter.

64 In so far as it may be argued that Vivaz was aware of the proposed takeover but not of its details (such as the fact that it would be for no consideration), we reiterate that this is not Vivaz’s case (see above at [60]). The fact that Vivaz had been continuously chasing Mr Lee for a payout for its shares in the Company should not be taken to suggest that it had been under the misapprehension that the Impugned Transaction must have involved some consideration. The first mention of “cashing out” came about considerably later in a WhatsApp message in April 2020, well after the 31 July 2019 Email. Within the scheme of things, it cannot be reasonably inferred that there is a clear link between the WhatsApp message and the Impugned Transaction.

65 More importantly, Vivaz, at least initially, did not in fact suggest that there should be any such link. Rather, Ms Quek had raised the “cashing out” point as background for how Vivaz came to discover the Impugned Transaction and in support of its case that it had purchased Kingsland’s 25% shareholding in the Company, and not Hotel 228’s FF&E, under the Kingsland-Vivaz SSA.

66 It would appear that these points are only raised more explicitly now on appeal in support of Vivaz’s claim that it had expected to receive some consideration for the disposal of the Company’s shares in OEI (and resulting diminution in value of Vivaz’s shares in the Company). However, there is no clear contemporaneous evidence of such a link between the agreement for Mr Lee to purchase Vivaz’s shares in the Company and the Impugned Transaction. At no point did any of the correspondence regarding this agreement refer to the Impugned Transaction. Moreover, as noted above at [64], the first mention of this alleged agreement only came about in April 2020, well after the 31 July 2019 Email. There is also no suggestion of any relevant link in Ms Quek’s two affidavits. Instead, she suggests that this issue of “cashing out” arose after Vivaz became discontented with an increase in the land lease rate for Hotel 228. This strongly suggests that any attempt to draw such a link now is an afterthought, as this was not evident from the evidence adduced by Vivaz for the s 216A application. If indeed Vivaz had expected to be paid some consideration for the transfer of the shares under the Impugned Transaction, one would have expected Vivaz to have said so from the outset.

The 4 January 2022 Email

67 The 4 January 2022 Email was sent by Mr Lee to various individuals, including Vivaz’s directors, Ms Quek and Mr Wong. Vivaz does not dispute that the 4 January 2022 Email was received by its directors. The email states as follows:

Dear All,

...

As discussed in Singapore, thank you for acknowledging the Tax responsibilities of the individual party. Together with Mr Pheap, we will quickly proceed to resolve this with the

authorities by end of January for the sake of OED business continuity.

The total outstanding is United States Dollars One Million Eight Hundred Fifty Thousand Two Hundred Ninety-Two and cents Seventy Nine only (USD1,850,292.79). We will try our best to reduce the tax but have no guarantees.

For the avoidance of doubt:

The year 2016 to the year 2018 Shareholders are as follows:

1. TPC (21.87%)(Msqm will underwrites 25% of TPC due)
2. Vivaz (21.87%) 590
3. Golden Light (5.76%)
4. Kaka Wilson (18%)
5. Kingsland (22.5%)
6. Camtrip (10%)

The year 2019 to the year 2020 Shareholders are as follows:

- 1. TPC (95%)*
- 2. Camtrip (5%)*

The year 2020 to the year 2022 Shareholders are as follows:

- 1. MSQM (49%)*
- 2. ZTH (51%)*

...

[emphasis in original in bold; emphasis added in italics]

68 The Judge found that on any reading, it was obvious from the contents of the 4 January 2022 Email that from 2019, “TPC” (*ie*, Threepohco) was a majority shareholder of OED and Vivaz no longer had any beneficial ownership over OED (GD at [38]). Yet, Vivaz did not raise any question about this at the time. Vivaz attempts to explain that its directors had not responded to the email as its focus was on tax liability, and that its directors would not have been concerned as talks about cashing out Vivaz’s shares in the Company had already been ongoing. We find this explanation unsatisfactory and agree with the

Judge’s finding that if cashing out was front and centre in Vivaz’s directors’ minds, they would have been especially concerned if the very shares they were attempting to sell no longer bore any value, the Company having lost beneficial ownership over OED (GD at [40]).

69 Vivaz argues that the Judge’s finding that the 4 January 2022 Email would have immediately raised significant alarm and concern was speculative. The email’s focus was on tax liability and responsibility, not shareholding. The fact that the 4 January 2022 Email reflected that Vivaz was not responsible for OED’s tax from 2018 onwards was consistent with the parties’ agreement that Vivaz would not be responsible for tax during the period it was in charge of operating Hotel 228. More importantly, from 2020, Vivaz believed it had already reached an agreement to sell its 25% shares in the Company at a valuation of US\$3.2m to Mr Lee. Vivaz was simply not concerned with the reflected “shareholding” from 2019 onwards, as the plan was always for Vivaz to be bought out by Mr Lee.

70 With respect, Vivaz’s argument that the 4 January 2022 Email concerned tax liability and not shareholding misses the point. The liability to contribute to OED’s tax would have arisen by virtue of the parties’ status as (direct or indirect) shareholders of OED. Even if we were to accept Vivaz’s suggestion to look past the plain wording of the 4 January 2022 Email, which stated in no uncertain terms that it was referring to the parties’ shareholding in OED, the point remains that the tax liability would reflect the parties’ shareholding. Accordingly, the fact that Vivaz was not liable to pay OED’s tax from 2019 onwards would have indicated that Vivaz was no longer a beneficial shareholder of OED from that point.

71 While Vivaz claims that it had dismissed the 4 January 2022 Email as its contents were consistent with parties’ agreement that Vivaz would not have to contribute to OED’s tax for the period during which it was operating Hotel 228, notwithstanding that Vivaz continued to be an indirect shareholder of OED through its 25% shareholding in the Company, the existence of such an agreement is a bare assertion that is disputed by Mr Lee. In any case, Vivaz only operated Hotel 228 for the period between 2019 and 2020. Vivaz has not provided any reasonable explanation for why it was not expected to contribute to OED’s taxes for the period after 2020 despite remaining a beneficial shareholder of OED. That Vivaz believed it had entered into an agreement with Mr Lee to be bought out is no answer – this alleged agreement was not executed and Vivaz claims that it continued to hold shares in the Company after 2020, thereby retaining an indirect interest in OED and remaining liable for OED’s taxes.

72 In fact, Vivaz’s allegation that it would not have been alarmed by the contents of the 4 January 2022 Email sits uncomfortably with its own account of events. Vivaz’s own case is that it had (through its directors) become suspicious “[s]ometime in or around 2023” after its directors came across a document showing that the entities “ZTH Co Ltd” and “My Square Metre (KH) Co Ltd” were the 51% and 49% owners of Hotel 228 respectively. This information “came as a shock” to Vivaz’s directors because Vivaz “as a 25% shareholder of the Company which was the ultimate owner of the Hotel, was not at any material time informed that the shares in OED had been or were to be sold”. This prompted them to begin an investigation into what had happened. Yet this change in the shareholding of OED was not new information – it had been set out in the 4 January 2022 Email which Vivaz’s directors had received at least a year earlier. If the discovery of this information in 2023 came as a

shock and prompted an investigation, it is difficult to understand why the same information in the 4 January 2022 Email did not raise similar alarm bells when it was received.

73 If Vivaz’s case is that it did not care about any changes in OED’s ownership when it received the 4 January 2022 Email because it believed it had already secured its exit from the Company, that same logic should have applied in 2023. The agreement for Vivaz to be bought out by Mr Lee was no more certain in 2022 than in 2023. Vivaz’s own evidence was that on or about 28 September 2021, after various other plans to buy it out had fallen through, it had discovered that Mr Lee’s *original* plan to buy it out using units in Leedon Heights (a residential development in Cambodia) had also failed. While Mr Lee had “sought to assure [Vivaz] that the [deal] ... was still on”, there were from that point no longer any concrete options as to how Vivaz would be bought out. This state of affairs continued to the present day, with no material changes occurring between 2022 and 2023.

74 When questioned on this point at the hearing of the appeal, counsel for Vivaz was unable to provide any satisfactory explanation for the discrepancy.

75 This fortifies our view that the Judge was correct in finding that Vivaz (through Mr Wong and Ms Quek) knew of the transfer of the Company’s shares in OEI to TPC Properties (*ie*, the Impugned Transaction) some time before objection was raised. The Judge’s finding was premised on the 31 July 2019 Email and the 4 January 2022 Email, and we see no reason to differ from his analysis. We agree with his determination that these were “glaring pieces of documentation” (GD at [32]) which ran contrary to Vivaz’s case. In our view, Vivaz had failed to provide any acceptable explanations for its starkly

inconsistent position in the face of the 31 July 2019 Email and the 4 January 2022 Email.

76 Finally, we also note certain inconsistencies in Vivaz’s overall account of how it came to know of the Impugned Transaction. As we had observed, Vivaz’s account of how its suspicions were aroused sits uncomfortably with the 4 January 2022 Email (see above at [72]). Moreover, its account of what it discovered, and *when* it did so, is also difficult to follow. In Ms Quek’s First Affidavit, she claimed that Vivaz had initially only been aware of the transfer of OEI’s shares in OED and only learned of the Impugned Transaction at the shareholders’ meeting on 7 August 2024 (above at [15]–[20]). This account appears to cohere with the evidence that Vivaz had arranged for a shareholder search on *OED* in April 2024, and the two s 216A notices sent by Vivaz – the first notice sent on 5 July 2024 was premised on Vivaz’s discovery that “OEI was no longer a shareholder in OED”, while the second notice on 21 November 2024 was premised on the wrongful transfer of the Company’s shares in OEI, *ie*, the Impugned Transaction. However, in Ms Quek’s Second Affidavit, she shifted ground and claimed that the first time that Vivaz’s directors had heard of the Impugned Transaction was in *March 2024*, at a meeting with Mr Lee (above at [21]). Not only did this depart materially from the initial account in Ms Quek’s First Affidavit, but it also called Vivaz’s conduct into question. Since Vivaz’s directors had already been informed that the Company was no longer a shareholder of OEI in March 2024 at the latest, it is difficult to understand why the first notice sent on 5 July 2024 made no mention of the Impugned Transaction. These inconsistencies in Vivaz’s account further buttress our view that Vivaz was not honest regarding its knowledge of the Impugned Transaction.

The Kingsland-Vivaz SSA

77 For completeness, we consider the arguments put forward by Vivaz which centre on the Kingsland-Vivaz SSA. The Judge found that there was “some significance” to Vivaz’s ostensible purchase of Kingsland’s 25% shareholding in the Company pursuant to the Kingsland-Vivaz SSA. This was because if Mr Lee’s contentions (as detailed above at [30]) were true, the transaction demonstrated that, contrary to Vivaz’s contentions, it had known that the overall plans went beyond a simple purchase of shares from Kingsland and, subsequently, an attempted sale of shares to Mr Lee (GD at [41]).

78 The Judge then found that three pieces of documentary evidence supported Mr Lee’s case that Vivaz had known that the true subject of the transactions encapsulated in the Kingsland-Vivaz SSA was *not* the 25% shares in the Company (GD at [45]–[49]):

(a) An email sent by Mr Lee on 15 May 2020 requesting Vivaz’s assistance in providing a “list of FF&E recognise [*sic*] in LH books”, and Ms Quek’s reply on 18 May 2020 with an excel sheet valuing Hotel 228’s FF&E at about US\$3.6m (the “May 2020 Email Exchange”). According to Mr Lee, “LH” referred to Lumiere Hotel Co., Ltd (“LHCL”), a Cambodian company which was Vivaz’s nominee, used for managing the operations of Hotel 228. The Judge found that the May 2020 Email Exchange supported Mr Lee’s contention that Vivaz had gained ownership over Hotel 228’s FF&E.

(b) Three WhatsApp messages sent by Ms Quek in a group chat named “118/228/PPGT Settlement” (the “Settlement Messages”), which

the Judge found were aligned with Mr Lee’s case that the subject matter of the transaction was Hotel 228’s FF&E:

(i) Ms Quek had sent a message on 31 January 2023 at 10.23am stating that Vivaz was “still pending [a] response on ... 228 FF&E as part of asset value”. On Vivaz’s case, there was little reason why Hotel 228’s FF&E would be mentioned “as part of asset value”, without mention of Vivaz’s shares in the Company.

(ii) On 31 January 2023 at 10.47am, Ms Quek sent another message in the same WhatsApp group chat stating that “[o]n 228, we will claim against OED”. On Vivaz’s case, there was no agreement between OED and Vivaz to claim against as the only arrangement between the two parties was for Vivaz to “utilise the FF&E without costs for as long as [Mr Wong] and [Ms Quek] were managing Hotel 228”. It was only on Mr Lee’s case that there would have been an agreement between OED and Vivaz as part of the Threepohco-Vivaz Resolution.

(iii) On 3 April 2023 at 5.50pm, Ms Quek sent a message stating that “[o]n 228 ... USD3.2mil+ interest FF&E (pending settlement)”.

(c) WhatsApp messages in a chat group named “LHM” between Ms Quek and Mr Lee on 16 March 2022 (the “LHM Messages”). At 2.02pm, Ms Quek first questioned, “who is over the 3.2mil?”, before stating at 2.33pm, “how would our settlement consider [*sic*] free from liabilities”. While the Judge accepted that this was not an “especially significant point”, he noted that there would appear to have been little

reason for the use of nomenclature such as “settlement” and “liabilities” in a transaction for the sale of shares.

79 On appeal, Vivaz argues that it was inappropriate for the Judge to have determined the issue of its knowledge of the true nature of the Kingsland-Vivaz SSA, as this factual dispute could not be conclusively determined by the affidavit evidence before him alone. The evidence relied on by the Judge was not unequivocal:

(a) The reason why Mr Lee had asked Vivaz for the value of Hotel 228’s FF&E in the May 2020 Email Exchange was simply because Vivaz was the operator of Hotel 228 at the material time. Furthermore, Hotel 228’s FF&E was not reflected in the assets of LHCL at the material time, nor was there any mention of Hotel 228’s FF&E belonging to Vivaz in its valuation dated 30 November 2023.

(b) The Settlement Messages should be read in the context of Vivaz trying to get a settlement for the sum of US\$3.2m which it had transferred pursuant to the Kingsland-Vivaz SSA. The references to Hotel 228’s FF&E were because the parties decided to value the 25% shares in the Company against Hotel 228’s FF&E. In this regard, Vivaz notes that Mr Lee’s own position is that there was no distinction between Hotel 228’s FF&E and Vivaz’s shares in the Company.

(c) The LHM Messages related to a separate matter between the parties involving My Square Metre’s shares in one PPGT Development Pte Ltd, the subject of the dispute in HC/CWU 46/2025 and have no relation to the Kingsland-Vivaz SSA.

80 We address each piece of evidence in turn.

81 The May 2020 Email Exchange was, on its face, equivocal. While the fact that Mr Lee asked Vivaz for the value of Hotel 228’s FF&E could suggest that Vivaz had in fact gained ownership over Hotel 228’s FF&E, it could also be because, as Vivaz suggests, it was the operator of Hotel 228 at the time. Further, it is not apparent from Mr Lee’s email what was meant by “LH books”. While “LH” could certainly refer to LHCL (as contended by Mr Lee), it could also refer to Lumiere Hotel (*ie*, Hotel 228 itself). In any case, even if Vivaz understood Mr Lee to be referring to LHCL’s books, its failure to correct Mr Lee in its response does not necessarily suggest that Hotel 228’s FF&E was recorded in LHCL’s books. A mistake regarding which entity’s books Hotel 228’s FF&E was recorded in would have been of little consequence to the parties (as compared to, for example, the reference to the takeover in the 31 July 2019 Email).

82 While the Settlement Messages may be stronger evidence in favour of Mr Lee’s account, we agree with Vivaz that they are not unequivocal. In our view, Vivaz’s contention that the references to FF&E are due to parties “[deciding] to value the 25% shares in the Company against Hotel 228’s FF&E” is not completely implausible, given Mr Lee’s own evidence to the effect that Hotel 228’s FFE was “referred to by the parties interchangeably with Vivaz’s shares in the Company” [emphasis in original].

83 Finally, Vivaz’s explanation that the LHM Messages were sent in relation to a separate matter between the parties is plausible. We also note that Mr Lee has not raised any objection to Vivaz’s interpretation of the LHM Messages in his submissions before this court.

84 To sum up, we are of the view that the evidence before the Judge pertaining to the Kingsland-Vivaz SSA is equivocal at best and of no assistance to either party. We agree with Vivaz that the evidence is not conclusive in and of itself and not so compelling and incontrovertible that it would suffice to – adopting the language in *Agus Irawan* at [6] – *destroy the credibility* of Vivaz’s propounded case. It bears repeating nonetheless that Vivaz’s primary case on appeal was that it was unaware of the Impugned Transaction. Notwithstanding our reservations in respect of the Judge’s evaluation of the Kingsland-Vivaz SSA, we do not think that the Judge had erred in his primary finding that Vivaz had known of the Impugned Transaction upon receipt of the 31 July 2019 Email, if not even earlier.

The Mr Lee-Threepohco Asset Swap

85 The Judge had further found that Vivaz’s knowledge of the Mr Lee-Threepohco Asset Swap was not pivotal to his overall conclusion that Vivaz had not discharged its burden of demonstrating good faith (GD at [53]). It was not strictly necessary for the Judge to make any finding on this point, and the Judge had clarified that he did so only for completeness. As such, for the purpose of this appeal, we see no need for this court to express any view on these findings as they have no material impact on the appeal.

86 Irrespective of whether the Judge’s findings in relation to the Mr Lee-Threepohco Asset Swap were correct, the Judge was entitled to find that Vivaz was aware of the Impugned Transaction by end July 2019, and accordingly, that Vivaz had not been honest about when it had learned of the Impugned Transaction.

Issue 2: Whether the Judge erred in finding that Vivaz has not discharged its burden under s 216A to prove good faith

87 The issue is whether Vivaz’s lack of candour regarding its knowledge of the Impugned Transaction would suggest that Vivaz is not a proper person to represent the Company’s interests.

88 According to Vivaz, it has put forward a case “to the best of its ability and what it believes is reflective of the truth behind the matter” and also adduced a “significant amount of contemporaneous evidence in support of its case.” Further, Vivaz asserts that a lack of candour is often not the sole basis for a finding that an applicant lacks good faith – it is often linked to an identified collateral purpose and/or a finding that the applicant did not have an honest belief that there was a good cause of action with reasonable prospects of success. In this regard, Vivaz maintains that it has demonstrated that it subjectively believed that there is a good cause of action for the Company to prosecute. Vivaz had adduced a significant amount of contemporaneous evidence demonstrating that it genuinely believed that: (a) it had acquired shares from Kingsland pursuant to the Kingsland-Vivaz SSA; and (b) its 25% shareholding in the Company was worth millions of dollars. From mid-2020 to 2023, Vivaz had been sincerely and consistently trying to resolve the issue relating to its sale of its shares in the Company to Mr Lee. In this vein, Vivaz had also clearly brought OA 1330 with the predominant purpose of restoring value to the Company. As such, Vivaz’s interests are aligned with those of the Company.

89 We are not unsympathetic to Vivaz’s position. As the Judge rightly observed, it is impossible for the court, at this stage, to come to any conclusions on what precisely was going on between the parties, and evidently neither party was being completely candid about what had transpired (GD at [66]). There was

also evidence that supported Vivaz’s case – in particular, in the WhatsApp messages between the parties, Mr Lee never appeared to deny the existence of an agreement for Vivaz to be bought out, nor did he question Vivaz on what agreement it was referring to.

90 The parties’ lack of clarity (and candour) might simply be a reflection of the complex and tangled web of restructuring that the parties had contemplated in 2019, which was further complicated after the outbreak of the COVID-19 pandemic in 2020. The true state of affairs might well lie somewhere in between the positions presented to the court by either party. However, the fact remains that Vivaz has anchored its case on being *unaware* of the Impugned Transaction, when the two emails (namely, the 31 July 2019 Email and the 4 January 2022 Email) relied on by the Judge clearly demonstrate otherwise. This means that it is not simply a case of a lack of candour on Vivaz’s part. Rather, Vivaz has misrepresented to the court its knowledge regarding the Impugned Transaction which formed the entire basis of its proposed derivative action.

91 This casts significant doubt on Vivaz’s good faith in bringing the derivative action. Vivaz’s dishonesty regarding its knowledge of the Impugned Transaction necessarily raises the concern of why it saw fit to misrepresent its position on this issue to the court. To date, Vivaz has failed to provide an acceptable explanation for this discrepancy between its position and the two emails. It is no answer for Vivaz to point to its alleged genuine belief in a good cause of action or its motivation of restoring value to the Company. As Vivaz itself acknowledges, “[i]n appropriate cases, the Court can find bad faith solely on the applicant’s dishonesty”.

92 In so far as Vivaz may suggest that its application should be allowed because its proposed derivative action to recover the assets of the Company would be in the Company's interests, we reiterate our observation at [44] above that the requirement of good faith under s 216A(3)(b) of the Companies Act is distinct from the requirement that the proposed derivative action be in the interests of the company under s 216A(3)(c) of the Companies Act. Even if it is *prima facie* in the Company's interests to bring an action, that should not weigh on the assessment of whether *Vivaz* is the proper person to bring it – which is, at its core, what the good faith requirement seeks to address. The fact remains that Vivaz's choice to misrepresent its knowledge of the Impugned Transaction raises serious questions as to its motivations, to which Vivaz has failed to provide a satisfactory answer.

93 Our conclusion that the Judge was correct in finding that Vivaz did not tell the truth regarding when it learned of the Impugned Transaction also means that there was an inordinate five-year delay between the time Vivaz became aware of the Impugned Transaction in or around 2019 and when it filed its s 216A application on 20 December 2024. This delay in bringing the s 216A application, despite the alleged seriousness of the harm to the Company's interests, supports a finding that Vivaz was not acting in good faith (see *Malcolm Tan* at [45]–[48]).

94 In so far as the Judge was prepared to find that Vivaz had made the s 216A application with a collateral purpose, this was based on his view that Vivaz had not acted in good faith. We do not think that it is necessary to address the arguments on whether the Judge had erred in finding a collateral purpose for the purpose of determining this appeal. We accept that the weight of the evidence supports the Judge's conclusion that Vivaz had known of the

Impugned Transaction and had not acted in good faith. At the very least, Vivaz ought reasonably to have known of the Impugned Transaction based on the available evidence. For reasons best known to Vivaz itself, it may have chosen to gloss over what was being discussed at the time. This would still be contrary to its primary assertion that it was kept in the dark and did not know of the Impugned Transaction.

95 We briefly address Vivaz’s argument that the Judge was wrong to adopt a higher threshold requiring full and frank disclosure. Despite certain references that the Judge had made to Vivaz’s various failings in respect of “disclosure” (see, eg, GD at [73] and [84]), we do not think that the Judge had in fact imposed a higher threshold than was appropriate. From his analysis, he was conscious that the enquiry pertained to whether Vivaz had acted in good faith and with candour.

96 Accordingly, we find that the Judge was not plainly wrong in finding that Vivaz had not discharged its burden of demonstrating good faith in making the s 216A application. Vivaz should therefore not be granted permission to commence the derivative action.

Conclusion

97 For the above reasons, we dismiss Vivaz’s appeal. We order Vivaz to bear Mr Lee’s costs of the appeal to be fixed at S\$50,000 inclusive of disbursements. We further order Vivaz to pay costs of S\$6,000 inclusive of

disbursements to Mr Lee for SUM 45 and SUM 47. The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

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