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Petroships Investment Pte Ltd
v
Wealthplus Pte Ltd and others and another matter

[2016] SGCA 17

Court of Appeal — Civil Appeal No 113 of 2014 and Summons No 293 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
25 November 2015

Companies — Members — Derivative action

21 March 2016

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 Case law is the lifeblood of the common law system in general and the Singapore legal system in particular. This is not surprising as case law is, in fact, a foundational building block in the genius of the common law and equity as we know it. Case law is often also an integral part of the process of statutory interpretation. It is, however, important to note that case law is not important for its own sake. It must be *relevant*. On rare occasions, it is not. One such occasion would be when a legal rule or principle is being formulated for the very first time – and/or for which there is no (or at least no directly relevant)

case law authority. At this juncture, the court must have recourse to *general (or, more accurately, first) principles* (which would entail an analysis which is guided, *inter alia*, by context, reason as well as common sense). As we shall see in a moment, this is precisely one such occasion. The judgment against which the present appeal has been brought (see *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others* [2015] SGHC 145 ("the GD")) focused on whether or not the pre-requisites pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("s 216A") had been satisfied (in particular, whether the claim had been brought in good faith). *However*, in our view, the *threshold* issue was whether or not s 216A was *even applicable in the first place* – particularly given the fact that the company concerned was *already in* ***liquidation***. In this last-mentioned regard, there was a dearth of *directly relevant* case law. Recourse had to be had to *general principles*. In this regard, it was clear, in our view, that s 216A was ***not applicable*** where the company concerned had gone into ***liquidation***. Hence, it was unnecessary for us to inquire (as the court below did) into the *application* of s 216A since, *ex hypothesi*, this provision *was not applicable in the first place*. We now set out the detailed grounds for our decision.

Facts

Project to exploit land use rights in China

2 The appellant was Petroships Investments Pte Ltd ("Petroships"), which was a minority shareholder in Wealthplus Pte Ltd ("Wealthplus"). Wealthplus was the first respondent. Its shareholders (and their shareholdings) were:

(a) Megacity Investment Pte Ltd ("Megacity"), the third respondent: 49%;

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(b) Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd ("KBBCE"): 41%; and

(c) Petroships: 10%.

3 The ultimate parent company of Megacity and KBBCE was Koh Brothers Group Limited ("Koh Bros Group"), which was the second respondent. Listed in 1994, Koh Bros Group describes itself as a well-established construction, property development and specialist engineering solutions provider. It offers construction services with various subsidiaries, joint ventures and associated companies in Asia, including China.

4 Early in 1998, Koh Bros Group founder, Koh Tiat Meng, invited Alan Chan, who controlled Petroships, to invest in a project to exploit certain land use rights in China. These rights, to develop five plots of land in Shantou, China, were initially held by KBBCE. Alan Chan agreed. Wealthplus was created as the investment vehicle for the project and held the land use rights through certain subsidiaries. Initially, Megacity and Petroships were the only two shareholders of Wealthplus. In 2011, Megacity transferred a portion of its 90% shareholding to KBBCE such that the former held 49% and the latter held 41% shareholding.

5 The terms of the joint investment between Petroships and Megacity were set out in a joint venture agreement dated 8 June 1998. It was stipulated that Wealthplus' paid-up capital would be $1m, with Megacity contributing 90% and Petroships the remaining 10% (in proportion to their shareholdings at that particular point in time). Wealthplus would also reimburse KBBCE for the cost of the land use rights, up to the amount of $27.7m. The shareholders would finance the first tranche of the reimbursement with an $11m loan to Wealthplus.

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As the contributions to the loan were in accordance with the shareholders' respective shareholdings, Petroships extended a loan of $1.1m to Wealthplus.

6 From July 1998 to September 2009, Wealthplus had three directors on its board. Petroships nominated Alan Chan. Megacity nominated Koh Teak Huat (Koh Tiat Meng's brother) and Koh Keng Siang (Koh Tiat Meng's son). Besides being Wealthplus directors, Koh Teak Huat and Koh Keng Siang were also directors in other companies within the Koh Bros Group.

Sale of land use rights

7 The project to exploit the land use rights in China did not come to pass. In August 2007, Wealthplus caused the rights to be sold with Petroships' consent. Wealthplus' subsidiaries collectively received $19.4m in sale proceeds. From 2008, Petroships started agitating for its share of the profits of the investment, the recovery of its capital and the repayment of its $1.1m loan to Wealthplus. Disagreements arose between Alan Chan on one side, and Koh Teak Huat and Koh Keng Siang on the other. This led Alan Chan to resign from his Wealthplus directorship in September 2009.

Series of suits

8 The disagreements spawned a series of successive suits that Petroships commenced against Megacity, Wealthplus and Koh Bros Group in different combinations. All were struck out. They are summarised as follows:

(a) On 27 March 2009, Petroships sued Megacity (Suit No 280 of 2009). It alleged that Megacity had failed to pay Petroships its share of the profits arising from the investment (amounting to $117,728), and that Megacity had failed to repay Petroships' $1.1m loan. On 21 August

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2009, the case was struck out on the basis that it disclosed no reasonable cause of action and/or was scandalous, frivolous or vexatious.

(b) On 12 January 2010, Petroships sued Megacity and Wealthplus (Suit No 23 of 2010). It alleged that Wealthplus had failed to repay Petroships' $1.1m loan, that Megacity had failed to procure Wealthplus' repayment of the loan, that Petroships, as a minority shareholder, had been oppressed by Wealthplus' delay in repaying the loan, and that Megacity and Wealthplus had acted in an unfairly discriminatory way towards Petroships. Petroships sought an order for Megacity to procure Wealthplus to repay the $1.1m loan and, alternatively, an order for Wealthplus to be wound up and to be ordered to repay the loan. On 9 September 2010, the case was struck out for breach of a peremptory order – Petroships had failed to meet timelines for the filing of documents.

(c) On 12 October 2010, Petroships sued Megacity and Wealthplus again (Suit No 783 of 2010). The claim was identical to that in the preceding suit. On 11 May 2011, it was struck out for being scandalous, frivolous or vexatious and/or otherwise an abuse of the court process.

(d) On 25 November 2011, Petroships sued Koh Bros Group in Suit No 867 of 2011 ("Suit 867/2011"). It alleged that both parties had a contractual relationship. Petroships alleged that Koh Bros Group had wrongfully caused Wealthplus to enter into various transactions against its interest. Petroships also alleged that Koh Bros Group had failed to repay the $1.1m loan, failed to distribute to Petroships its share of the profits realised by Wealthplus, and was liable to account for Petroships' share of Wealthplus' profits.

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9 Preceding the last-mentioned suit (*ie*, Suit 867/2011) was a letter dated 17 August 2011 to Koh Tiat Meng, in which Alan Chan (through his solicitors) questioned four transactions ("the four transactions") that Wealthplus had entered into. Petroships claimed that these transactions did not seem to be in Wealthplus' interests, *viz*:

(a) sums totalling $14.9m were transferred from Wealthplus to various companies within the Koh Bros Group which appeared unrelated to Wealthplus' investment in China;

(b) a sum of $135,005 owed to Wealthplus in 2008 was written off and described only as bad debts;

(c) a sum of $651,658, being provision for impairment in 2009 for non-trade related debts; and

(d) a sum of $559,631, being director's fees paid in 2008 and 2009.

10 Wealthplus' solicitors replied to the aforementioned letter and stated that Wealthplus was the more appropriate party to address these queries. Wealthplus told Alan Chan that its directors would be pleased to answer his queries at its coming annual general meeting, which took place on 22 November 2011. At the meeting, the explanations offered were as follows:

(a) the transfer of various sums to companies within the Koh Bros Group was part of the reimbursement cost for the acquisition of the land in China as per the joint venture agreement dated 8 June 1998;

(b) the write-off of S$135,005 comprised mainly the outstanding balances due from Wealthplus' three former subsidiaries in

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China (which had been disposed of in the 2007 financial year) to their immediate holding company, which could not be recovered;

(c) the provision for impairment of $651,658 included:

(i) an outstanding balance of $537,253 due from the three former subsidiaries (which were disposed of in the 2007 financial year) to related companies in China, the recovery of which was doubtful; and

(ii) a prepayment of S$112,335 for an amount incurred by a director relating to the disposal of the land in China; and

(d) Wealthplus provided director's remuneration to Koh Teak Huat, as he was the only director who actively managed Wealthplus' business. He was paid director's remuneration for contributions made in respect of the disposal of land in China. Koh Keng Siang and Alan Chan received no directors' remuneration.

11 Dissatisfied with this response, Petroships commenced Suit 867/2011 three days after the 2011 AGM. On 26 March 2012, the suit was struck out for being frivolous and vexatious; the assistant registrar found that Petroships had failed to adduce any evidence of a contractual relationship with Koh Bros Group. On 10 May 2012, Petroships' appeal to the High Court was dismissed.

The s 216A application

12 On 19 June 2012, Petroships served notice on Wealthplus' directors as required under s 216A(3)(*a*) (hereafter, all statutory provisions refer to the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") unless otherwise stated).

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This informed the directors of the minority shareholder's intention to apply for leave to bring a statutory derivation action in Wealthplus' name against its directors if they failed to provide a full explanation of the four transactions within 14 days, or to commence necessary legal actions against the directors (for having caused Wealthplus to make the four transactions) and various companies in the Koh Bros Group (for recovery of the transferred monies).

13 Wealthplus' directors failed to act on Petroships' notice. On 14 August 2012, Petroships filed Originating Summons No 766 of 2012 ("OS 766") to seek the court's leave to commence a derivative action against the two groups of defendants. In one group were the Wealthplus directors, Koh Teak Huat and Koh Keng Siang. In the other group were Megacity, KBBCE, Koh Bros Group, and other related companies in the Group. The subject matter of the proposed derivative action comprised the four transactions (that Alan Chan queried on 17 August 2011 (see above at [9])) which were alleged to be among the transactions which did not appear to be in Wealthplus' interests in Suit 867/2011.

Wealthplus in members' voluntary liquidation

14 On 21 August 2012, a week after OS 766 was filed, Wealthplus was placed in members' voluntary liquidation through a special resolution passed by the requisite majority of its shareholders. Petroships applied unsuccessfully for an injunction to restrain Wealthplus from acting on the resolution. Liquidators were appointed ("the liquidators").

15 On 9 October 2012, Petroships drew to the liquidators' attention the four transactions. It asked them if they accepted the directors' explanations and whether they would be taking any action to vindicate Wealthplus' rights. On

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16 November 2012, the liquidators stated that they intended to take steps to investigate Petroships' allegations provided, *inter alia*, that the shareholders consented. However, the shareholders could not arrive at any consensus. On 28 January 2013, the liquidators thus applied to the High Court for directions. But before the application could be heard, Megacity and KBBCE (who owned a combined 90% of Wealthplus) requisitioned an extraordinary general meeting to consider a resolution to remove the liquidators from office. The application was adjourned pending the meeting, which was scheduled in August 2013. Before the meeting, the liquidators accepted the inevitable and tendered their resignations. At the meeting on 21 August 2013, Wealthplus resolved to accept the liquidators' resignations and appoint new liquidators.

16 Petroships asked the new liquidators ("the new liquidators") about the four transactions. The new liquidators indicated that they did not intend to take over the previous liquidators' application, which was accordingly withdrawn. The new liquidators adopted a neutral stance with regard to Petroships' application in OS 766. In September 2013, Koh Bros Group and Megacity applied successfully to be added as respondents to oppose the application.

Decision of the court below

17 In OS 766, the High Court judge ("the Judge") did not grant Petroships leave to commence derivative action. While Petroships had complied with the notice pre-requisite (see above at [12]), he held that the pre-requisites in s 216A(3)(*b*) and s 216A(3)(*c*) were not met.

18 He was not satisfied that Petroships was acting in good faith within the meaning of s 216A(3)(*b*) for the following reasons:

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(a) Petroships had an illegitimate collateral purpose in seeking leave to bring the derivative action as its "real purpose" was to recover its $1.1m loan to Wealthplus and its share of the profits from its investment in Wealthplus (see the GD at [101]). This inference was irresistible from the nature of the actions previously commenced by Petroships.

(b) The Judge, referring to the English High Court decision of *Iesini v Westrip Holdings Ltd* [2010] BCC 420, accepted that a shareholder acted in good faith so long as its "dominant purpose" was to benefit the company. On this test, the Judge held that Petroships' collateral purpose was its dominant purpose in pursuing the derivative action, as it would not otherwise have brought the application (see the GD at [146]–[147]).

(c) Petroships' delay in applying for leave to commence the derivative action could be taken as an indication that it lacked the requisite good faith. Each time it had a choice, Petroships pursued a remedy for alleged wrongs which it claimed to have suffered in preference to vindicating Wealthplus' rights (see the GD at [115]–[116]).

(d) Alan Chan was dishonest in the course of the hearing and his lack of honesty was attributable to Petroships (see the GD at [117]).

(e) Petroships failed to name Alan Chan as a defendant in the proposed derivative action although Wealthplus had entered into most of the impugned transactions while he was a director (from July 1998 to September 2009). This meant that Wealthplus had a similarly arguable claim against Alan Chan for breach of directors' duties as well. That Petroships did not propose to sue him was evidence of its collateral

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purpose, which had nothing to do with remedying the wrongs allegedly suffered by Wealthplus (see the GD at [129]–[138]).

19 As the s 216A pre-requisites are cumulative, the Judge recognised that it was unnecessary to go on to assess if Petroships' proposed action was *prima facie* in Wealthplus' interests within the meaning of s 216A(3)(*c*). However, he found that Petroships' application failed under this limb as well.

20 The Judge stated that the question of whether a proposed derivative action was *prima facie* in the company's interests involved not just an assessment of the legal merits of the action to determine if it was "legitimate and arguable" but also a holistic consideration of whether the action was in the "practical and commercial interests of the company" (see the GD at [152]–[153]). This was where the Judge considered the fact that Wealthplus was in liquidation. He was prepared to assume that the proposed derivative action was legitimate and arguable. However, he found that the action was not *prima facie* in the company's interests as the remedy that Petroships sought – for its proposed action to be given independent consideration untainted by the majority shareholders' self-interest – was available by a means which did not require Wealthplus to be brought into litigation against its will. Redress was available through the liquidators (see the GD at [154]).

21 The Judge observed that, in liquidation, control shifted from the self-interested majority to the liquidator, who was duty bound to exercise his powers "competently and impartially, without fear or favour" (see the GD at [157]). In liquidation, it was the liquidator and not the board of directors who was empowered under the Act (see s 305(1)(*b*) read with s 272(2)(*a*)) to unilaterally bring or defend legal proceedings in the name of the company, without having

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to seek shareholders' approval at a general meeting (see the GD at [156]). Therefore, the underlying rationale for a derivative action "largely" disappeared when the company was in liquidation (see the GD at [157]).

22 The Judge dismissed Petroships' argument that the derivative action had continued relevance despite the fact that Wealthplus had entered into liquidation. Petroships argued that in a members' voluntary liquidation, the majority shareholders retained the power to remove the liquidator under s 294(3). This meant that Wealthplus' new liquidators would not act against the wrongdoing majority for fear of being removed from their appointments. The Judge disagreed. Petroships had provided no grounds to support its conclusion. He also held that a derivative action was inappropriate even if Petroships could demonstrate that the liquidators had refused to act on the allegations out of self-interest. In such a situation, the Act and common law provided Petroships with alternative avenues to pursue its claims without having to commence a derivative action. First, it could apply to court for the liquidators to be replaced with its nominees under s 302. Second, it could apply to court for a reversal of the liquidators' decision and seek a direction for the liquidators to commence action under s 315. Third, it could invite the court to exercise its common law power to order the liquidators to allow Petroships, as a contributory and therefore a party to the liquidation, to bring proceedings in the name of the company, provided that Petroships agreed to give the necessary indemnities (see the GD at [162]). We would also observe, parenthetically, that an action could also be brought against a liquidator for breach of duty under s 341 (see also Tan Cheng Han SC (gen ed), *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, Revised, 2009) ("*Walter Woon on Company Law*") at para 17.146).

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The parties' arguments on appeal

The appellant's case

23 Before us, Petroships maintained that it was acting in good faith within the meaning of s 216A(3)(*b*). Petroships denied that it harboured a collateral purpose – its primary purpose was to recover debts due to Wealthplus, which then stood to recover a significant amount of assets for distribution in liquidation. Petroships submitted that even if its dominant purpose was to obtain a remedy for the alleged wrongs that it had suffered, this was entirely consistent with Wealthplus' interests. Petroships was entitled to act in its self-interest. Petroships argued against the drawing of inferences from its first three actions (see above at [(8(a)–(8(c)]), as these actions were commenced by its previous counsel without authorisation. Petroships further submitted that Alan Chan was not involved in any of the impugned transactions. To prove its honest belief that it had a good cause of action, Petroships also sought to adduce new evidence by way of Summons No 293 of 2015 ("the summons"). The new evidence included documents that purportedly demonstrated the new liquidators' lack of probity.

24 Petroships advanced two arguments to support its contention that the proposed derivative action was *prima facie* in Wealthplus' interests within the meaning of s 216A(3)(*c*). First, it argued that the rationale for a derivative action had not been displaced by liquidation. Wealthplus was in a members' voluntary liquidation, and therefore members retained the power to remove a liquidator by special resolution under s 294(3). Petroships argued that on the facts, the new liquidators were "beholden to [the] will" of the wrongdoing majority shareholders, which continued to exercise "effective control" over Wealthplus. The correspondence and documents that Petroships sought to adduce as new evidence were alleged proof of continued wrongdoer control.

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25 Second, Petroships argued that the alternative remedies proposed by the Judge were "wholly impracticable and/or unnecessary". Petroships submitted that the respondents bore the burden of demonstrating that the alternative remedies would afford a better remedy for Wealthplus. The respondents had only pointed to the theoretical existence of these alternative "remedies" without showing how they would afford a better remedy for Wealthplus.

The respondents' case

26 Koh Bros Group and Megacity submitted that the fact that Wealthplus was in liquidation rendered Petroships' case a non-starter. They cited common law authorities from England, Australia and Hong Kong to support the proposition that, at common law, a derivative action cannot be brought in the name of a company which was already in liquidation. The respondents submitted that the *statutory* remedy (pursuant to s 216A) was likewise unavailable in liquidation. In support of this argument, they cited English and Australian authorities, including the English High Court decision of *Cinematic Finance Limited v Dominic Ryder and Others* [2010] EWHC 3387 (Ch) ("*Cinematic Finance Limited*") and the New South Wales Court of Appeal decision of *Chahwan v Euphoric Pty Ltd and another* [2008] NSWCA 52 ("*Chahwan*"), which we shall return to below. On the back of these authorities, the respondents submitted that s 216A provides a remedy for minority shareholders when directors refuse to enforce a company's rights. However, in liquidation, the power to run the company shifts from the board of directors to the liquidators, the latter of whom are governed by the Act.

27 In any event, the respondents submitted that Petroships was not acting in good faith within the meaning of s 216A(3)(*b*). They contended that the derivative action was aimed at circumventing the striking out orders in the

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various actions, and that Alan Chan was allegedly dishonest and was himself a director of Wealthplus until 22 September 2009. They also disagreed with Petroships' various arguments on appeal, including the contention that the requirement of good faith was satisfied so long as the action appeared to be in Wealthplus' interests, and that Petroships' motive was irrelevant.

28 Koh Bros Group and Megacity also submitted that it was not in Wealthplus' interests that derivative action be brought. The alleged transfers to various companies within the Koh Bros Group were in fact receivables belonging to Wealthplus. They alleged that Petroships had since tailored its claim from one based on the alleged transfers to one based on the liquidators' alleged refusal to collect debts owed to Wealthplus. This was, *inter alia*, problematic as the proper forum of complaint would be the winding up regime under the Act and not s 216A. Koh Bros Group and Megacity further submitted that there were proper commercial reasons for writing off the bad debts and the provision of impairment, and that the director's remuneration was justifiable as the land in China could not otherwise have been sold.

The appellant's reply

29 Petroships made various counter-arguments in its reply. Of these arguments, the most important for the purpose of this appeal relates to its submission that s 216A remains available even when a company is in liquidation. Petroships submitted that the provisions and case law did not support the assertion that s 216A is unavailable in the context of all companies in liquidation. Such an assertion ignored the situation of a company which was in members' voluntary liquidation, where, on the new evidence sought to be adduced, the wrongdoer majority continued to be in *de facto* control of the company and could prevent actions being brought against them.

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30 Petroships also submitted that it was wrong to follow the approach in other jurisdictions in relation to the non-availability of the common law derivative action when a company was in liquidation. This was because the statutory derivative action had to be taken on its own terms – it was not a mere codification of the common law derivative action but a response to the shortcomings of the remedy at common law.

31 Petroships further distinguished the decisions cited by Megacity and Koh Bros Group on, *inter alia*, the basis that in those decisions, the factual situations were such that there was no further wrongdoer control. It suggested that the underlying principle to be drawn from the cases was that members had the right to take action on behalf of the company to vindicate its rights "if the present controllers of the company (be it the directors or the liquidators) refuse to enforce the company's rights". Petroships did note however, that the case of *Chahwan* arguably supported the contention that liquidation would remove the availability of statutory derivative action. But Petroships submitted that that decision was hardly of assistance as it was based on a significantly different provision in the Australian Corporations Act 2001 (Cth) ("the Australian Act"). Moreover, it was submitted that it was unclear whether future Australian decisions would adopt the approach in *Chahwan*.

Our decision

32 The singular – and crucial – issue before us was whether Petroships should be granted leave under s 216A to commence statutory derivative action in Wealthplus' name against its directors. It was apparent that most of the ink spilled was aimed at addressing whether Petroships fulfilled the pre-requisites in s 216A, specifically, s 216A(3)(*b*)–(*c*). However, this, with respect, put the cart before the horse. As we observed at the beginning of our grounds, the

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threshold issue was whether s 216A was even applicable in the first place, as Wealthplus was already in liquidation. In the context of Singapore's statutory derivative action as enshrined in s 216A, this was a question for which no answer was available in *directly* relevant case law. We thus proceeded to approach this novel question on first principles. Our approach started with the statutory text, before we explored the legislative history and case law. At the end of the analysis, we were satisfied that s 216A is unavailable once a company is in liquidation.

The statutory text

33 Section 216A states 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.
>
> (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

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> 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.
>
> …
>
> [emphasis added]

34 Petroships submitted that nothing in s 216A suggested that the remedy was unavailable in liquidation. In fact, the express wording suggested that s 216A was applicable to both going concerns as well as companies in liquidation. It anchored its argument on s 216A(2), which stipulates that a complainant can apply for leave to, *inter alia*, bring an action in the name of and on behalf "of the company". Since s 4 defines "company" as one incorporated pursuant to the Act or any corresponding previous written law, "company" would include both going concerns as well as companies in liquidation.

35 We disagreed as s 216A suggests, on the contrary, that the application for leave to commence a derivative action is in the context of going concerns. Section 4 states that the definitions therein apply only in so far as the contrary intention does not appear. Section 216A(2) is subject to s 216A(3). Section 216A(3)(*a*), which is the notice pre-requisite, stipulates that no action may be brought unless the court is satisfied that the complainant has given 14 days' notice to the *directors* of the company of its intention to apply for leave to commence the action *if the directors* do not bring, diligently prosecute or defend or discontinue the action or arbitration. In this regard, in the Singapore High Court decision of *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980, Judith Prakash J observed as follows (at [14]):

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> Counsel for Ms Kao, Mr Davinder Singh SC, contended that *this notice requirement* served *to give* ***the directors*** *a chance to consider a response to the complaint provided in the notice*. I accepted Mr Singh's suggested rationale as it provided both practical and commercial sense. If the company would be willing to pursue the complaint on its own, the leave application would become redundant, and no further legal costs would be incurred or wasted in dealing with the issue of whether leave ought to be granted. [emphasis added in italics and bold italics]

Reference may also be made to Pearlie Koh, "Shareholder Litigation – Corporate Wrongs" in ch 10 of Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015), where the learned author observes as follows (at paras 10.050−10.051):

> **10.050** The objective of the requirement of giving notice to the directors of the company is to give the company, acting through its board of directors, the opportunity to evaluate the complaint and consider its rights and appropriate course of action. This recognises that the company is the proper plaintiff, and that it should therefore be given the opportunity to address the complainant's concern. In the case of an application for leave to commence an action on the company's behalf, the board may, when it receives notice, respond by deciding that the company should shoulder the responsibility for the suit, thus making the derivative action unnecessary. As Judith Prakash J explained in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* (*"Fong Wai Lyn Carolyn"*) [[2011] 3 SLR 980 at [14], also reproduced above]*:*
>
> > If the company would be willing to pursue the complaint on its own, the leave application would become redundant, and no further legal costs would be incurred or wasted in dealing with the issue of whether leave ought to be granted.
>
> **10.051** Alternatively, the directors may take such steps as to correct or remedy the situation that formed the basis for the complainant's application. For example, the wrongdoer might be dismissed or demoted. This notwithstanding, there may still be a need to consider if leave ought nevertheless to be granted because the company had already suffered the damage or loss caused by the alleged wrong(s), which loss may not have been fully remedied by the *ex post* remedial action. However, the directors' response may be relevant to the question whether it would, in the circumstances, be in the company's interests that the proposed action be brought.

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36 Evidently, the scenario envisaged in s 216A is one where there exists *directors* who are capable of taking action to vindicate the company's rights, *ie*, that they remain in *active management*. Whilst a company is a going concern, it is normally for the board of directors to authorise legal proceedings as the power to manage is usually vested in the board: see *Walter Woon on Company Law* at para 9.6. However, when a company enters into liquidation, the board is effectively *functus officio*; the liquidator is now in the driver's seat. For example, under s 294(2), which is applicable only to members' voluntary winding up, all powers of the directors cease on the appointment of a liquidator, except in so far as the liquidator, or the company in general meeting with the liquidator's consent, approves the continuance thereof. Hence, the directors have no power to react to any notice served pursuant to s 216A(3)(*a*), whether to prosecute, defend or discontinue an action on the company's behalf. In this context, it would make little sense to require slavish adherence to the notice pre-requisite. Instead, corporate actions may be commenced by the liquidator when a company is in liquidation: see *Walter Woon on Company Law* at para 9.7. Section 272(2)(*a*) grants the power to "bring or defend any action or other legal proceeding in the name and on behalf of the company" to the liquidator, who is, according to s 272(3), subject to the control of the court in its exercise of various powers under s 272. Section 272(3) further states that any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of the liquidator's powers.

37 Section 216B further indicates that s 216A is meant to be applied to a company other than one under the control of a liquidator, as it envisages ratification of acts by the members of a company. Section 216B states as follows:

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> **Evidence of shareholders' approval not decisive — Court approval to discontinue action under section 216A**
>
> **216B.**—(1) An application made or an action brought or intervened in under section 216A shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company *has been or may be approved by the members of the company*, but evidence of approval by the members may be taken into account by the Court in making an order under section 216A.
>
> …
>
> [emphasis added]

Legislative history

38 The legislative history of s 216A does not evince a contrary interpretation to that which has just been proffered. In 1993, the Singapore Parliament decided to introduce ss 216A and 216B into the Act. The provisions were based on equivalent provisions in Canada, which introduced the relevant federal legislation in 1975. This provided minority shareholders with a statutory avenue to commence an action in the name of the company, therefore providing them "with a way around the vague rule" in the English case of *Foss v Harbottle* (1843) 2 Hare 461 ("*Foss v Harbottle*"): see Meng Seng Wee & Dan W Puchniak, "Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth" in ch 8 of Dan W Puchniak, Harald Baum & Michael Ewing-Chow (eds), *The Derivative Action in Asia, A Comparative and Functional Approach* (Cambridge University Press, 2012) ("*Wee & Puchniak*") at p 330. *Foss v Harbottle* had hitherto established that it is for the company, which has a separate legal personality, to sue for the wrongs that have been done to it; a shareholder can seek to vindicate the company's rights only in very exceptional situations. This would be the case where, for example, a fraud has been visited

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on the minority by the wrongdoing majority, who cause harm to the company but use its controlling power to prevent the company from taking action.

39 The impetus for change came from Prof Walter Woon, who advised the parliamentary draftsman in 1990 of the desirability of reforming the law on the exceptions to the rule in *Foss v Harbottle*: see *Wee & Puchniak* at p 337. The Parliamentary debates and Select Committee report at the time, however, did not specifically discuss the question of whether s 216A was intended to be available to a company which had gone into liquidation (see generally *Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at cols 228–253, especially at col 231; *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at cols 290–294, especially at col 293; the *Explanatory Note* to the Companies (Amendment) Bill (No 33/1992); and *Report of the Select Committee on the Companies (Amendment) Bill* (Bill No 33/92) (Parl 2 of 1993, 26 April 1993) ("*the Select Committee Report*")). In fact, the thrust of the discussions appeared to take place in the context of going concerns. In its views on the main issues raised concerning the statutory derivative action, the Select Committee considered if there was a need to make statutory provision for a derivative action, given that there were already common law exceptions to allow minority shareholders to bring an action in the company's name (see *the Select Committee Report* at [41]). Based on the representations received, it decided that the statutory remedy should not be made available to public-listed companies, as their proceedings and performance were already monitored by regulatory authorities and disgruntled shareholders of such companies had the avenue of selling their shares in the open market (*ibid* at [45]).

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40 As already noted above (at [38]), s 216A was based on legislation in Canada, which was a trailblazer in the introduction (in the Commonwealth) of the statutory derivative action to circumvent the difficulties in the common law regime. Singapore and New Zealand, which made similar legislative changes in 1993, were relatively early jurisdictions to introduce statutory derivative actions. According to *Wee & Puchniak* at p 340, Singapore's reform preceded similar provisions that were enacted elsewhere in the Commonwealth. Australia and United Kingdom, the jurisdictions which Singapore relied mainly on for its Companies Act, introduced statutory derivative actions only in 1999 and 2006, respectively. Hong Kong did so in 2005 (*ibid* at p 337).

41 The relevant section in the present Canada Business Corporations Act (RSC, 1985, c C-44) ("the Canadian Act") reads as follows:

> **Commencing derivative action**
>
> **239 (1)** Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.
>
> **Conditions precedent**
>
> **(2)** No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that
>
> > **(a)** the complainant has given *notice to the directors* of the corporation or its subsidiary of the complainant's intention to apply to the court under sub-section (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
> >
> > **(b)** the complainant is acting in good faith; and

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> **(c)** it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.
>
> …
>
> [emphasis added]

42 Like Singapore's s 216A, the notice pre-requisite in s 239(2)(*a*) of the Canadian Act requires complainants to give notice to the *directors* of their intention to apply to court for leave to commence derivative action if the *directors* do not take the requested action.

43 The genesis of Canada's statutory derivative action was discussed by the Supreme Court of Nova Scotia in *L&B Electric Ltd v Oickle* (2005) NSSC 110 ("*L&B Electric v Oickle*"). In his judgment at [35], Moir J noted the severe criticisms that came to be levied on *Foss v Harbottle* in the mid-20th century and observed that the "problem was that the English courts developed and Canadian courts quickly embraced a galvanized, formalistic approach to what justified a departure [from the rule in *Foss v Harbottle*]".

44 In response to the difficulties, the Ontario legislature created a Select Committee to review the province's corporate legislation in 1965. The Lawrence Committee (named after its chairman Allan F Lawrence) issued the Interim Report of the Select Committee on Company Law in 1967 ("*the Lawrence Report*"), which led to a *legislated* derivative action in Ontario in 1970 (see *L&B Electric v Oickle* at [38]). The Ontario legislation influenced the recommendations of another committee led by Robert W V Dickerson ("the Dickerson Committee"), which published its Proposals for a New Business Corporations Law in Canada ("*the Dickerson Report*") in 1971. *The Dickerson Report* came in two volumes: the first was a narrative whilst the second was a

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draft statute. The enactment of Canada's Business Corporations Act in 1975 was based on *the Dickerson Report* (see *L&B Electric v Oickle* at [39]).

45 Moir J noted that the Lawrence Committee was "concerned about abuse of power by those having control through majority shareholdings" (see *L&B Electric v Oickle* at [37]). *The Lawrence Report* concluded that the statutory derivative action was "the most effective remedy to enforce the suggested statutory standard of conduct and care to be imposed *upon directors* in the exercise of their duties and responsibilities" (at p 62) [emphasis added]. A statutory derivative action would allow a minority shareholder to sue in representative form, claiming redress for a wrong done to the company, and should be incorporated into Ontario law and practice to serve as "an effective procedure whereby corporate wrongs can be put right". The Lawrence Committee observed as follows (at p 63):

> 7.4.3. The Committee therefore recommends that the Ontario Act be amended by adding a substantive provision to the effect that a shareholder of a company may maintain an action in a representative capacity for himself and all other shareholders of the company suing for and on behalf of the company to enforce any rights, duties or obligations owed to the company which could be enforced by the company itself or to obtain damages for any breach thereof. The Act should be further amended to set out the following procedural aspects of the substantive remedy. The shareholder should be required to sue in a representative capacity, it being clear that the judgment or award is to be in favour of and for the benefit of the company. As conditions precedent to the right to bring the action, the plaintiff should be required to establish that he was a shareholder of record at the time the wrong was alleged to have occurred and that he has made reasonable efforts to cause the company to commence or maintain the action on its own behalf. Further, the Act should provide that the intended plaintiff must make application ex parte to a judge of the High Court of Ontario designated by the Chief Justice of the High Court for an order permitting the plaintiff to commence the action. In practice, it can be assumed that the application will be supported by affidavit material which would include the draft writ of summons and statement of claim. The shareholder

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> should be required to establish to the court that he is acting bona fide and that it is prima facie *in the interests of the company or its shareholders that the action be brought*. … [emphasis added]

46 The recommendation that the shareholder should be required to demonstrate that it is *prima facie* in the "interests of the company or its shareholders that the action be brought" is an implied suggestion that the statutory derivation action was designed as a remedy for a minority shareholder in a *going concern*. This is because of the reference to the interests of the company and its members, but not those of its creditors. The interests of creditors would be the dominant consideration in a situation where, for example, an insolvent company is placed in a creditors' voluntary liquidation.

47 The recommendations in *the Lawrence Report* were duly enacted as s 99 of Ontario's Business Corporations Act 1970 ("the Ontario Act"). Section 99 states as follows:

> 99.-(1) Subject to subsection 2, a shareholder of a corporation may maintain an action in a representative capacity for himself and all other shareholders of the corporation suing for and on behalf of the corporation to enforce any right, duty or obligation owed to the corporation under this Act or under any other statute or rule of law or equity that could be enforced by the corporation itself, or to obtain damages for any breach of any such right, duty or obligation.
>
> (2) An action under subsection 1 shall not be commenced until the shareholder has obtained an order of the court permitting the shareholder to commence the action.
>
> (3) A shareholder may, upon at least seven days' notice to the corporation, apply to the court for an order referred to in subsection 2, and, if the court is satisfied that,
>
> > (a) the shareholder was a shareholder of the corporation at the time of the transaction or other event giving rise to the cause of action;

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> (b) the shareholder has made reasonable efforts to cause the corporation to commence or prosecute diligently the action on its own behalf; and
>
> (c) the shareholder is acting in good faith and it is *prima facie* in the interests of the corporation or its shareholders that the action be commenced,
>
> the court may make the order upon such terms as the court thinks fit, except that the order shall not require the shareholder to give security for costs.
>
> …

48 The Dickerson Committee expressly stated that it had followed the model in s 99 of the Ontario Act in drafting subsection (2) of s 19.02 of its draft statute. This sub-section, which required the complainant to have made reasonable efforts to cause the directors to take action, reads as follows:

> **19.02**
>
> …
>
> (2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that
>
> (a) the complainant has made reasonable efforts *to cause the directors of the corporation* or its subsidiary to bring, diligently prosecute or defend or discontinue the action,
>
> (b) the complainant is acting in good faith, and
>
> (c) it is prima facie in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.
>
> …
>
> [emphasis added]

49 The Dickerson Committee explained the suggested sub-section in the preceding paragraph as follows (at para 482):

> **482**. Subsection (2) of s. 19.02, which adopts in principle a recommendation of the Jenkins Committee (para. 206), and

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> which follows the model adopted in s. 99 of the Ontario Act, requires a shareholder who seeks to bring a derivative action to obtain a court order before commencing legal proceedings. At one stroke this provision circumvents most of the procedural barriers that surround the present right to bring a derivative action and, incidentally, minimizes the possible abuse of "strike suits" that might otherwise be instituted as a device to blackmail management into a costly settlement at the expense of the corporation. Although it confers extraordinarily wide discretion upon the court, subsection (2) does state the conditions that must be met before a derivative action may be commenced. By requiring good faith on the part of the complainant this provision precludes private vendettas. And by requiring the complainant to establish that the action is "prima facie in the interest of the corporation" it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarrass directors or officers who have committed an act which, although unwise, is not material. In effect, this provision abrogates the notorious rule in *Foss v. Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions. In the preface (page v) to the second edition of his text, *Modern Company Law*, Professor Gower states that "… an attempt has been made to elucidate the mysteries of the rule in *Foss v. Harbottle*; I believe that I now understand this rule, but have little confidence that readers will share this belief". We have been so persuaded by Professor Gower's elucidation of these "mysteries" that we have relegated the rule to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties—and obvious injustices—engendered by that infamous doctrine.

50 The Jenkins Committee that *the Dickerson Report* referred to was formed in the United Kingdom in 1959 to review and report on, *inter alia*, the Companies Act 1948 (c 38) (UK) ("the Companies Act 1948"). The Jenkins committee was concerned with the wrongful use of control that was vested in the majority. Its recommendation, which the Dickerson Committee took on board, states as follows (at para 206):

> In addition to these direct wrongs to the minority, there is the type of case in which a wrong is done to the company itself *and the control vested in the majority is wrongfully used to prevent action being taken against the wrongdoer*. In such a case the minority is indirectly wronged. In certain special cases, such as

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> those arising from an illegal or *ultra vires* act, a member of the company may sue to remedy the wrong, but, generally speaking, under the rule in *Foss v. Harbottle*, the company alone can sue for a wrong done to it. To that general rule there is an exception under which a member may sue if, but only if.
>
> (a) the wrong alleged to have been done to the company is of a fraudulent character; and
>
> (b) he can show that the control vested in the majority is being, or will be, used to prevent the company from suing, in such a way as to constitute a "fraud on the minority".
>
> It has been represented to us that conditions (a) and (b) are too restrictive, since the company's omission to sue may be unfair to the minority even if the wrong done to the company is not fraudulent and since the plaintiff may find it very difficult to prove both that the defendants control the company and that there is a "fraud on the minority" – a notoriously vague concept. We think there is justice in this criticism, but we think it would be extremely difficult to devise a satisfactory general provision expressing the exception to the rule in *Foss v. Harbottle* in wider terms. …
>
> [emphasis added]

51 Evidently, the Jenkins Committee must have been concerned about wrongdoer control in companies that were going concerns. This is because it cannot be said that control remains "vested in the majority" when a company is in liquidation. Even in a members' voluntary liquidation, s 304(2) of the Companies Act 1948 empowered the court to remove a liquidator and appoint another liquidator on cause being shown.

52 Before we leave this section, we note that s 19.03 of the draft statute of the Dickerson Committee does contain mention of liquidation. The section recommends that, in connection with an action brought (or intervened in) under s 19.02, the court may make any orders that it thinks fit, including directing that any amount adjudged payable by a defendant in the action shall be paid directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary ("the direct payment provision"). *The*

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Dickerson Report explained that s 19.03 was designed to give very broad discretion to the court to supervise generally the conduct of a derivative action (at para 483):

> … Moreover, in certain cases, e.g., where a corporation has redeemed or purchased its own shares *or has been liquidated or dissolved*, a court can order payment directly to shareholders and former shareholders of the amount recovered, thus resolving a technical problem that has resulted in obvious injustice in some U.S. cases. In addition, it enables the court to permit the amount recovered to flow directly through to shareholders, precluding wrongdoers from sharing in the recovery by the corporation. [emphasis added]

53 Whilst s 19.03 contemplates the situation of a company that has been liquidated, we are of the view that there is no necessary inconsistency with the pre-requisite in s 19.02 for the complainant to have made reasonable efforts to cause the directors to take action. In view of the wording in s 19.02, s 19.03 would pertain to a situation where the company enters liquidation *after* consent to bring a derivative action in the company's name is given.

54 As mentioned above, *the Dickerson Report* formed the blueprint for the Canada Business Corporations Act, which was enacted in 1975. The present s 240 of this Act states as follows:

> **Powers of court**
>
> **240** In connection with an action brought or intervened in under section 239, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing,
>
> **(a)** an order authorizing the complainant or any other person to control the conduct of the action;
>
> **(b)** an order giving directions for the conduct of the action;
>
> **(c)** an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the

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> corporation or its subsidiary instead of to the corporation or its subsidiary; and
>
> **(d)** an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

55 To the extent that the direct payment provision in s 19.03 of the Dickerson Committee's draft statute might suggest that statutory derivative action is available to a company in liquidation, it is worth noting that the drafters of s 216A ***excluded*** the direct payment provision, which remains in the Canadian legislation at s 240(c). Our s 216A(5) (as originally enacted) states:

> In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interests of justice, including (but not limited to) the following:
>
> (a) an order authorising the complainant or any other person to control the conduct of the action;
>
> (b) an order giving directions for the conduct of the action; and
>
> (c) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action.

56 To conclude our review of legislative history, we found no indication that suggested that s 216A was intended to be available as a shareholder's remedy in the context of a company that had been placed in liquidation.

57 Finally, we note that when Canada introduced the statutory derivative action, the drafters would likely have been aware of the common law precedent that held that that the right of a minority shareholder to maintain a representative action against the company and the majority shareholders ceased as soon as the company went into liquidation: *Ferguson v Wallbridge* [1935] 3 DLR 66. This was an appeal from the Court of Appeal for British Columbia to the Judicial Committee of the Privy Council. If the common law position in relation to the

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availability of derivative action in liquidation was unsatisfactory to the drafters, one would have assumed that they would have made this explicit in the relevant legislation.

Case law on the statutory derivative action

58 There is no directly relevant case law on s 216A in Singapore. In other jurisdictions, there are authorities that state that leave to commence a statutory derivative action should not be granted when a company is in liquidation. For example, in the United Kingdom, which introduced the statutory derivative action in the Companies Act 2006 (c 46) (UK) ("the UK Act"), the English High Court in *Cinematic Finance Limited* held that derivative claims should not brought when a company is in liquidation. The case involved a majority shareholder who sought permission for derivative action. Roth J held that it was only in very exceptional circumstances that it could be appropriate to permit a shareholder in control of the company to bring a derivative claim (at [14]). He further held (at [22]):

> Here, on the claimant's case, the companies are insolvent companies. If they were placed into liquidation or, as may be, administration, then it would be for the liquidator or administrators to decide whether or not to pursue these claims. Derivative claims should not normally be brought on behalf of a company in liquidation or administration (see Gore Brown on Companies, 45th edition, paragraph 18 (14).) Since here, if the companies were subject to appropriate insolvency procedures – and I emphasise it is the claimant's evidence that the companies are insolvent – it would then be inappropriate for a derivative claim to lie, that is, in my judgment, a further reason why the present claim should not be permitted. The controlling shareholder should not seek to circumvent the insolvency regime by starting a derivative claim.

59 In New Zealand, where the statutory derivative action is embodied in s 165 of its Companies Act (Act No 105 of 1993) (NZ) ("the New Zealand

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Companies Act"), the High Court held in *Hedley v Albany Power Centre Ltd (in liq)* [2005] 2 NZLR 196 ("*Hedley v Albany Power Centre*") at [55] that "once a company is placed in liquidation, the Court no longer has – or at least ought not to exercise – its s 165 jurisdiction". The court reasoned that as a matter of principle, allowing an application for derivative action would potentially undermine the liquidator's principal duty of gathering in and distributing the company's assets in an efficient manner. It also drew on s 284 of the New Zealand Companies Act, which provides for court supervision of liquidation. The court held that s 284 offered not just an adequate remedy but the most appropriate one when a company was in liquidation. In Lang Thai & Matt Berkahn, "Statutory Derivative Actions in Australia and New Zealand: What Can We Learn from Each Other?" (2012) 25 NZULR 370, the authors reviewed *Hedley v Albany Power Centre* (at 387) and noted that the decision was applied in a subsequent case in which the High Court interpreted the decision to mean that "there is no jurisdiction to utilise s 165 following liquidation" (see *Buxton v Mainline Contracting Ltd (in liq)* [2010] HC Auckland CIV-2010-404-1224, 22 October 2010 at [4]). The authors, however, take the view that this assertion was an "overstatement" on the face of s 165, and the better position is that "while not conclusive, liquidation is a factor that the Court will take into account in deciding whether to grant leave to commence a derivative action under the discretion given by s 165(1)".

60 In Australia, our attention was drawn to *Chahwan*, which extensively considered the question of whether statutory derivation action was available to a company in liquidation in the context of Part 2F.1A (Proceedings on behalf of a company by members and others) of the Australian Act. Section 237 of the Australian Act states as follows:

> 237 Applying for and granting leave

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(1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

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

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

(3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:

(a) the proceedings are:

(i) by the company against a third party; or

(ii) by a third party against the company; and

(b) the company has decided:

(i) not to bring the proceedings; or

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in the decision:

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> (i) acted in good faith for a proper purpose; and
>
> (ii) did not have a material personal interest in the decision; and
>
> (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
>
> (iv) rationally believed that the decision was in the best interests of the company.
>
> The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold. …

61 Following its analysis of the statutory provisions and extrinsic materials, the New South Wales Court of Appeal unanimously concluded (at [125]) that Part 2F.1A of the Australian Act had no application to a company in liquidation, whether the company was in voluntary (shareholders or creditors) or court-ordered liquidation. In doing so, the court distinguished various decisions at first instances which had held that Part 2F.1A applied to a company in liquidation (at [121(i)]–[122]).

62 The Australian statutory derivative action provision is worded differently from s 216A in material respects. For example, s 237(2) requires the court to grant leave once the pre-requisites are met; there is no discretion. Section 237(3) also includes the rebuttable presumption that granting leave is not in the company's best interests in certain situations, such as where it is established that the directors acted in good faith for a proper purpose. However, the differences in the procedural aspect merely reflect a different philosophy of the hurdles that a shareholder should cross before he can avail himself of the remedy. The *rationale* for the introduction of statutory derivative action *remains unchanged*. Notwithstanding the differences, we found certain aspects of the

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reasoning in *Chahwan* relevant to our own analysis of s 216A. These include the following:

(a) The court noted that there were indications in the statutory provisions that Part 2F.1A of the Australian Act was intended to deal with companies other than those in the control of a liquidator. Section 239 of the Australian Act provides that a person is not prevented from applying for leave even if the members of a company ratify or approve the conduct. Section 237(3)(*c*) of the Australian Act provides that if the directors who participated in the decision acted in good faith, there is a rebuttable presumption that it is not in the company's best interests to grant leave (at [121(b)]).

(b) The court also observed that prior to the creation of Part 2F.1A of the Australian Act, shareholders or creditors could only institute proceedings in the name of the company over the opposition of the directors if they came within an exception to the rule in *Foss v Harbottle*. However, there was no such exception where a company was in liquidation (at [121(d)]).

(c) The court also agreed that as the cases dealing with *Foss v Harbottle* and its exceptions involved going concerns, the statutory provisions that were meant to replace that rule and its exceptions should also apply only to companies which were going concerns in the absence of contrary indication (at [121(e)]).

(d) No part of the mischief identified in the explanatory memorandum and the report of the Companies and Securities Law

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Review Committee dealt with a situation where the company was under liquidator control (at [121(f)]).

(e) The statutory provisions, in particular, s 1321 of the Australian Act which applied to a liquidator's decision to refuse to exercise his power under s 477(2)(a) of the Australian Act to bring proceedings in the name of the company, provide appropriate remedies to a person otherwise qualified to make an application under s 237(1) of the Australian Act, notwithstanding that it is in the court's discretion to grant the relief sought under s 1321 of the Australian Act (at [124(n)]).

63 In so far as s 216A is concerned, our review of the statutory provisions and the extrinsic materials have also suggested that s 216A is intended to apply to companies other than those in the control of a liquidator. The inapplicability of the exceptions to *Foss v Harbottle* to companies other than going concerns is also relevant to us as common law derivative action is (subject to the discussion below) part of Singapore law. Our Companies Act also provides statutory remedies in the liquidation regime that negate the need for a shareholder to seek leave under s 216A, as was identified by the Judge below (see above at [22] as well as *Walter Woon on Company Law* at paras 17.142−17.146).

Case law on common law derivative action

64 The position with respect to the common law derivative action also supports our reading that, as a matter of principle, statutory derivative action should not be available to a company in liquidation. At common law, a derivative claim cannot be brought by a minority shareholder of a company in liquidation: see Victor Joffe QC et al, *Minority Shareholders: Law, Practice and Procedure* (Oxford University Press, 4th Ed, 2011) ("*Minority*

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Shareholders") at para 3.143. The learned authors, citing the English High Court decision of *Fargro v Godfroy* [1986] 1 WLR 1134, explain thus:

> … The reason given lay in the nature of the derivative claim as a procedural device which enables proceedings to be brought on behalf of the company notwithstanding that it is under the control of persons who have committed or acquiesced in the wrongdoing. 'But once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation … the liquidator is the person in whom that right is vested.' In these circumstances, it was held that the reason for any exception to the rule in *Foss v Harbottle* disappears.

65 In a similar vein, it has been observed in *Walter Woon on Company Law* as follows (at paras 9.6 and 9.7):

> … the right to authorise a proceeding belongs to the person or body in whom the function of management is vested. As the power to manage is usually vested with the board of directors, it will normally be for the board to authorise proceedings.
>
> By the same token, when a company is in liquidation, corporate actions may be commenced by the liquidator. The liquidator may commence the action in the name of the company or in his own name. In the latter case, however, the liquidator may be personally liable for costs. *The directors no longer have any authority to instruct counsel to commence litigation once the company is in liquidation, and if they do so they may be personally liable for costs.* When the company is under judicial management, the power to sue belongs to the judicial manager. However, where the company is in receivership, directors retain a residual power to authorise legal proceedings.
>
> [emphasis added]

It has also been pertinently observed in the same work thus (see *ibid* at para 17.122):

> On the appointment of a liquidator in a voluntary winding up (whether members' or creditors'), the powers of the directors cease except so far as is allowed by the liquidator or by the members (or the committee of inspection or the creditors, in the

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> case of a creditors' voluntary winding up) with the consent of the liquidator [citing s 294(2) of the Act]. Although there is no express provision in the Act, powers of the directors cease when the court orders the winding up of the company [citing the Supreme Court of New South Wales (Equity Division) decision of *Re Country Traders Distributors Ltd and the Companies Act* [1974] 2 NSWLR 135 at 138]. The court may, however, appoint the directors as special managers to assist the liquidator.

Finally, this work states as follows (see *ibid* at para 17.134):

> Once a company is in liquidation, the board of directors is effectively *functus officio*. The power to run the company vests with the liquidator. His job is to wind up the company's business, realise the assets, pay off the creditors and return whatever is left over to the members.

66 As mentioned above, the United Kingdom enacted statutory derivative action in the UK Act, which *replaced* the common law derivative action. The authors of *Minority Shareholders* note the view that since the statutory derivative action in the UK Act "represents a new dispensation, it is possible that the courts in the United Kingdom will adopt a different position when faced with applications by members for permission to bring derivative claims under [the UK Act] when a company is in liquidation to that which existed at common law" (at para 3.144).

67 In Singapore, the case for the non-availability of the statutory derivative action in liquidation is arguably stronger as, unlike the United Kingdom and Canada, the common law derivative action was not expressly abolished with the introduction of s 216A (see *Wee & Puchniak* at p 331; *contra* Malaysia and Hong Kong (see *Walter Woon on Company Law* at para 9.73)). This remains so after certain amendments to the Act took effect from July 2015. When s 216A was introduced in 1993, it applied only to Singapore private companies. This meant that the common law derivative action continued to exist *at least* for public-listed and foreign companies, which were excluded from the purview of

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s 216A. In July 2015, the Act was amended to, *inter alia*, extend s 216A to public-listed companies in Singapore (s 146(*a*) of the Companies (Amendment) Act 2014 (Act 36 of 2014) deleted the definition of "company" in s 216A(1), which was hitherto defined as a company other than one listed on the Singapore securities exchange). Following this amendment, the common law derivative action must necessarily remain for foreign companies. However, the question is whether a shareholder who can avail itself of s 216A can nevertheless choose to rely on the common law. This has been the subject of some discussion by academics, whose views are still relevant although they preceded the recent amendments.

68 *Wee & Puchniak* note that this is "an open question" that has not been conclusively determined by the Singapore courts. They state (at p 331):

> … When section 216A is available, however, it is an open question as to whether a shareholder may nevertheless choose to rely on the common law. Although some jurisdictions abolished the common law derivative action expressly when they enacted their statutory derivative action, Singapore did not take this approach. In principle, it would seem that the omission to make section 216A the only avenue for a shareholder to enforce a corporate right means that the common law derivative action *continues* to be available (even when the statutory derivative action is also available). However, in [*Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197] the Court of Appeal refused to express its view on this question and left it open. In practice, the question is probably moot, as it is far easier for a shareholder who wants to enforce a corporate right to rely on section 216A than the nebulous fraud on the minority exception to the rule in [*Foss v Harbottle*] to pursue a derivative action

69 On balance, the general consensus at least amongst the academic writers appears to be that the common law derivative action continues to exist alongside s 216A. In *Walter Woon on Company Law*, it is said that for unlisted companies, "it is doubtful whether common law derivative actions are precluded by s 216A.

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The earlier edition of this book was of the opinion that a member still has a choice about the procedure he wishes to adopt and the courts here have not commented on this point. However, it is difficult to see why an applicant should resort to the common law procedure when there are so many advantages of using the s 216A procedure" (at para 9.71) (and *cf* public-listed companies which were excluded from the scope of s 216A until 1 July 2015). And, in Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) ("*Chew*"), whilst the learned author acknowledged *obiter dicta* to the contrary in the British Columbia Supreme Court decision of *Shield Development Co Ltd v Snyder and Western Mines Ltd* [1976] 3 WWR 44 at 52, she observed thus (at p 323):

> It is to be noted, however, that the Canadian statutory derivative action is not limited to members of unlisted companies alone, and the regime applies equally to listed and unlisted companies. In Singapore, the statutory derivative action regime is applicable only to unlisted companies. *It is submitted that where there is no express abrogation of common law rights, the common law derivative action, in substance and procedure, continues to co-exist in Singapore, and indeed, it is the route that has to be availed of by members of listed companies seeking to pursue a derivative action.*
>
> *The statutory derivative action was intended to enhance minority shareholders' rights and remedies. In which case, there is no reason why common law rights to pursue a derivative action ought to be considered abrogated by s 216A of the Companies Act, whether in the case of listed or unlisted companies, where the statute does not expressly state so.*
>
> [emphasis added]

70 We also note that in one of the written representations to the Select Committee, one of the representors, Dr Low Kee Yang, did raise the following issue (see *the Select Committee Report*, Appendix II, *Written Representations* at p A 11 (but *cf* the view of the then Minister for Finance, Dr Richard Hu Tsu Tau in *the Select Committee Report*, Appendix III, *Minutes of Evidence* at p B 8

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and the response by Dr Low and his further elaboration in response to a question by Mr Chng Hee Kok, *ibid*, as well as the view of Ms Susan de Silva, *ibid* at p B 21; however, this exchange occurred prior to the exclusion of the application of s 216A with respect to foreign as well as public-listed companies when it was introduced in 1993)):

> If the Bill becomes law, there is still a possibility that the common law remedy still exists side by side with ss 216A and 216B: see *Re Northwest Forest Products* [1975] 4 WWR 724 (BCSC). If for some reason a member chooses not to have to comply with the s 216A (3) conditions of notice, good faith and interests of the company, he may opt for the common law remedy instead. Is that remedy still available? If it is necessary to remove such lingering doubts, there should perhaps be a provision to the effect that apart from s 216A, no derivative actions may be brought.

Therefore, if the intention was to remove the common law derivative action when s 216A was introduced, one would have thought that the drafters would have expressly provided thus. There was no discussion of the removal even in the run-up to the latest amendments to s 216A, which remains inapplicable to a foreign company. However, the issue as to whether or not the common law derivative action co-exists with, or has (instead) been abrogated by, s 216A is one that can be conclusively determined when the issue next arises directly for decision before the Singapore courts.

71 What *does* appear clear, however, is that, as a matter of ***practicality***, it does not seem efficient or effective for a party to initiate a common law derivative action when a statutory derivative action pursuant to s 216A is available. As Margaret Chew has perceptively observed (see *Chew* at p 324; *cf Walter Woon on Company Law* at para 9.73):

> … However, it would be unusual for a complainant, for practical reasons, to ignore section 216A and to pursue the convoluted course of a common law derivative action, since section 216A

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> provides, at the least, a clear, simplified and efficient procedure. Furthermore, in an application pursuant to section 216A, it is submitted that the onus does not lie on the complainant to show a 'fraud on the minority', in particular, wrongdoer control. Therefore, from the pragmatic point of view, it would seem to be in the interests of the complainant to pursue a statutory derivative action where he is a member of an unlisted company. Where a complainant chooses to forego the simplified statutory derivative action route, and opts (in the case of an unlisted company) to launch an application to pursue a derivative action by the common law route, the question then has to be with what motive the action is pursued. Where such a motive may be classified as one that is ulterior and the complainant is held not to be approaching the courts with 'clean hands,' should an alternative remedy be available (for instance, the statutory derivative action), it is conceivable that proceeding under the common law may be considered an abuse of process.

72 Whilst the issue may be moot as a matter of practicality, any continued right of a shareholder to utilise both remedies suggested to us that the *same principle* should apply to both forms of derivative action – that such an action (whether under common law or pursuant to s 216A) should *not* be available to a company *in liquidation*. To hold otherwise would result in an incongruous situation where in liquidation, one form of derivative action is available but not the other, even though both remedies are designed to address similar mischief.

73 We would conclude by pointing out that our decision in no way means that a corporate wrong will go without a remedy. Petroships submitted that the underlying principle in allowing a minority shareholder to take derivative action is whether there continues to be wrongdoer control. In this regard, Petroships suggested that the new liquidators, who were appointed through a members' voluntary liquidation and could be removed by special resolution, were beholden to the majority and under its effective control (see above at [24]). However, this ignored the fact that in liquidation, even in members' voluntary liquidation, the liquidator is subject to the oversight of the court. We disagreed

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that the remedies afforded by the liquidation regime are theoretical. As the Judge stated, "[t]he liquidator has a legal obligation to discharge his duties and to exercise his powers competently and impartially, without fear or favour" (see the GD at [157]). In *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR 458, VK Rajah JA (who delivered the judgment of this court) stated (at [22]):

> All liquidators have to uncompromisingly observe their obligations to maintain independence and act fairly regardless of the manner of their appointment and the identity of their appointer. For instance, in a voluntary liquidation, the liquidator must act independently, and not be open to influence from the appointing directors, especially when any of them has a vested interest in denying creditors their proofs of debt. …

Conclusion

74 We therefore dismissed the appeal and the summons, based on the threshold issue that s 216A, in our judgment, does not avail a minority shareholder in the situation when the company (as was the case here) is in liquidation. This includes a members' voluntary winding up. The derivative action pursuant to s 216A is one that avails a minority shareholder who is dissatisfied by the refusal of the board to act in the interests of the company. Its primary rationale is that it enables a party – who is aggrieved by the fact that those in control of the company are unwilling to act – to initiate the necessary legal action. Once the company is in liquidation, the powers of the directors cease and instead those powers vest in the liquidator. Before us, counsel for Petroships, Mr Tan Kok Peng, confirmed that the real grievance in this case was with the failure of the new liquidators to act. But as we pointed out in the course of arguments, there are other provisions in the Act that deal with the control of the liquidator. In the circumstances, we made no order as to costs in favour of the first respondent as we made no ruling on the allegations that were made

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against the new liquidators. We ordered costs in favour of the second and third respondents in the sum of $20,000 (including reasonable disbursements). The usual consequential orders also applied.

75 Given our decision that the application failed on the threshold issue (*ie*, that s 216A was not applicable in the context of the present case), it was unnecessary to deal with the substantive arguments on whether the pre-requisites in s 216A(3)(*b*)–(*c*) were met.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

Tan Kok Peng, Ho Mingjie Kevin, Grace Loke and Xiao Hongyu (Braddell Brothers LLP) for the appellant;
Mulani Prakash P and Carmen Chen (M & A Law Corporation for the first respondent;
Rethnam Chandra Mohan, Khelvin Xu Cunhan and Tan Ruo Yu (Rajah & Tann Singapore LLP) for the second and third respondents.

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