IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 111

Suit No 1165 of 2013

Between

Sinwa SS (HK) Co Ltd (Shareholder of and also for the benefit of other shareholders of Nordic International Limited)

… *Plaintiff*

And

(1) Nordic International Limited
(2) Morten Innhaug

… *Defendants*

JUDGMENT

[Companies] — [Derivative action] — [Common law derivative action]

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v
Nordic International Ltd and another

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7 June 2016 Judgment reserved.

Steven Chong J:

Introduction

1 A joint venture between two companies is akin to the marriage of a couple. If the relationship works, it can be hugely rewarding – in the case of corporations, financially so, and in the case of couples, personal fulfilment. Joint corporate success will usually translate into diversification of the business, spawning subsidiaries in the same way a harmonious union between individuals produces offspring. But if the venture does not work for whatever reason, like a failed marriage, it can lead to an acrimonious and unforgiving fall-out.

2 The dispute before me exemplifies such a fall-out following a bitter breakdown of the relationship between two joint venture partners, the plaintiff and the second defendant, under a shareholders' agreement dated 4 July 2007

("the Shareholders' Agreement").[1] Their relationship broke down more than seven years ago, and has generated a slew of litigation which carries on till this day. It is in the context of this protracted dispute that the plaintiff's current application – for leave to commence arbitration proceedings in the name of the first defendant against its former ship manager Nordic Maritime Pte Ltd ("Nordic Maritime") – has arisen.

3 Although this action concerns substantially the same losses which are the subject matter of other related proceedings, it raises several interesting issues for my determination, particularly on the application of the Limitation Act (Cap 163, 1996 Rev Ed) to common law derivative actions, and on the requirement for such proceedings to be brought in good faith and in the best interest of the company.

Background

4 The plaintiff, Sinwa SS (HK) Co Ltd ("Sinwa"), is a company incorporated in Hong Kong engaged in the business of, *inter alia*, marine supply and logistics.[2] The second defendant, Mr Morten Innhaug ("Mr Innhaug"), is a Norwegian national habitually resident in Singapore with vast experience in the operation and management of seismic survey vessels.[3] He is the founding shareholder of the first defendant, Nordic International Limited ("Nordic International"). Nordic International was incorporated in the British Virgin Islands for the purposes of acquiring and owning a fishing

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1 Affidavit of Tan Lay Ling for Suit No 1166 of 2013 dated 26 March 2014 ("TLL affidavit for Suit 1166"), para 8.

2 TLL affidavit for Suit 1166, para 6.

3 TLL affidavit for Suit 1166, para 7.

trawler that was to be converted into and operated as a seismic survey vessel ("the Vessel").[4]

5 As financing was required for the conversion of the Vessel into a seismic survey vessel, Mr Innhaug entered into the Shareholders' Agreement, which was initially between him and Sinwa Limited, a Singapore public listed company. Under the terms of the Shareholders' Agreement, Sinwa Limited injected capital of US$2m into Nordic International in return for a 50% stake in the company.[5] Mr Innhaug retained the remaining 50% of Nordic International's shares.[6] The Shareholders' Agreement was later novated to Sinwa pursuant to a novation agreement dated 28 August 2007.[7] On paper, the joint venture was expected to be a productive liaison – a combination of Sinwa's financial resources with Mr Innhaug's technical know-how in the operation of a highly specialised and potentially lucrative seismic survey vessel. Unfortunately, it turned out to be a nightmare.

6 Initially, things appeared to be going well as a time charterparty for the Vessel was concluded on 8 June 2007 between Nordic International and BGP Geoexplorer Pte Ltd ("BGP") ("the Time Charter").[8] At that point, BGP already had an agreement with TGS-NOPEC Geophysical Company SA ("TGS") for the provision of seismic services dated 22 December 2006 ("the Seismic Agreement").[9] Not long after, however, disputes surfaced

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4 Affidavit of Evidence-In-Chief of Morten Innhaug for Suit No 1165 of 2013 dated 8 March 2016 ("MI affidavit"), para 4.

5 Affidavit of Evidence-In-Chief of Tan Lay Ling for Suit No 1165 of 2013 dated 19 January 2016 ("TLL affidavit"), para 6.

6 TLL affidavit for Suit 1166, para 9.

7 TLL affidavit for Suit 1166, para 10.

8 TLL affidavit for Suit 1166, para 12.

between the parties. It appears that the catalyst for these disputes was the purported assignment by BGP of the Time Charter to another company owned by Mr Innhaug, Nordic Geo Services Ltd ("NGS"), pursuant to a memorandum of agreement between Nordic Maritime, BGP and TGS dated 23 August 2008.[10] This purported assignment was executed without the knowledge or consent of Sinwa. The seeds of distrust between Sinwa and Mr Innhaug were thus sowed, which then took root and proliferated.

Related proceedings

7 Over the last seven years, the parties have been frequent users of our judicial and arbitral services, the details of which are summarised in *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2015] 2 SLR 54 ("*Sinwa (CA 108)*") (at [11]-[17]). For present purposes, it suffices to recount that the disputes between the parties have engendered two arbitral proceedings,[11] three originating summonses,[12] three suits (including the present action)[13] and two appeals to the Court of Appeal.[14] They have also contributed to our jurisprudence through several written judgments, two of which have been published: *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 ("*Sinwa (OS 960)*") and *Sinwa (CA 108)*.

8 These arbitral and court proceedings, although against different parties and premised on different causes of action, relate substantially to the same

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9 MI affidavit, para 5.

10 MI affidavit, para 17.

11 BGP Arbitration commenced on 18 November 2009; SIAC Arbitration No 4 of 2012.

12 Originating Summonses Nos 960 of 2009, 22 of 2010 and 650 of 2011.

13 Suits Nos 875 of 2010, 1165 and 1166 of 2013.

14 Civil Appeals Nos 5 of 2010 and 108 of 2014.

losses which Sinwa says Nordic International has suffered as a result of Mr Innhaug and/or BGP's actions. Currently, the following proceedings are still pending:

(a) SIAC Arbitration No 4 of 2012 ("SIAC 4") between Sinwa and Mr Innhaug, which resulted in a partial arbitral award dated 1 October 2013. Under this partial award, the arbitrator found that there was a deadlock between the two parties for the purposes of the Shareholders' Agreement, and ordered Sinwa to sell its shares in Nordic International to Mr Innhaug at a price to be assessed. The assessment has stalled due to disputes on the valuation methodology to be adopted.

(b) Sinwa has obtained leave of court *vide* Originating Summons No 960 of 2009 ("OS 960") to commence a derivative action in the name and on behalf of Nordic International against Mr Innhaug for breach of directors' duties. The trial of this action, Suit No 875 of 2010 ("Suit 875"), is currently fixed for hearing in the second half of this year.

(c) Sinwa has also obtained leave of court *vide* Suit No 1166 of 2013 to commence separate arbitration proceedings in the name of Nordic International against BGP for alleged breaches of the Time Charter.[15] Although leave was obtained on 18 December 2014, the arbitration has not progressed beyond service of the notice of arbitration. In fact, the arbitral tribunal has yet to be even constituted.[16]

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15 Order of Court No 40 of 2015.

16 Second Defendant' Closing Submissions dated 4 April 2016 ("DCS"), para 269.

Present application

9 In spite of the multiple pending proceedings, relating substantially to the same alleged losses, Sinwa has brought this suit to obtain leave of court to commence yet another derivative action on behalf of Nordic International. This time the intended action is against Nordic Maritime, the former ship manager of Nordic International. Nordic Maritime is a Singapore company of which Mr Innhaug is also a director and shareholder.[17] It entered into a ship management agreement dated 1 January 2007 with Nordic International to manage the Vessel ("the Ship Management Agreement"), which Sinwa claims it has breached. Sinwa intends to pursue the derivative action against Nordic Maritime by way of arbitration in Singapore as the Ship Management Agreement is subject to an arbitration clause. The clause provides for the Ship Management Agreement to be governed by and construed in accordance with Singapore law, and for any dispute arising out of or in connection with the agreement to be referred to arbitration in Singapore.[18]

Claims for which leave is sought

10 Sinwa alleges that Nordic International has claims against Nordic Maritime for:

(a) the misappropriation of funds in the sum of US$400,000 on 28 May 2008;[19]

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17 MI affidavit, para 6.

18 MI affidavit, p 131, cl 19.3 read with p 127, box 18.

19 Statement of Claim (Amendment No 2) dated 27 May 2014 ("SOC"), paras 22-27.

(b) losses arising from the failure to inform Nordic International of excessive bunkering charges incurred by the Vessel in June 2008;[20]

(c) the double payment of insurance premiums in November 2008;[21] and

(d) losses arising from the conduct of Nordic Maritime which led to the termination of the Seismic Agreement by TGS on 19 December 2008;[22]

(e) losses arising from the following discrepancies uncovered in Nordic International's accounts:

(i) administrative charges levied by Nordic Maritime on Nordic International from September 2008,[23]

(ii) erroneous and/or excessive payments for crew salaries between February 2008 to April 2009,[24]

(iii) excessive payments for provisions, cabin stores, bonded stores and stores and consumables in 2008;[25] and

(f) an account of profits in respect of revenue earned by the Vessel for certain ad-hoc projects carried out by the Vessel in the period after 15 June 2010.[26]

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20 SOC, paras 42-43.

21 SOC, paras 44-46.

22 SOC, paras 28-35.

23 SOC, paras 38-39; TLL affidavit, para 19.

24 SOC, paras 40-41.

25 SOC, paras 47-51.

11 In the course of the trial, Sinwa's director, Ms Tan Lay Ling ("Ms Tan"), conceded that the following claims are unsustainable:[27]

(a) the alleged misappropriation of US$400,000;

(b) the losses arising from the excessive bunkering charges which were allegedly incurred; and

(c) the alleged double payment of the insurance premium.

The above claims were conceded to be without basis by Ms Tan under cross-examination because the monies have either been long repaid or properly accounted for. I should make it clear that the concessions were not extracted pursuant to any intensive cross-examination. Any reasonable diligence in reviewing the documents would have revealed that the above claims are non-starters. In this regard, it is plainly unsatisfactory that these baseless claims do not merely feature in Sinwa's pleadings and its opening statement,[28] but are also inexplicably repeated in Sinwa's closing submissions as well.[29] No effort was made by Sinwa's counsel, Mr Anthony Soh ("Mr Soh"), to exclude these claims to reflect Ms Tan's concessions. This conduct may have some bearing on the issue of whether the present application is *bona fide* in the best interest of the company, as I will discuss below (at [62]).

Legal context and issues

12 As Nordic International is a foreign company, a statutory derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) is not

26 SOC, paras 55-59.

27 Notes of Evidence ("NOE") for 15 March 2016, pp 111:17-118:23.

28 Plaintiff's Opening Statement dated 7 March 2016, para 27.

29 Plaintiff's Closing Submissions dated 4 April 2016 ("PCS"), para 68.

available. The applicable principles are therefore those governing a common law derivative action:

(a) First, it must be proved that the company is entitled, *prima facie*, to the relief claimed. This means that the plaintiff must show that the company has a reasonable or legitimate case against the defendant for which the company may recover damages or otherwise obtain relief: *Sinwa (OS 960)* at [21].

(b) Next, the action must fall within the proper boundaries of the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189. The rule is that, in any action in which a wrong is alleged to have been done to a company, the proper plaintiff is the company itself (see *Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)* [1982] Ch 204 at 210–211). The only true exception to the rule is "fraud on the minority" which applies when the alleged wrongdoer has committed a "fraud" against the company and is himself in control of the company. As it is not in dispute that this exception applies in the present case, I will comment no further on the controversies surrounding the definition of "fraud" in this context as elucidated by Andrew Ang J in *Sinwa (OS 960)* (at [49]-[55]).

(c) Finally, in exercising its discretion whether to grant leave to commence a derivative action, the court will consider if the action is *bona fide* in the best interest of the company rather than for some ulterior or purely self-serving purpose (see *Sinwa (OS 960)* at [69]). The court, at this stage, will also consider other factors such as any unreasonable delay in bringing the action (Tan Cheng Han, *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2009)

("*Walter Woon*") at para 9.78) and the availability of any viable alternative remedies (see *Sinwa (OS 960)* at [61]-[64]; *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui) and others* [2008] 1 SLR(R) 197 ("*Ting Sing Ning*") at [30]).

13 Mr Innhaug accepts that the low threshold test of a *prima facie* case on the merits is satisfied for the claims identified by Sinwa, save for (i) the three claims which Ms Tan accepted to be baseless (see [11] above); (ii) the head of claim relating to the termination of the Seismic Agreement by TGS (see [63] below); and (iii) the claim for an account of profits in respect of the ad-hoc projects ("the ad-hoc projects claim") (see [54] below). He however seeks to challenge the application on two fundamental arguments. His case is that:

(a) all the claims, except for the ad-hoc projects claim, are time-barred ("the Limitation issue"); and/or

(b) the application is not *bona fide* in the best interest of Nordic International ("the Good Faith issue").

If these arguments are accepted, the application should be refused as it would be futile and improper, respectively, to grant leave of court to commence the intended derivative proceedings.

Limitation issue

14 First, it is important to bear in mind that this leave application is brought by Sinwa *qua* shareholder for leave to commence arbitration proceedings in the name and on behalf of Nordic International against Nordic Maritime. In other words, while Sinwa is the *de facto* claimant in the leave application, Nordic International remains the *de jure* claimant against Nordic

Maritime for the purposes of calculating the applicable limitation period. Second, the notice of arbitration has yet to be issued against Nordic Maritime.

15 Under these circumstances, the key legal issue is when time in respect of the derivative action ceases to run under the Limitation Act. Is it the date when the notice of arbitration is issued against Nordic Maritime *after* leave is granted, or the *earlier* date when the application for leave to commence the derivative action was filed? The difference is crucial. If the former interpretation is accepted, all the claims would be time-barred save for the ad-hoc projects claim. Mr Soh accepts this. This is also apparent from the dates for the accrual of the various claims set out in [10] above. On the other hand, if the latter analysis is right, the claims would be saved since the leave application here was filed on 20 December 2013, within the six-year limitation period from the earliest date when the alleged causes of action accrued: s 6(1) of the Limitation Act.

Parties' arguments

16 Sinwa's primary position is that it would be unfair if time continued to run against Nordic International even though the leave application was brought within the six-year period. It submits that this is a lacuna in the law arising from the unique procedural nature of the current derivative proceedings, which should be deemed to have been "brought" for the purposes of the Limitation Act when the leave application was filed. As a fall back, Sinwa raises four further submissions:

(a) The claims are, in any event, saved under s 24A of the Limitation Act.

(b) Any order of the court granting leave is to be treated as a "judgment" for the purposes of s 6(3) of the Limitation Act. The substantive derivative action against Nordic Maritime is then "an action upon" this judgment which only needs to be brought within 12 years from the date on which leave is granted by this court.

(c) Mr Innhaug is issue estopped from raising the Limitation issue as it was raised before the Assistant Registrar ("AR") in the earlier unsuccessful application to strike out this action, Summons No 6120 of 2014.

(d) Mr Innhaug lacks the *locus standi* to raise the time-bar defence as it is for Nordic Maritime, as the proper defendant, to raise the defence in the arbitration.

17 Mr Innhaug's response is that the express language of s 6(1) of the Limitation Act dictates that an action would be time-barred unless proceedings are commenced by or on behalf of the company against the wrongdoer within six years from the date the wrong was committed, regardless of when the application for leave is filed. He submits that any unfairness resulting from this analysis is Sinwa's own doing as the so-called "lacuna" has only materialised in this case because Sinwa elected to apply for leave *before* commencing the arbitration against Nordic Maritime. It could and should have issued the notice of arbitration on behalf of Nordic International against Nordic Maritime and simultaneously, or soon thereafter, applied for leave of court to bring the derivative action in the name or on behalf of Nordic International. Mr Innhaug argues that if Sinwa had undertaken this route, the action would have been brought within time.

When does time cease to run for a derivative action?

18 I start with s 6(1) of the Limitation Act, which provides:

> **Limitation of actions of contract and tort and certain other actions**
>
> **6.**—(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (*a*) actions founded on a contract or on tort;
>
> (*b*) actions to enforce a recognizance;
>
> (*c*) actions to enforce an award;
>
> (*d*) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture

Leaving aside Sinwa's fall back arguments, it is common ground between the parties that s 6(1)(*a*) applies to the substantive claims for which leave is sought.[30]

19 It is also common ground that the Limitation Act applies to the arbitration. While no specific submission was made by the parties as to whether the intended arbitration will be governed by the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") or the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), it would appear that the IAA would apply since Nordic International is a foreign company. In either case, the Limitation Act applies: see s 11 of the AA and s 8A of the IAA. For purposes of calculating the limitation period, the commencement of the arbitral proceedings is by default "the date on which a request for that dispute to be referred to arbitration is received by the respondent": Art 21 of the Model Law and s 9 of the AA. Thus, in this judgment, I shall treat the service of a notice of

[30] PCS, paras 83–84; DCS, para 84.

arbitration as equivalent to the issuance of a writ, and the expressions "arbitration" and "action" are used interchangeably.

20 Mr Innhaug's counsel, Mr Joseph Tan ("Mr Tan"), developed his argument based on the express language of s 6(1) of the Limitation Act in this way:

(a) From a plain reading of s 6(1), time begins to run for the purposes of limitation on "the date on which the cause of action accrued". It stops when the "actions" are brought. The Limitation issue thus turns on the identification of the relevant "cause[s] of action" and "action".

(b) The "cause[s] of action" in this case are the claims which Nordic International purportedly has against Nordic Maritime, *inter alia*, under the Ship Management Agreement. It follows that time started to run for the purposes of s 6(1) when the alleged wrongs were done to the company itself. This point is not disputed.

(c) The "action" in s 6(1) is defined in s 2 of the Limitation Act to include "a suit or any other proceedings in a court" (and also arbitral proceedings due to s 11 of the IAA). From a full reading of s 6(1), it is clear that the "actions … brought" must be based on the "cause[s] of action" vested in Nordic International.

(d) Crucially, as is common ground, the proper plaintiff for the action is Nordic International, to whom the causes of action have accrued. Therefore, time only stops running when an action to prosecute these causes of action is brought by or on behalf of Nordic International against Nordic Maritime. In other words, the "action" in

this case is necessarily a reference to the intended arbitral proceedings in the name of Nordic International rather than this application for leave.

(e) Finally, as no such arbitral proceedings were commenced within the six-year period from the date when the causes of action accrued, the intended claims against Nordic Maritime, save for the ad-hoc projects claim, are now clearly time-barred.

21 I find Mr Tan's argument persuasive and plainly supported by the wording of s 6(1). On its face, there is nothing in s 6 or any other provision of the Limitation Act indicating that a *leave application* by a shareholder to commence a common law derivative action in the name of a company can constitute an "action" brought by or on behalf of the company to enforce its accrued cause of action.

22 It is true that, ordinarily, this question would not arise in a common law derivative suit commenced by way of court proceedings. In a typical common law derivative suit, the action against the wrongdoer would be brought by the aggrieved shareholder in its own name, with the indication that it is commenced in a representative capacity and for the benefit of the company of which he is a shareholder; the company itself would be joined as a defendant in order that it be bound by the result of the representative action. The issue of *locus standi* would then be decided as a preliminary point (see *Sinwa (OS 960)* at [15]-[16]; A*bdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 and *Walter Woon* at paras 9.60–9.62). In such a case, there is typically only a single "action" brought by the aggrieved shareholder on behalf of the company against the wrongdoer, albeit in the shareholder's own name. If leave is obtained following the

determination of the preliminary point, the action would continue for the merits to be adjudicated. If leave is denied, the action would not proceed further. In either case, it is clear that time would stop running when the action in court is brought.

23 In the present case, however, due to the arbitration clause in the Ship Management Agreement, this route was not available to Sinwa. Thus, it opted to bring this application *solely* for leave to commence arbitration in the name of Nordic International *before* commencing the substantive arbitral proceedings against Nordic Maritime. In such circumstances, there are two separate proceedings – this leave application in Sinwa's name, and the intended arbitration in Nordic International's name against Nordic Maritime. As the leave application is a preliminary step to the arbitration, it may be tempting to view these two proceedings as one single "action" for the purposes of s 6(1). But they are clearly distinct – the two proceedings are tied to different forums, and feature different plaintiffs and different defendants. Significantly, the intended arbitration is the only "action" in which the relevant causes of actions vested in Nordic International will be prosecuted against Nordic Maritime. Thus, I am compelled by the language of s 6(1) of the Limitation Act to reach the conclusion that Sinwa's current application for leave did not have the effect of stopping the limitation period from running.

24 Although there is no local authority on point, Mr Tan relies on foreign jurisprudence in aid of his argument. In the Canadian case of *Carr v Cheng, Dorset College Inc*, 2007 BCSC 1693 ("*Carr*"), for instance, the court had to consider if the derivative action was barred by s 3(5) of the British Columbia Limitation Act (RSBC 1996, c 266). The provision, which has since been repealed, was similar to s 6(1) of our Limitation Act, and provided that the action "may not be brought after the expiration of 6 years after the date on

which the right to do so arose". The court, in calculating the limitation period, took the date when the writ of summons for the main derivative action was filed as the date when the proceedings were commenced (at [105]). No reference was made to the earlier date when the application for leave to commence the derivative action was filed.

25 The same premise influenced the court in *Daniel Winfield v Ian Daniel and another*, 2004 ABQB 40 ("*Winfield*"). That was also a Canadian case, and there were parallel actions for oppression and leave to commence derivative proceedings. The defendant submitted that the leave action should be postponed till the resolution of the oppression action. The plaintiff, in response, argued that this delay could result in "irreparable harm" as it would lead to the expiry of the limitation period. The court accepted this argument (at [52]), implicitly acknowledging that time had continued running despite the filing of the leave application.

26 The Australian case of *Denis Cassegrain v Gerard Cassegrain & Co Pty Ltd and another* [2008] NSWSC 976 ("*Cassegrain*") is also instructive. There, the court was faced with an application for leave to commence a derivative action to recover land. Under s 27(2) of the New South Wales Limitation Act 1969, the action had to be brought within 12 years from the date on which the cause of action first accrued. The limitation expiry date was 14 September 2008. The leave application was filed on 18 December 2007 and the hearing was concluded on 5 September 2008. So the parties, recognising that time had continued to run despite the filing of the application for leave, expressly applied for an order by consent that the plaintiff be granted permission to file the statement of claim in the name of the company pending the determination of the leave application. The court acknowledged that the purpose of the order was to protect the plaintiff and the company "from the

possibility that the limitation period… will expire before I deliver judgment on the leave application" (at [6]). It was also observed that the claim may have expired on 14 September 2008, but for the orders made by consent.

27 Further, although not concerning a derivative action, I note that there is at least one local decision in which the interplay between the Limitation Act and the requirement for leave of court to commence an action was in issue. In *Management Corporation Strata Title Plan No 2677 v Hock Chuan Ann Construction Pte Ltd (in liquidation)* [2008] 1 SLR(R) 77 ("*Hock Chuan Ann Construction*"), the Singapore High Court considered an application by the plaintiff under s 299(2) of the Companies Act for leave to bring legal proceedings against a company under a creditors' voluntary winding up. The cause of action in tort was due to expire on 30 September 2007, and the leave application was filed on 5 September 2007. Choo Han Teck J, in denying leave on 20 September 2007, took into account the lateness in the application; it was implicit in his reasoning that time had continued to run despite the filing of the leave application (see [2] and [5]).

28 Finally, in the course of examining this issue, I came across an interesting Canadian article, Robert Thompson QC, Scott Jeffers and Codie Chisholm, "The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions" (2012) 49:3 Alberta Law Review 603 ("the Article"). The Article suggests that time should stop running when the leave application is filed for derivative actions, *inter alia*, because:

> (a) the applicant could otherwise be left without a remedy as a result of procedural delay or appeal, which are factors not entirely within his control;

(b) the leave application should be seen as a condition precedent to commencing the main action, and shows that the applicant does not intend to "sleep on its right"; and

(c) the eventual defendant or potential defendant would be put on notice that the applicant intends to enforce its rights when the leave application is filed.

As the Article has some bearing on the issue before me, I brought it to the parties' attention and invited submissions on its relevance, if any.

29 According to the Article, it was prompted by inconsistent Canadian authorities on whether it is the date of filing of the leave application or the date of filing the statement of claim that is relevant to satisfying a limitation period. The authors opine that the "inconsistent approach is particularly problematic since the two dates are often far enough apart that significantly different results can arise in respect to an argument that the claim is time-barred depending on which date is applied to the analysis" (at p 605). While cases such as *Carr* and *Winfield* are acknowledged, it is argued that these decisions should be given little weight as they did not squarely consider the question of whether the leave application was sufficient to commence proceedings. Rather, it was simply assumed that the position is otherwise.

30 Sinwa relies substantially on the Article, though I found Mr Soh's analysis to be somewhat superficial. While the Article's underlying normative arguments are persuasive, Mr Soh failed to explain how they can be applied to the interpretation of s 6(1) of our Limitation Act. In particular, he did not deal with the fact that the legal analysis advanced in the Article turns on the

specific language used in the Alberta Limitations Act (RSA 2000, c L-12) ("the ALA").

31 Section 3(1) of the ALA states:

> **Limitation periods**
>
> 3 (1) Subject to subsections (1.1) and (1.2) and section 11, if a claimant does not *seek a remedial order* within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (ii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
>
> [emphasis added]

32 It is apparent that the provision is worded quite differently from s 6(1) of our Limitation Act. Section 6(1) refers to "action", while s 3(1) of the ALA refers to a "remedial order". The latter is defined to include "a judgment or an order made by a court in a civil proceeding requiring the defendant to comply with a duty or to pay damages for the violation of a right" (s 1(i) of the ALA). The ALA also separately refers to "proceedings commenced" (s 2(1)). Since the ALA includes both the phrases "proceedings commenced" and "seek a remedial order", the Article suggests that they should be ascribed different meanings, and that to "seek a remedial order" should not be synonymous with starting an action or commencing proceedings. In its analysis, the phrase can

and should be read broadly to encompass the prior application for leave to commence a derivative action.

33 By contrast, s 6(1) of our Limitation Act is clear. The only reference is to "actions" which, in this case, must refer to the intended arbitration in the name of Nordic International against Nordic Maritime, as reasoned above. I also note that s 3(1) of the ALA is based on the discoverability principle, which turns on the *knowledge* of the claimant of the "injury" giving rise to the cause of action. The provision therefore provides for a much shorter limitation period of two years. Section 6(1) of our Limitation Act, on the other hand, provides for a much longer limitation period of six years starting from the *accrual* of the cause of action. This distinction is also material as an aggrieved shareholder, under our regime, has sufficient time to apply for leave before commencing the derivative action, if it elects to proceed sequentially as Sinwa has done in this case.

Can a derivative action be commenced prior to obtaining leave of court?

34 This leads to the only point in the Article which initially found some traction with me. The Article rightly observes that after a plaintiff files the leave application, it often has no control as to when the application will be heard and consequently, when leave will be either granted or refused. The actual date of the outcome will invariably be subject, *inter alia*, to the right of the defendant to file reply affidavits, any appeal against the decision on leave, and the schedule and availability of the Judge or the appellate court. For these reasons, it was suggested that the filing of the leave application should be sufficient to bring the matter within the limitation period "in order to avoid any potential injustices" (at p 605).

35 In addressing this concern, I am mindful that I am constrained by the language and structure of our Limitation Act (see *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [67]). I also note that our longer six-year limitation period would ordinarily be sufficient for parties to anticipate any reasonable delays arising from the conduct of the leave application.

36 More importantly, the argument based on injustice assumes that this application could only have been brought *sequentially*, as Sinwa has done in this case. Mr Tan, however, argues that there is no reason why Sinwa could not have issued the notice of arbitration in the name and on behalf of Nordic International and filed this application for leave *at the same time or shortly thereafter*. If leave was subsequently granted, the derivative action could proceed. But if leave was denied, the arbitration would have to be discontinued. In either case, the Limitation issue would not arise. In my view, adopting this route would avoid the potential injustice identified in the Article.

37 As Mr Soh conceded during oral submissions, there is no reason why this route could not have been adopted by Sinwa. By contrast with a statutory derivative action under s 216A of the Companies Act, there is no procedure governing a common law derivative action prescribed in either the Companies Act or the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("the ROC"). As noted above at [22], the action would ordinarily be commenced in the aggrieved shareholders' own name, with the indication that it is being brought in a representative capacity for the benefit of the company. It is thus well-established that the action may be brought *first*, without leave, before the court *thereafter* decides on the issue of *locus standi*. This is the reason why it was observed by Campbell JA in *Tom Michael Oates v Consolidated Capital Services Pty Ltd and others* [2009] NSWCA 183 that "there is no requirement

under the general law relating to derivative actions for leave to be obtained before a plaintiff commences such an action" (at [105]).

38 In this case, the usual procedure was not available to Sinwa due to the arbitration clause in the Ship Management Agreement, but nonetheless leave of court was required to proceed with the common law derivative action in Nordic International's name *via* arbitration. However, Sinwa still could have issued a notice of arbitration without first having obtained leave, then sought leave retrospectively or *nunc pro tunc* from this court. It is accepted that such retrospective leave can be sought in the context of liquidation for claims against the insolvent company and the liquidator, both of which require leave under the Companies Act (see *Jumabhoy Rafiq v Scotts Investment (Singapore) Pte Ltd (in compulsory liquidation)* [2003] 2 SLR(R) 422 and *Excalibur Group Pte Ltd v Goh Boon Kok* [2012] 2 SLR 999, respectively). I do not see why similar retrospective leave cannot be granted in the context of a common law derivative action, which is ordinarily commenced in court without leave in any event. Alternatively, it was always open to Sinwa to apply to the court for permission to file the notice of arbitration in Nordic International's name pending the determination of this leave application, as was done by the parties in *Cassegrain* (see [26] above).

39 I must make it clear that my above observations are confined to common law derivative actions. The questions of when time stops running for the purposes of a statutory derivative action, and whether retrospective leave can be granted for such actions are not before me, and will have to be considered when they arise in due course.

40 I should also add for completeness that, on the facts of this case, there is no injustice to Sinwa. It has had ample time to bring these claims, as the

parties have been immersed in disputes since 2009. This particular application to bring a derivative action against Nordic Maritime had its origin in the Court of Appeal's decision in Civil Appeal No 5 of 2010 granting leave to bring a derivative action against Mr Innhaug in his capacity as a director of Nordic International. In its *extempore* judgment,[31] the Court of Appeal noted that Sinwa was at liberty to "commence further derivative or other action in the name and on behalf of [Nordic International] against other parties for further breaches" (at [1]). The judgment was made on 29 September 2010. But Sinwa only filed this leave application some three years later on 20 December 2013. No satisfactory reason was furnished to justify this inordinate delay. The only excuse provided by Ms Tan for this lapse in time was that Sinwa needed time to find an expert witness and gather the evidence.[32] However, the evidence presented was substantially the same as that which was tendered in OS 960, which was heard in 2009. Further, no explanation was given as to why such a long time was required to procure the services of an expert. The alleged unfairness, if any, is the direct result of Sinwa's own decision to proceed in this manner.

Section 24A of the Limitation Act

41 Section 6(1) of the Limitation Act was specifically pleaded by Mr Innhaug in his defence to defeat the leave application.[33] Sinwa, however, has not pleaded s 24A of the Limitation Act or the facts in support thereof, but nevertheless seeks to rely on the provision to save the claims which are time-

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31 Judgment No 527 of 2010.

32 NOE for 15 March 2015, pp 81:12-81:20.

33 Defence of the Second Defendant (Amendment No 2) dated 11 May 2015, para 53.

barred (for the implications of this failure to plead, see [45] below). This submission is wholly misconceived for a number of fundamental reasons.

42 Section 24A applies to claims in respect of latent injuries and damage. The relevant sub-sections are as follows:

> **Time limits for negligence, nuisance and breach of duty actions in respect of latent injuries and damage**
>
> **24A.**—(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).
>
> **...**
>
> (3) An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —
>
> (*a*) 6 years from the date on which the cause of action accrued; or
>
> (*b*) *3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action*, if that period expires later than the period mentioned in paragraph (a).
>
> [emphasis added]

Typically this provision is invoked in cases of latent injuries where the cause of action might not have been apparent to the injured party. In such situations, the law, through s 24A, allows the limitation period of three years to run from the date when the claimant acquired the requisite knowledge for bringing the action instead of the default six years from the accrual of the cause of action.

43 Mr Soh, however, accepted that Sinwa gained the requisite knowledge to bring this action when it conducted an audit on Nordic International

"between 25 May 2009 to June 2009", as pleaded in its statement of claim.[34] Therefore, even if Sinwa could rely on s 24A, the claims would have expired by June 2012 which was well before this application was filed. I was thus puzzled as to why Sinwa was seeking to rely on s 24A. In his oral submissions, Mr Soh clarified that his submission was based on the language of s 24A(3)(*b*) which states that the three-year period runs from the earliest date on which "the plaintiff … had both the knowledge required for bringing an action … *and a right to bring such an action*" [emphasis added]. His position was that the "right to bring" a derivative action only arises after the court grants leave to commence the action. Section 24A, on this analysis, allows Sinwa three years from the date when the court grants leave to issue the notice of arbitration against Nordic Maritime.

44 I found this to be a startling submission, which I cannot accept. If true, then claims in a derivative action can never be time barred, and an aggrieved shareholder could bring an action on behalf of the company regardless of how long has passed since the causes of action accrued and since it acquired the requisite knowledge of the damage to the company. This would undermine both the framework of our limitation regime, and the fundamental principle that a plaintiff in a derivative action "cannot have a larger right to relief than the company itself would have if it were plaintiff" (see *Dominion Cotton Mills Co Ltd and others v George E Amyot and others* [1912] AC 546 at 552). It is also clear from the language of s 24A that the reference to "the plaintiff" is to the company in which "the cause of action [is] vested" (*ie*, Nordic International). Thus the relevant date when the "right to bring such an action" arose in this case is the date the alleged wrongs were committed against Nordic International by Nordic Maritime.

[34] SOC, paras 36-37.

45 It is also my view that Sinwa needs to plead its reliance on s 24A of the Limitation Act. Under O 18 r 8 of the ROC, "a party must in any pleading subsequent to a statement of claim plead specifically any matter, for example … any relevant statute of limitation … which he alleges makes any claim or defence of the opposite party not maintainable". Here, Sinwa relies on s 24A in response to Mr Innhaug's limitation defence, but there is no mention of the provision in Sinwa's reply. Further, the application of s 24A is, by its nature, fact sensitive. Thus the facts in support of the provision must also be pleaded so that the defendant can challenge Sinwa's assertion of the "earliest date" when it acquired the knowledge required to bring the action. Sinwa failed to do this as well.

46 Finally, both Sinwa and Mr Innhaug's submissions assume that the party whose knowledge is relevant for the purposes of s 24A is Sinwa *qua* shareholder. However, as I noted above, a close examination of the words of s 24A(3) indicate that the reference to "the plaintiff" whose knowledge matters is to the company (*ie*, Nordic International) instead. Therefore, even if it is established that Sinwa only gained knowledge of the wrongs to the company much later, it is not clear that it would be able to avail itself of the extension of time provided for under s 24A(3) of the Limitation Act (see UK Law Commission, *Report on Limitation of Actions* (LC 270, 3 April 2001) at paras 4.207–4.210). However, as no submissions were made on this point and it is unnecessary for me to make a finding thereon, I will leave this issue open for future determination.

Section 6(3) of the Limitation Act

47 Sinwa raised a similarly contrived interpretation of s 6(3) of the Limitation Act. The provision deals with the time limit for the enforcement of

judgments. But Sinwa submits that it also applies in this case. The argument only has to be stated, to be rejected. According to Sinwa, any order of the court granting leave is to be treated as a "judgment" for the purposes of s 6(3). The substantive derivative action against Nordic Maritime is then "an action upon" this judgment which only needs to be brought within 12 years from the date on which leave is granted by this court. Therefore Sinwa has, not just three, but 12 years to commence proceedings against Nordic Maritime after obtaining leave of court.

48 As with the similar submission premised on s 24A which I rejected above, this argument, if accepted, would make nonsense of the Limitation Act. The submission does not make sense on its own terms either as any subsequent arbitral proceedings against Nordic Maritime would be founded upon the causes of action vested in Nordic International, and cannot conceivably be construed as "an action upon" an order of this court granting leave.

Issue estoppel

49 Sinwa's reliance on issue estoppel is premised on the AR's rejection of Mr Innhaug's argument that the claims were time-barred in his earlier application to strike out various paragraphs of the statement of claim. Her decision was affirmed on appeal by Chan Seng Onn J.[35] It is elementary that for issue estoppel to apply, one of the key requirements is that the earlier order "must be a final and conclusive judgment on the merits" (see *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14]). It is eminently clear that the AR's refusal to

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[35] Registrar's Appeal No 25 of 2015.

accept Mr Innhaug's submissions on the Limitation issue at the striking out hearing cannot conceivably satisfy this requirement. This conclusion is self-evident from the oral judgment delivered by the AR wherein she expressly stated that the Limitation issue should be best decided by the trial judge:[36]

> In pointing this out, I make it clear that all I am saying is that the issue of time-bar is a factor which the trial judge will consider in due course in this action in any event, and given the fact that this is a novel case and there may be a need to look closely into the facts to determine if the defence of limitation would clearly apply such that leave ought not to be granted, the proper forum at which the issue should be considered is at trial and not before me.

Given these observations, it is incomprehensible how her decision could amount to a "final and conclusive judgment on the merits". The affirmation of the AR's decision on appeal does not add anything to this analysis.

50 What is disappointing about Sinwa's submission on this point is its abject failure to provide any reasonable basis in support of its position. It seems to me that the submission was made as a matter of routine simply because it was pleaded even though it was bereft of any legal or factual substratum, and more importantly without any belief in its veracity.

Locus standi to raise the limitation defence

51 This is another ill-conceived argument by Sinwa. Both parties are *ad idem* that for leave to be granted, there must be a *prima facie* case on the merits. It follows that leave "ought to be denied if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful" (see *Sinwa* (*OS 960)* at [24]). But as I noted earlier, the parties to the leave application are different from the parties to the intended derivative action. So the only way Mr

[36] NOE for Summons No 6120 of 2014 dated 21 January 2015.

Innhaug, who is opposing the leave application, can demonstrate to this court that the alleged claims are bound to fail is by reference to the defences vested in the intended defendant, Nordic Maritime. In that sense, the arguments raised in the context of a leave application will necessarily reflect the defences which the intended defendant is expected to raise in the substantive derivative action. Once this is properly understood, there can be no doubt that Mr Innhaug is entitled to raise the limitation defence in challenging this leave application. This is not an issue of *locus standi*, but simply a reflection of the principle that leave should not be granted if it would be futile to do so.

52 Therefore, I reject all of Sinwa's arguments to defeat the Limitation issue. It follows that all claims, save for the ad-hoc projects claim, are time-barred since no notice of arbitration was issued in respect of these claims within the six-year limitation period.

Good Faith issue

Ad-hoc projects claim

53 The ad-hoc projects claim is the only remaining claim which is not out of time. It is undisputed that the Vessel performed at least seven ad-hoc projects after 15 June 2010,[37] and that she remained in Nordic Maritime's possession throughout this period. It is also uncontroversial that these projects generated revenue, which Sinwa says exceeded US$9.5m in 2010 and 2011.[38] So Sinwa's case is that the Vessel must have made profits as a result of these ad-hoc projects. As no such profits were received by Nordic International during this period, these sums must have been wrongfully retained by Nordic

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37 MI affidavit, para 73.

38 TLL affidavit, para 74.

Maritime. If so, then Nordic International would clearly have a *bona fide* claim for which leave ought to be given.

54 Mr Innhaug accepts that Nordic International, as principal, is *prima facie* entitled to seek an account of any profits from Nordic Maritime as its agent. He however submits that this head of claim is baseless as Sinwa has failed to provide any proof that there were such profits made despite being provided access to the full accounting records of Nordic Maritime – even if Nordic Maritime was ordered to provide an account of profits, there is nothing for it to pay over. In other words, this claim does not satisfy the *prima facie* threshold. As noted in *Sinwa (OS 960)* at [21], in order for the *prima facie* test to be satisfied, there must be a reasonable or legitimate case against the wrongdoer for which the company may recover damages or obtain other relief. In his submissions, this argument is raised by Mr Innhaug to challenge the *bona fides* of the leave application. To echo what was observed by the Court of Appeal in the context of a statutory derivative action, there is an obvious overlap between the *prima facie* threshold and the requirement of good faith, in that an applicant with an unmeritorious claim will also typically be unable to demonstrate that he is acting in good faith and for the benefit of the company (see *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [55]).

55 There are several difficulties with Sinwa's analysis that the Vessel must have made profits from the ad-hoc projects. First, it is axiomatic that revenue is not the same as profits. In fact, Mr Innhaug's case that the Vessel was loss making throughout this period is supported by Nordic International's previous application, Summons No 2567 of 2012 in Suit 875 ("SUM 2567"), for, *inter alia*, the re-delivery of the Vessel to Nordic International to be "warm-stacked" in Batam, Indonesia. This application was driven by Sinwa

itself, and was motivated, *inter alia*, by its concern that the Vessel "appeared to be incurring operation expenses that far exceeded its revenue".[39] Hence, in Nordic International's supporting affidavit for SUM 2567 dated 25 May 2012, it is stated that:[40]

> … [I]t has come to the Plaintiff's [*ie,* Nordic International] attention, after perusing the aforesaid Cost Performance Reports, that the Vessel's continued operation and employment in various seismic survey projects is not justified. *The operation costs of the Vessel far outweigh the revenue that it has earned in the last three years.*
>
> [emphasis added]

56 Sinwa now seeks to advance a *volte-face* in submitting that "it would have been illogical for [the Vessel] to continue working between 2009 and 2 December 2011 if all of its ad-hoc projects were in fact loss-making".[41] While this reasoning may appear intuitively appealing, it is simply not supported by *any* evidence that there were in fact any such profits made. As Mr Innhaug points out, Sinwa has been given the Vessel's Cost Performance Reports and Nordic International's general ledgers for the relevant periods, as well as full access to Nordic Maritime's accounting records. The Cost Performance Reports, in particular, indicate that the Vessel incurred losses of approximately US$1.3m, US$2.6m and US$2.9m in 2009, 2010 and 2011, respectively.[42]

57 Sinwa, understandably, challenges the veracity of these records; but it has not provided any real basis for this challenge. At first, Ms Tan suggested on the stand that Sinwa has been unable to verify the accounting records and

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39 TLL affidavit, para 69.

40 Affidavit of Bruce Rann for Summons No 2567 of 2012 dated 25 May 2012, para 51.

41 PCS, para 61.

42 TLL affidavit, pp 348-351.

reports against the underlying source documents.[43] However, she later admitted that Nordic Maritime has never denied Sinwa access to the source documents.[44] Despite this full access, Sinwa has not been able to identify any particular discrepancy, and their allegations that the accounts are either incomplete or unverified are all broad and unspecified. I also note that Sinwa, *via* its parent company Sinwa Limited, had sent its auditors to the offices of Nordic Maritime to conduct annual audits of the Vessel's accounts up to the financial year 2012.[45] Yet Sinwa has been unable to provide any evidence that there were either profits made by the Vessel during this period, or that the Vessel's records, which indicate that it was loss-making during this period, are in any way inaccurate. Instead, it superficially states that it is "unable to quantify the profits without a forensic examination/audit of the source documents that support the revenue and costs of the Vessel's ad-hoc jobs".[46] This application, however, is not for discovery but for leave to commence a substantive claim. The burden is on Sinwa to establish at the leave application that there is a *prima facie* claim, but it has been unable to do so. Further it has been unable to even articulate what exactly such a "forensic examination/audit" would entail since it has already been granted full access to both the relevant accounting records and the underlying source documents. Therefore, the inescapable conclusion is that this claim is without merit, and cannot be for the benefit of Nordic International. Leave of court should not be granted to facilitate a fishing expedition by Sinwa to determine *whether* profits were made by the Vessel in respect of the ad-hoc projects.

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43 NOE for 15 March 2016, p 97:10.

44 NOE for 15 March 2016, p 100:3.

45 MI affidavit, para 103.

46 PCS, para 60.

58 There are two further points to be dealt with for this claim. First, in its written submissions, Sinwa places much weight on the revenue of US$2.5m which the Vessel allegedly generated in December 2009, according to the Cost Performance Report for that year.[47] During the course of the trial, Mr Tan informed me that this sum was not actually sales generated from any of the ad-hoc projects. Rather, it was monies received by Nordic Maritime from TGS following the settlement of an arbitration in London over the latter's termination of the Seismic Agreement.[48] Although Mr Innhaug corroborated this on the stand,[49] Mr Tan was unable to point me to any correspondence or other objective evidence confirming the source of these monies. Sinwa therefore disputes that this sum was received by way of settlement from TGS. This point, however, is neither here nor there. Regardless of whether this was a settlement sum or revenue earned from an ad-hoc project, the fact remains that the relevant Cost Performance Report still shows that the Vessel did not make any profits in 2009 even with this US$2.5m included. Also, the sum was received by Nordic Maritime in 2009, which is outside Sinwa's pleaded claim for an account of profits for the period after 15 June 2010.[50]

59 Next, Sinwa challenges the daily US$800 management fees which Nordic Maritime continued to charge Nordic International throughout this period even though the Ship Management Agreement had purportedly lapsed on 1 July 2010.[51] In total, Sinwa's estimate is that US$877,800 was wrongfully deducted as management fees.[52] There are four difficulties with this argument.

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47 TLL affidavit, p 348.

48 NOE for 15 March 2016, pp 26:9-27:2.

49 NOE for 16 March 2016, pp 120:20–121:1.

50 SOC, para 55.

51 TLL affidavit, para 91.

(a) First, as Mr Tan pointed out, although the Ship Management Agreement provided for 1 July 2010 as the termination date,[53] cl 17 of the contract expressly provides that "[t]hereafter it shall continue until terminated by either party giving to the other notice in writing".[54] Sinwa asserts that the parties had agreed at a meeting on 7 October 2010 that the Ship Management Agreement had expired by September 2010;[55] but there is no evidence before this court that the requisite notice in writing was actually issued by Nordic International to Nordic Maritime. Thus, it appears that the disputed management fees were rightfully charged to Nordic International under the Ship Management Agreement.

(b) Second, even if the Ship Management Agreement had lapsed on 1 July 2010, it cannot be disputed that Nordic Maritime continued to provide the Vessel with services as its ship manager throughout this period. The Vessel was not chartered out. Instead, the ad-hoc projects comprised contracts for seismic services between Nordic International and the clients.[56] These contracts were performed by Nordic Maritime on behalf of Nordic International using the Vessel, and Nordic Maritime bore most of the expenses for the projects.[57] Therefore, Nordic Maritime was entitled to be recompensed for these expenses and the services it provided to the Vessel (*ie*, on a *quantum meruit*

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52 TLL affidavit, para 102.

53 MI affidavit, p 127, box 17.

54 MI affidavit, p 130, cl 17.

55 TLL affidavit, para 60.

56 MI affidavit, para 77.

57 MI affidavit, para 85.

basis) as it is not disputed that Nordic International did not have any staff of its own. No evidence was adduced, however, as to whether the sum which Nordic Maritime had charged Nordic International was excessive even on a *prima facie* basis.

(c) Third, Sinwa is seeking leave to pursue the ad-hoc projects claim by way of arbitration. As noted above, this claim is in respect of seven ad-hoc projects after 15 June 2010. The only operative arbitration clause, however, is found in the Ship Management Agreement. It is Sinwa's pleaded case that the ad-hoc projects claim is "in breach of clauses 3.3, 3.5, 4.1 and 7 of the Ship Management Agreement and/or [Nordic Maritime's] duties to [Nordic International]". Furthermore, in acknowledging that the ad-hoc projects claim is subject to arbitration, Sinwa has also accepted that ad-hoc projects must have been undertaken and managed by Nordic Maritime pursuant to the Ship Management Agreement, and that the Ship Management Agreement had not lapsed on 1 July 2010 as alleged.

(d) Finally, and crucially, the pleaded claim in respect of the ad-hoc projects after 15 June 2010 is for an account of *profits*. Given that the losses reflected in the Vessel's accounts far exceed the sum which Sinwa says was wrongfully deducted as management fees, it is difficult to see how this issue, even if decided entirely in Sinwa's favour, would lead to a finding of a *prima facie* claim for undisclosed profits generated by the ad-hoc projects.

Therefore, this argument does not alter my finding that the intended arbitration is not *bona fide* in the best interest of Nordic International in respect of the ad-hoc projects claim.

60 This conclusion is sufficient to dispose of Sinwa's application for leave, in full. However, for completeness sake, I will set out my analysis of Mr Innhaug's remaining submissions on the Good Faith issue.

Pursuit of other claims without merit

61 Mr Innhaug argues that there are several other claims which are likewise without basis. Taken as a whole, he argues that these claims demonstrate that this action has been brought by Sinwa merely to harass him, and not in good faith for the benefit of Nordic International.

62 First, I have already identified the three claims which Ms Tan herself acknowledged were baseless (see [11] above). The fact that Sinwa continues to pursue these claims despite Ms Tan's concessions on the stand is not only inexplicable, but also supports Mr Innhaug's argument that the manner in which this application has been conducted indicates that it has not been brought for the benefit of Nordic International.

Claim arising from termination of the Seismic Agreement

63 Next, Mr Innhaug argues that the claim arising from the termination of the Seismic Agreement between BGP and TGS on 19 December 2008 is also a non-starter. Sinwa claims that Nordic Maritime breached its obligations under the Ship Management Agreement by failing to adequately rectify and address certain technical problems with the Vessel which were highlighted by TGS in a letter to Nordic Maritime dated 5 December 2008.[58] This failure of

management, Sinwa says, led to the termination of the Seismic Agreement by TGS on 19 December 2008.[59] This, in turn, caused the Vessel to be laid up and Nordic International to incur losses.

64 Mr Innhaug's response to this claim is two-fold. First, his position is that the technical problems identified by TGS all arose from design issues which sprung from the conversion of the Vessel from a fishing trawler into a seismic survey vessel. This conversion, he asserts, was under the purview of Nordic International, as owner, and BGP, as the time charterer, and outside the scope of the Ship Management Agreement. Therefore, Mr Innhaug submits that Nordic Maritime was not responsible for the technical flaws which led to the termination of the Seismic Agreement. Sinwa, to meet this argument, produced expert evidence on the flaws identified by TGS. I did not, however, find the evidence of Sinwa's expert, Mr Jasbir Singh, particularly helpful. His report had no clear terms of reference, and dealt with the technical issues in a vacuum without specific relevance to Mr Innhaug's case that the flaws were design defects outside the scope of Nordic Maritime's duties as a ship manager. There were also questions posed as to his standing as an expert given his lack of specific technical qualifications. Ultimately, there is no necessity for me to rely on Mr Singh's evidence because I am satisfied from the objective evidence that it is arguable that the flaws which allegedly led to the termination of the Seismic Agreement would, *prima facie*, fall within the scope of the Ship Management Agreement. As Mr Innhaug candidly admitted on the stand, Nordic Maritime was paid the full management fees throughout the period of the Vessel's conversion into a seismic survey vessel.[60] The

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58 MI affidavit, p 237.

59 MI affidavit, p 240.

60 NOE for 16 March 2016, p 37:3.

Vessel was not operational during this period, and it is arguable that Nordic Maritime had assumed responsibility for both the Vessel's conversion and its technical management. Indeed, Mr Innhaug accepted that, as Nordic International did not have employees of its own, it was the employees of Nordic Maritime who were negotiating for the seismic equipment, putting the equipment on board, and so forth.[61] Therefore, if Nordic International does have a cause of action arising from the termination of the Seismic Agreement, then it is not unarguable that Nordic Maritime would be responsible under the Ship Management Agreement.

65 Mr Innhaug's second response to this claim is more clinical – there is no such cause of action vested in Nordic International. Quite simply, Nordic International was not privy to the Seismic Agreement which was between TGS and BGP. There is no evidence that the termination of the Seismic Agreement had any knock-on impact on the Time Charter or caused Nordic International to suffer any loss. BGP remained liable to Nordic International for hire throughout the relevant period. Sinwa not only accepts this, but has in fact initiated arbitration proceedings against BGP for breaches of the Time Charter on this very basis (see [8(c)] above). The purported assignment of the Time Charter to NGS does not affect this analysis either – the notice of assignment dated 22 September 2008 expressly states that BGP was to remain responsible to Nordic International for due performance of the Time Charter.[62] Therefore, I find that this claim is plainly without any basis as well.

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61 NOE for 16 March 2016, pp 47:11–48:3.

62 TLL affidavit for Suit 1166, p 65.

Availability of alternative remedies

66 As Ang J observed in *Sinwa (OS 960)*, where there are alternative remedies available to the plaintiff to seek redress instead of commencing a derivative action, the plaintiff ought to resort to those alternative remedies, provided that they are real and viable options (at [60]-[64]). This principle, in my view, applies in this case.

67 First, there is a substantial overlap between the claims in the current action and the pending claims against Mr Innhaug in Suit 875 and the arbitration under the Time Charter against BGP. Particularly, the claim in respect of losses arising from the termination of the Seismic Agreement is repeated in almost identical fashion in Sinwa's statement of claim for Suit 875.[63] Thus, as far as this claim is concerned, it is difficult to see how bringing yet another derivative action can be for the benefit of Nordic International. It will only result in unnecessary duplication of efforts and costs. There is also no evidence that these alternative routes to recovery are not viable. The position might arguably be different if recovery against either Mr Innhaug or BGP is low. But in actual fact, the converse here is true as Nordic Maritime is, by all accounts, the least financially sound of the three possible defendants – Mr Innhaug, BGP and Nordic Maritime.

68 More pertinently, due to the partial award in SIAC 4, there is a clear and open path available to the parties for the resolution of the disputes between them. The partial award orders Sinwa to sell its shares in Nordic International to Mr Innhaug at a price to be assessed. While the parties have been unable to agree on the valuation methodology to be adopted, it is entirely

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[63] Statement of Claim (Amendment No 2) for Suit 875 dated 22 May 2014, paras 5 and 11.

open to them to apply to court for this purpose. This is not only a viable alternative remedy, but is in fact "the best solution to the dispute" in the words of the Court of Appeal in *Ting Sing Ning* (at [30]). Therefore, this is another basis on which I deny Sinwa leave to proceed with the intended arbitration.

Unreasonable delay

69 I have already discussed the unreasonable delay in the bringing of this application in the context of the Limitation issue (see [40] above). This is also a factor which indicates that this action is not *bona fide* in the best interest of Nordic International.

Collateral purpose

70 Finally, Mr Innhaug submits that all of the above factors lead to the inexorable conclusion that this application has been brought for a collateral purpose (*ie*, to harass Mr Innhaug and continue the litany of litigation against him) rather than in good faith. He also relies on the timing of the action as evidence of this collateral purpose. Sinwa, of course, denies this. Sinwa also argues that once it is established that there is a *prima facie* case on the merits, then it necessarily follows that the claim is brought in good faith and is in the best interest of the company. Mr Innhaug, on the other hand, argues that evidence of a collateral purpose can defeat the application even if there is a *prima facie* claim.

71 Dealing with Sinwa's secondary argument first, it is plainly wrong. If there is a *prima facie* claim which, if successful, would result in funds being recovered by the company, this *may* give rise to the inference that bringing the derivative action would be in the best interest of the company. However, that

is not the end of the analysis. As the Court of Appeal noted in *Ang Thiam Swee* in the context of s 216A(3)(*c*) of the Companies Act (at [56]):

> In determining whether the requirement in s 216A(3)(*c*) has been satisfied, *apart from a detached assessment of the merits in prosecuting the proposed statutory derivative action, the court may also go further to examine whether it would be in the practical and commercial interests of the company for the action to be brought.* In *Pang Yong Hock* ([12] *supra*), this court also suggested that some consideration be given to alternative remedies (at [21]–[22]):
>
> > 21 … A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.
> >
> > 22 In considering the requirement in s 216A(3)(c), the court should also consider whether there is another adequate remedy available, such as the winding up of the company (*Barrett v Duckett* [1995] 1 BCLC 243). …
> >
> > [emphasis added]

72 While these comments were made in the context of a statutory derivative action, there is no reason why they should not apply equally to this case. Thus, there is little doubt that evidence that this application was motivated by a collateral purpose rather than for the benefit of the company would lead to a denial of leave regardless of the merits of the claims.

Timing of this action

73 Do the facts support the existence of an ulterior or collateral purpose? Apart from the factors already laid out above – namely, the pursuit of baseless claims, the unreasonable delay in bringing this application, and the failure to pursue alternative remedies – Mr Innhaug argues that the timing of this action

is also illuminating. The partial award in SIAC 4 was handed down on 1 October 2013. Thereafter, Mr Innhaug filed Summons No 5773 of 2013 seeking an order to vacate the trial dates for Suit 875 which had been fixed for hearing in January 2014. This summons was brought on the basis that the parties' disputes would be resolved by the partial arbitral award. It was contested by Sinwa, but was nonetheless granted by the court on 9 December 2013. In the interim, the arbitrator also directed on 27 November 2013 that Nordic Maritime is to permit an independent auditor full access to its accounting records for a forensic re-construction of the accounts before the valuation of the shares in Nordic International.[64] Despite these developments, Sinwa commenced this action on 20 December 2013, merely 23 days after obtaining the directions for a forensic re-construction of the account, and 11 days after the court vacated the trial dates for Suit 875. Therefore, Mr Innhaug argues that this action must necessarily have been motivated by a collateral purpose to harass and continue the litany of litigation against him rather than for the *bona fide* best interest of Nordic International. Otherwise, it is argued that Sinwa would have followed up with the valuation of the shares as ordered in the SIAC 4 award and resolved its dispute with Mr Innhaug once and for all.

74 While these facts certainly do not portray Sinwa in the best light, there is no need for me to make a finding that this action was motivated by a desire to harass Mr Innhaug. What is clear, given all the factors which I have considered thus far, is that this action is clearly not *bona fide* in the best interest of Nordic International.

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64 Second Defendant's Bundle of Documents for Closing Submissions ("DCBOD"), p 103.

75 For the above reasons, I dismiss Sinwa's application for leave to commence arbitration proceedings against Nordic Maritime in the name and on behalf of Nordic International, with costs. Taking into account the nature of the leave application which was heard over three days inclusive of the oral submissions involving a novel point on the limitation issue, costs of $60,000 excluding disbursements is awarded to Mr Innhaug. The bulk of Mr Innhaug's disbursements were incurred for his affidavit of evidence-in-chief ("AEIC") which exceeded 8,000 pages. His total disbursements were about $26,750 of which $16,264 was for the filing fee for his AEIC. However, as the documents were indiscriminately exhibited in his AEIC without due consideration, I consider it fair to discount the total disbursements to $20,000, to be paid by Sinwa to Mr Innhaug. Sinwa should focus its attention on the two pending derivative actions for which leave of court has been obtained, one of which, Suit 875, is shortly due for hearing before me.

Steven Chong
Judge

Anthony Soh Leong Kiat (One Legal LLC), Andrew Ho Yew Cheng and June Lim Pei Ling (instructed) for the plaintiff;
Joseph Tan Wee Kong and Joanna Poh Ying Ying (Legal Solutions LLC) for the second defendant.