IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 5

Civil Appeal No 11 of 2016

Between

CHONG CHIN FOOK (ZHANG ZHENFU)

… *Appellant*

And

(1) SOLOMON ALLIANCE MANAGEMENT PTE LTD (formerly known as SOLOMON ASSET MANAGEMENT PTE LTD)
(2) LIM PEI LING JUNE
(3) GOH YAM SIM

… *Respondents*

Summons No 91 of 2016

Between

LIM PEI LING JUNE

… *Applicant/Second Respondent*

And

CHONG CHIN FOOK (ZHANG ZHENFU)

… *Respondent/Appellant*

In the matter of Originating Summons No 804 of 2015

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

And

In the matter of Suit No. 215 of 2015

Between

CHONG CHIN FOOK (ZHANG ZHENFU)

… Plaintiff

And

(1) SOLOMON ALLIANCE MANAGEMENT PTE LTD (formerly known as SOLOMON ASSET MANAGEMENT PTE LTD)
(2) GOH YAM SIM
(3) LIM PEI LING JUNE

… Defendants

GROUNDS OF DECISION

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Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
13 September; 2 November 2016

11 January 2017

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

Introduction

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Chong Chin Fook v Solomon Alliance Management Pte Ltd and others* [2016] 2 SLR 622 ("the GD"). The Judge refused to grant the Appellant leave pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("s 216A") to allow him to control the conduct of proceedings, on behalf of a company, Solomon Alliance Management Pte Ltd ("the Company"), in an *on-going* suit involving the Company. We allowed the appeal and now give the detailed grounds for our decision.

2 The central motif that underlay our decision can be summarised in one phrase – conflict of interest. Indeed, as will be evident from our analysis, this

particular case was rife with conflicts of interest on the part of the directors of the Company (both past and the present, only remaining director). There was, likewise, the danger of a separate set of conflicts of interest which would arise on the part of the Appellant had we permitted him to take control of the conduct of the said proceedings, on behalf of the Company, without let or hindrance.

3 That brings us to another important feature of the present case – that of balance. Proceedings pursuant to s 216A are, by their very nature, often characterised by allegations of misconduct levelled by one party against the other, resulting in a generally fractious atmosphere. It is therefore also often necessary for the court to strike a *balance* in the midst of the tension that divides the parties concerned. This can be achieved, *inter alia*, by the broad power conferred on the court pursuant to s 216A(5) of the Companies Act ("s 216A(5)") to make such orders as it thinks fit in the interests of justice. Indeed, we exercised our powers under s 216A(5) given the fact that there might (as noted in the preceding paragraph) be a different set of conflicts of interest on the part of the Appellant had he been allowed to take control of the conduct of the proceedings on behalf of the Company without more. We therefore granted the Appellant *conditional* leave under s 216A.

4 Finally, the present case also raised a significant point of law in respect of the legal criterion to be applied in an application under s 216A in order to ascertain whether or not the company concerned would diligently prosecute the *on-going* proceedings concerned. For reasons which we will come to, we held that the Appellant need only show that it was *probable* that the Company would not diligently prosecute the suit, as opposed to an *actual* lack of diligent prosecution by the Company.

5 With this, we turn first to briefly outline the facts salient to the issues on appeal.

The facts

6 The Company was founded by the Appellant, the third respondent ("Goh"), Pang Chee Kuan Capellan ("Pang"), Helen Chong ("HC") and Thomas Chin (who has since left the Company and was not a material figure in so far as the dispute was concerned). The Company was in the business of providing business and management consultancy services. As part of this, it marketed and sold asset-backed investment products including land acquisition and joint-development products.

7 The exact beneficial shareholding of the Company was in dispute. The details of that dispute were not relevant to the appeal except that Goh was not a registered shareholder but that the Appellant took the position that Goh's wife held 5% of the shares on trust for him. It was, however, undisputed that the Appellant was a substantial shareholder, albeit being in a minority, with at least 24.4% of the shares in the Company. Further, it was not disputed that, at the very least, HC and Pang together formed a bare majority.

8 On or around 20 October 2011, the Company entered into an Independent Sales and Marketing Agreement with Shenton Wealth Holdings Pte Ltd ("SWH") under which it was appointed as an affiliate to sell SWH's investment products. The Appellant averred that HC had a significant interest in SWH. The Company sold, amongst others, products from Dolphin Capital GmbH ("Dolphin") and Ritz Property Investment Asia Pte Ltd ("Ritz"). For ease of reference, we will refer to these products from Dolphin as "the Dolphin Products".

9 To market and sell investment products, the Company appointed sales agents, who would receive commission upon successful sales. The appointed sales agent would enter into an Independent Contractor Agreement ("IC Agreement") with the Company. Pursuant to the IC Agreement, a sales agent could not market and sell products that competed, either directly or indirectly, with the products sold by the Company. Pang was appointed a sales agent of the Company pursuant to an IC Agreement dated 17 August 2009.

10 Following the departure of two directors (who are not material to the dispute) sometime in 2012, the Appellant became the sole director of the Company. At the same time, HC and Pang took on greater management responsibilities in the Company.

11 Disputes began to arise over the management of the business. Matters came to a head when the Appellant suspected Pang and HC of diverting business from the Company. According to the Appellant, in 2012, Pang, who marketed the Dolphin Products, earned $1,220,540.98 in management fees and personal commission. The following year, he earned $1,431,930.30. He had generated $2,499,400 in 2013 for the Company through sales of the Dolphin Products. In 2014, however, Pang's sales of the Dolphin Products fell by approximately 96% to $91,000. This led the Appellant to suspect that Pang was diverting sales from the Company in breach of the IC Agreement. The Respondents, on the other hand, attributed Pang's dip in sales to personal problems. Pang's mother had passed away on 3 September 2013 and his mother-in-law had passed away shortly thereafter. His wife was then diagnosed with cancer. All this led him to stop working completely for a period of time to focus on his family.

12 Despite being made aware of this, the Appellant remained dissatisfied. He engaged a private investigation firm, Commercial Investigations LLP ("Commercial"), to look into the matter. Sometime in 2014, Commercial arranged for its agent, Ms Loke, to meet Pang for the purpose of making a purported investment. It appeared from Commercial's report that Pang had recommended the Dolphin Products to Ms Loke, representing that he was from a company called Megatr8 Inc Pte Ltd ("Megatr8"). He further represented that he had single-handedly, and within seven days, raised $10m for Megatr8. When Ms Loke purportedly entered into a contract for investment, Pang sent her a scanned copy of the contract *via* email. The email address used by Pang to send the scanned copy of the contract indicated that the sender was HC's daughter. Moreover, the contract was scanned from a machine that belonged to SWH, which, as mentioned, was a company that the Appellant said HC had an interest in. All this, the Appellant submitted, confirmed his suspicions that HC and Pang were working together to divert business from the Company.

13 The Appellant subsequently arranged to have a meeting with HC and Pang on 24 November 2014 ("the 24 November Meeting"). Transcripts of the meeting, which was taped in its entirety, were exhibited in the affidavits filed by the parties.

14 Shortly after the 24 November Meeting, on 30 November 2014, the Appellant sent an email to all shareholders setting out the main points agreed at the meeting, including the settlement agreement supposedly reached ("the 30 November email"). He stated that they had amicably arrived at terms for him to be compensated as well as for his withdrawal as a shareholder and director of the Company. He also stated that it was agreed that he could take

all the monies left in the Company's account once all the costs and expenses "on releasing the office units and manpower [had] been settled". Finally, the Appellant stated that the disposal of the office units and company assets as well as the bonuses and payments to the staff was to be effected at his discretion.

15 According to the Respondents, the 30 November email was misleading as to the terms of the alleged settlement. HC responded to the email on 12 December 2014 informing the Appellant that shareholder agreement was required for any decision made in respect of the termination of staff, payment of salaries and bonuses as well as the disposal of company assets and equipment.

16 After a series of further correspondence, it became clear that an amicable settlement was no longer on the cards. In this regard, the Appellant claimed that HC was unilaterally imposing additional conditions on the settlement.

17 On 6 January 2015, the Company's former solicitors, M/s Eugene Thuraisingam ("ET"), acting on instructions from the Appellant (who was the Company's sole director at the time), sent a letter of demand to Pang alleging that Pang had breached the IC Agreement by diverting business from the Company.

18 On 14 January 2015, Pang's solicitor, Mr Andrew Ho (formerly of Engelin Teh Practice LLC ("ETP")), replied with a holding letter. More than a month later, on 18 February 2015, after being reminded by ET, ETP replied on behalf of Pang, stating that the IC Agreement was limited in its operation to specific products. It was further alleged that the IC Agreement had expired

and was no longer operative because those specific investment products had been fully sold or marketed before 2013. Pang also denied that he had represented himself as being from Megatr8.

19 One day before, on 13 January 2015, the shareholders, excluding the Appellant, called for an Extraordinary General Meeting ("the EGM") to be held on 10 March 2015. The purpose of the EGM was for the shareholders to consider resolutions for the removal of the Appellant as a director of the Company and the appointment of Goh and the second respondent, June Lim ("JL"), in his stead. JL, a practising lawyer, is Pang's niece. She is also married to Andrew Ho, who, as noted above, was representing Pang in his dispute with the Company over the alleged breach of the IC Agreement.

20 On 25 February 2015, ET informed the Appellant that the Company could still pursue an action against Pang but that it was no longer as straightforward as initially thought because Pang had cast doubt on the validity of the IC Agreement. Additionally, ET explained that since they were the Company's solicitors on record, they had to take instructions from the board or someone properly delegated with authority and that, in the light of the impending EGM to remove the Appellant, there could be issues as to authority, which would complicate matters should the Company commence proceedings against Pang. The next day, ET sent a further email reiterating much of the same and seeking confirmation that it was the Company's instructions for an action to be commenced against Pang.

21 On 27 February 2015, the Appellant replied with instructions to commence an action ("the 27 February email"). The salient parts of the 27 February email read as follows:

> Though in the letter of demand to [Pang], we are pursuing a sales revenue of close to $2.5 million base on 2013 sales figure of close to $20 million. This sum may well just be the tip of the iceberg since [Pang] has indicated to the prospect that he closed a sales of $10 million with a week.
>
> Regardless of how true is his statement, as a layman in such court case, I am of the view for you to blow up the figure and for him and Implicate Megatr8 into the trial. Involve MAS and IRAS where possible. There will certainly be money trace and discredit his character and integrity if the $10 million sales is not found.
>
> …
>
> In short, since we are proceeding with the legal action, I want you guys to go all out and show no mercy till they admitted their wrong doing (same go for [HC] when pursuing her case). Give me all suggestions on how we can escalate this case and blow it out of proportion. …
>
> …
>
> Can I at this point suspend both their appointment (once the letter of demand for [HC] has been sent out) till this matter is concluded?
>
> Regardless of whether I can or cannot suspend their appointment, can I announce to all my company staffs and sales agents (independent contractors) on company action on both parties.

22 On 4 March 2015, the Appellant, through the Company, suspended Pang for breaches of the IC Agreement. On 5 March 2015, the Company commenced Suit 215 of 2015 ("Suit 215") against Pang for breaches of the IC Agreement. In the present application, leave was sought by the Appellant under s 216A to control conduct of Suit 215 on behalf of the Company.

23 On 6 March 2015, the Appellant sent a notice with the Company's letterhead to all of the Company's clients informing them of Pang's suspension ("the 6 March Notices").

24 At the EGM held on 10 March 2015, the Appellant was removed as the sole director. In addition, Goh and JL were duly appointed as directors of the Company. Following this, JL sought legal opinions on the merits of Suit 215. She approached Quahe Woo & Palmer LLC ("QWP") for a legal opinion instead of ET (who were the Company's solicitors on record in Suit 215). In their opinion dated 8 April 2015, QWP advised that Suit 215 be withdrawn to avoid substantial costs. QWP advised that the IC Agreement was void for being an unreasonable restraint of trade clause and that there were evidential gaps which made it difficult to show that Pang had breached the terms of the IC Agreement. The IC Agreement only appeared to govern marketing of investment products in relation to "The Villages of Aina Le'a, Plot D1-B" and did not make mention of the Dolphin Products. In QWP's opinion, it was doubtful whether the IC Agreement extended to preclude Pang from marketing and selling the Dolphin Products through Megatr8. For those reasons, amongst others, QWP advised that it was difficult for the Company to successfully sue Pang for breach of the IC Agreement. In a supplementary advice issued on 18 May 2015, QWP advised that the IC Agreement had been discharged by frustration because the products under the IC Agreement (in relation to the Villages of Aina Le'a, Plot D1-B) were unavailable for sale as of March 2012.

25 JL then wrote to ET, extending copies of QWP's legal opinion. ET responded to her email on 20 May 2015, stating that they maintained their initial view that the Company had a case against Pang but that it was not a straightforward claim. ET further noted that if the objective in commencing the suit was to put pressure on Pang to reach a settlement, it might be worthwhile pursuing Suit 215 but this carried with it the risk that the Company might be ordered to pay costs if Pang raised a "robust defence" at trial.

26 JL extended copies of both ET's and QWP's legal opinions to the Appellant on 10 June 2015. The Appellant was informed that the issue as to whether Suit 215 should be continued would be discussed and voted on at the next Annual General Meeting ("AGM") scheduled on 16 June 2015. The Appellant was invited to state his position as to why Suit 215 should be continued. Furthermore, the Appellant was put on notice that should he wish to compel the Company to proceed against the advice obtained, he should at least agree to bear the legal costs of the action and to indemnify the Company for any losses sustained if the claim is unsuccessful. The AGM was eventually postponed to 20 July 2015.

27 On 16 July 2015, Pang filed his defence and counterclaim in Suit 215. Pang counterclaimed in defamation, basing his claim on the 6 March Notices which were sent by the Company, under the control of the Appellant, to its clients. The Appellant was joined as a defendant to the counterclaim.

28 At the AGM, all the other shareholders abstained from voting, leaving the Appellant to decide if the Company should continue with Suit 215. The other shareholders cautioned the Appellant that if he voted to continue with Suit 215, he would have to bear all the legal costs and expenses should the Company fail. The Appellant refused to vote and left the AGM.

29 The Company then issued a Third Party Notice in Suit 215 to the Appellant seeking indemnification and/or contribution in respect of the Pang's counterclaim. The Appellant, in turn, issued a Third Party Notice against the Company seeking indemnification and/or contribution in respect of Pang's counterclaim.

30 On 24 August 2015, Pang applied to strike out the Company's statement of claim in Suit 215. This application was stayed pending the resolution of the Appellant's s 216A application before the Judge. After the Judge's decision, the Company on 3 March 2016, through its current solicitors, Eldan Law LLP ("ELD"), successfully resisted Pang's striking out application.

31 On 8 October 2015, the Appellant commenced Suit 1023 of 2015 ("Suit 1023") for minority oppression against the other shareholders of the Company. Amongst other relief, he sought a buy-out or an order for the Company to be wound up. The defendant shareholders engaged Andrew Ho as their solicitor in Suit 1023.

32 On 29 February 2016, JL resigned as a director leaving Goh as the only director of the Company. JL returned to legal practice, joining her husband at Eden Law Corporation. Andrew Ho continued to represent Pang in Suit 215 and the defendant shareholders in Suit 1023.

The Judge's decision

33 The Judge dismissed the Appellant's application under s 216A for leave to control the conduct of Suit 215 on behalf of the Company because: (a) he was not satisfied that the Appellant was acting in good faith; and (b) he was not satisfied that allowing the Appellant to have conduct of Suit 215 was *prima facie* in the interests of the Company owing to the conflict of interest on the part of the Appellant that would arise should he be granted leave. In addition, the Judge held that the Appellant had to demonstrate that the Company was not prosecuting or defending the action with diligence because

the application was in respect of an action that was *on-going*. This, in his view, the Appellant had failed to do.

34 In so far as the issue of good faith was concerned, the Judge referred specifically to the 27 February email in which the Appellant had instructed ET to blow the case out of proportion (see above at [21]). The Judge was of the view that, individually, the pieces of evidence did not show a lack of good faith, but when considered with the sequence of events leading to the commencement of Suit 215, they demonstrated that good faith was lacking on the part of the Appellant. The strong language used by the Appellant in giving instructions to ET to commence Suit 215, while he faced an impending EGM in which he was likely to be removed, gave the overall impression that the Appellant was intent on pursuing matters against Pang come what may and was sufficient to demonstrate "a clouding of judgment that was sufficient to demonstrate a disregard of the interests of the Company" (at [26] of the GD).

35 On the question as to whether it appeared to be *prima facie* in the interests of the Company that the action be prosecuted, the Judge opined that a higher threshold should be applied since proceedings were already underway (at [27] of the GD). The Judge found that the Appellant had failed to demonstrate "that there was something wanting in the company's management or conduct of" Suit 215 (at [29] of the GD). Furthermore, it was not *prima facie* in the interests of the Company for the Appellant to have control over conduct of Suit 215 as there would be a clear conflict of interest on the part of the Appellant and detriment to the Company if he were allowed to do so. The Appellant faced a claim of contribution and/or indemnification from the Company and the Judge opined that if the Company were free to act in its own interests, it might, for instance, look to the Appellant to bear full responsibility

for the proceedings in the event it is unsuccessful against Pang (at [37] of the GD). This would not happen if the Appellant had conduct of the proceedings.

36 The Judge was cognisant that JL was Pang's niece and that Goh was hostile to the Appellant. However, the Judge held that there was nothing to demonstrate that Suit 215 was being pursued with anything other than the requisite rigour. Even if there were conflicts of interest on both sides, any conflict on the part of Goh and JL was not brought home to the Company and, in any event, the possibility of conflict on the part of Goh and JL did not outweigh that of the Appellant (at [40] of the GD).

37 Finally, he held that as a matter of the practical and commercial interests of the Company, which itself commenced the litigation, it would be preferable for the conduct of Suit 215 to be left in the hands of those who had commenced it (at [43] of the GD).

Arguments on appeal

Appellant's case

38 The Appellant submitted that he was acting in good faith because he honestly and reasonably believed that the Company had a viable cause of action against Pang and he was not using the mechanism provided in s 216A for the purposes of obtaining a buy-out of his shares. He denied that this was the collateral purpose for which he sought control of the action.

39 The Appellant accepted that he had to satisfy the court as a threshold issue that the Company would not diligently prosecute Suit 215. He submitted that there was sufficient evidence that demonstrated that the directors of the Company were dragging their feet in prosecuting Suit 215. JL was Pang's

niece and Goh was the head of Ritz, a company in which HC has an interest, showing that he too was aligned with HC and Pang.

40 In so far as the conflicts of interest that would arise on the Appellant's part if leave under s 216A were granted were concerned, the Appellant pointed out that both the Company and he were on the same side in respect of Pang's counterclaim as they would both plead a defence of justification. If, however, Pang succeeded, the Appellant accepted there would be a conflict of interest. To mitigate these conflicts, the Appellant expressed a willingness to enter into certain undertakings which included the withdrawal of his Third Party Notice for contribution and/or indemnity.

Respondents' cases

41 The Respondents' cases were largely aligned. First, they submitted that there was no evidence of an *actual* lack of diligent prosecution by the Company. The Company had been meeting all deadlines and even successfully resisted a striking out application brought by Pang.

42 Secondly, the Appellant had commenced Suit 215 in bad faith, attempting to use the action to strong-arm the other shareholders into buying him out. It would not, therefore, be in the interest of the Company to allow the Appellant to take conduct of Suit 215 as to do so would allow him to plunder the assets of the Company to further his own personal agenda.

43 Finally, the Respondents pointed to the conflicts of interest on the part of the Appellant which would arise if he were permitted to take control of Suit 215 on behalf of the Company. The Appellant faced a counterclaim brought by Pang for defamation and the Company would possibly have to look

to the Appellant for indemnification and/or contribution. The Respondents submitted that the Appellant's proposed undertaking was nothing more than a desperate attempt to gain control of the Company for the purpose of controlling its conduct of Suit 215 and that if he were serious, he should undertake to pay costs, not from the time he took control of Suit 215, but from its commencement.

Issues before this court

44 The relevant part of s 216A reads as follows:

> (2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.
>
> (3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —
>
> > (*a*) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
> >
> > (*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 be brought, prosecuted, defended or discontinued.

45 In the present case, the giving of notice under sub-s (3)(*a*) was not in dispute. The following issues thus arose for determination:

> (a) whether the appellant had taken out the application in good faith ("Issue 1");

(b) the appropriate legal criterion to be applied in an application under s 216A in order to ascertain whether or not the company concerned would diligently prosecute the *on-going* proceedings concerned and whether the Appellant had satisfied the criterion ("Issue 2"); and

(c) whether it appeared to be *prima facie* in the interests of the Company that the action be prosecuted and/or defended ("Issue 3").

46 Before turning to elaborate on our decision in respect of each of the issues identified above, we turn briefly to JL's application in Summons No 91 of 2016 ("SUM 91").

JL's application to cease to be a respondent in the appeal

47 In SUM 91, JL applied to cease to be a party in the appeal. She submitted that she was at all times a nominal defendant in the proceedings by virtue of the fact that she was a director of the Company. However, given the fact that she had resigned from her position as a director of the Company, there was no longer any reason for her to continue to participate in the appeal. Not surprisingly, SUM 91 was resisted by the Appellant.

48 JL filed SUM 91 on 27 October 2016. To appreciate fully the lateness of her application, it is necessary to briefly set out the procedural history of the appeal.

49 The Judge rendered his decision on 2 February 2016, releasing his detailed grounds on 23 February 2016. The Appellant had appealed against the Judge's decision on 10 February 2016. As mentioned above, on 29 February 2016, JL resigned as a director of the Company. On 13 September 2016, the

hearing of the appeal commenced. By that time, all parties, including JL and Goh, had filed submissions as to why the appeal should be dismissed. The hearing of the appeal was adjourned to afford parties the opportunity to consider if they wished to reach an amicable settlement.

50 As no amicable settlement was reached, a further hearing was fixed on 2 November 2016. About 5 days before the scheduled hearing, JL filed SUM 91.

51 The highly belated filing of SUM 91 was sufficient reason in itself for us to dismiss the application. JL had resigned on 29 February 2016 and had ample opportunity before the parties first appeared before us on 13 September 2016 to file her application. Further, we did not agree that JL was merely a nominal defendant. She had filed substantive submissions before the Judge as to why the Appellant's leave application should be dismissed. Similarly, on appeal JL took a position on the merits of the appeal. She could hardly be described as a nominal defendant. We should add that JL did not point to any particular rule in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) under which she was bringing her application. For all these reasons, we dismissed SUM 91.

52 With this, we turn to our decision on the substantive issues in the appeal, beginning with Issue 1.

Issue 1

53 To recapitulate, the Judge was not satisfied that the Appellant was acting in good faith because the cumulative effect of the communications between the Appellant and ET, specifically the strong language used in the 27 February email in which instructions were given for the Company to

commence Suit 215, demonstrated that the Appellant wanted to pursue matters against Pang in a manner that showed a clouding of judgment sufficient to demonstrate a disregard of the interests of the Company.

54 With respect, we did not agree with the conclusion arrived at by the Judge as we were satisfied that the Appellant *had* demonstrated that he was acting in good faith. As we observed at the outset of these grounds (above at [3]), proceedings pursuant to s 216A generally involve a fractious atmosphere, usually because of allegations of misconduct levelled by one party against the other. Similar observations have been made in decisions of this court (see, for example, *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [20]). In *Pang Yong Hock*, it was held that questionable motivations of the applicant *per se* might not amount to bad faith. Instead, bad faith may be established where the questionable motivations constituted a personal purpose which indicated that the company's interests would not be served (see *ibid*).

55 In *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*"), this court comprehensively surveyed the requirement of good faith in an application brought under s 216A, explaining as follows (at [16]–[17]):

> 16 … that good faith is dependent less on the motives which trigger the application for leave to bring a statutory derivative action, and more on the purpose of the proposed derivative action, which must have an obvious nexus with the company's benefit or interests. …
>
> 17 Often, an applicant will have a number of overlapping motives, which in turn may cloud the identification of his principal purpose in seeking leave to commence a statutory derivative action. The present case involves just such a confluence of factors. …

56 It was further explained (at [29]−[31]) that the inquiry of an applicant's good faith was a subjective investigation into whether the applicant honestly or reasonably believed that a good cause of actions exists:

> 29 … This survey of the case law reveals a piecemeal evolution which has incrementally incepted objective considerations of legal merits into s 216A(3)(*b*) of the Companies Act. It appears to us that this development detracts from both the language and the substance of the provision. While the applicant's good faith and the merits of his application need not be unconnected (for example, as pointed out in *Swansson*, the court may find that the applicant lacks good faith if no reasonable person in his position could believe that a good cause of action existed), they are not necessarily connected. … *As such, the conceptual integrity of the good faith requirement demands that any considerations of legal merits under this head must be yoked to the intents and purposes of the applicant who is seeking to initiate a statutory derivative action, ie, to an assessment of whether the applicant honestly or reasonably believes that there is a good cause of action.* This is not inconsistent with the decision of this court in *Pang Yong Hock*, particularly in the oft-cited dicta at [20] that "[t]he best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all".
>
> 30 One consequence of the fixation on the legal merits of the proposed statutory derivative action is that local jurisprudence has been sparse on the substantive relevance of the applicant's motives to the assessment of his good faith. *What is nevertheless clear, following* Pang Yong Hock*, is that hostility alone cannot constitute bad faith.* However, no test has been articulated as to the point at which an applicant's motives will collaterally impugn his good faith. The Australian position is that the applicant lacks good faith where his collateral purpose amounts to an abuse of process (see *Swansson* at [37]). This test resonates, as abuse of process is one of the grounds for striking out an action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). … Given that the statutory derivative action under s 216A of the Companies Act also relates to a similar exercise wherein the court has to evaluate the *bona fides* of the applicant based on affidavit evidence, the "abuse of process" test provides a useful standard by which to decide whether the applicant's collateral purpose amounts to bad faith. …

> 31 The onus is upon the applicant to demonstrate that he is or may be "genuinely aggrieved" (see *Pang Yong Hock* at [19]), and that his collateral purpose is sufficiently consistent with the purpose of "doing justice to a company" (see *likewise Pang Yong Hock* at [19]) so that he is not abusing the statute, and, by extension, also the company, as a vehicle for his own aims and interests.
>
> [emphasis added]

57 In *Ang Thiam Swee*, the court found that the applicant was not acting in good faith because the overriding impression given by the applicant was that he felt he either had or would have been wronged and was using the s 216A mechanism not as a means of pursuing the interests of the company, but, instead, to secure and/or advance his own interests within the company. As there was no clear coincidence between the company's interest and the applicant's apparent collateral purpose, the application appeared to be a cynical attempt to load the scales against another minority shareholder on the pretext of doing justice to the company. The court also held that it was clear that, having regard to the totality of the evidence, the applicant did not have an honest belief in the merits of the proposed derivative action.

58 The situation before us was markedly different. It was clear to us that on the evidence, the Appellant *did* have an honest belief in the merits of Suit 215. The Appellant was advised by ET that there was a case against Pang. Even in the face of QWP's advice that Suit 215 should be withdrawn, ET maintained that there was a case against Pang. Moreover, the Appellant's suspicions that Pang was diverting business from the Company was ostensibly confirmed by Commercial, whose report concluded that Pang was offering for sale the Dolphin Products for Megatr8, instead of the Company.

59 While we agreed with the Judge that the language used in the 27 February email was indeed strong, to say the least, this did not detract from the fact that on the objective evidence, the Appellant appeared to have an honest belief in the merits of Suit 215. As we have stressed multiple times, a certain degree of acrimony, usually manifested in hostility between the parties, is bound to be present. The 27 February email was drafted by the Appellant who appeared to have just resolved to commence litigation through the Company against Pang. Strong, even extreme language, was only to be expected.

60 The Judge found that there was a clouding of judgment that was sufficient to demonstrate a disregard for the interests of the Company presumably because of the Appellant's personal vendetta against Pang. With respect, we were unable to agree with the Judge's finding. As was explained in *Ang Thiam Swee*, the mere presence of a collateral purpose would not preclude an application under s 216A if the Appellant could demonstrate that his collateral purpose was sufficiently consistent with the purpose of doing justice to the Company. In our judgment, any personal vendetta that motivated the Appellant to commence Suit 215 and/or to continue pursuing it was sufficiently consistent with doing justice for the Company. Ultimately, if Suit 215 turned out to be successful, value would be restored to the Company which it had been allegedly deprived of. Furthermore, the Appellant's subjective belief in the merits of Suit 215 was not merely fanciful, given that he had legal opinions advising him that there was indeed a case against Pang. He even obtained Commercial's report stating that Pang had offered for sale the Dolphin Products for Megatr8.

61 On appeal, the Respondents submitted that the Appellant was using the statutory derivative action mechanism to strong-arm the existing shareholders to buy him out of the Company. This was a further collateral purpose that was not consistent with the Company's interest. They submitted that to allow the Appellant to have control of the conduct of Suit 215 would allow him to plunder the assets of the Company to further his own aim.

62 It was not disputed that at some point before the relationship broke down completely, the Appellant was negotiating terms for his exit from the Company. In our view, it is not uncommon for shareholders of a private company to negotiate terms of a buy-out when their relationship deteriorates to a level beyond repair. Nevertheless, we did not agree with the Respondents that the Appellant indeed commenced the present application for that purpose. We could not see how seeking to control Suit 215, which was an action against Pang alone for diversion of business from the Company, furthered the Appellant's purpose of obtaining a buy-out from the Company. Instead, it was the Appellant's claim in minority oppression in Suit 1023 against all shareholders of the Company that was clearly more suited for this particular purpose alleged by the Respondents.

63 Given, in all the circumstances, that the Appellant had an honest belief in the merits of Suit 215 and the fact that his collateral purpose was sufficiently consistent with achieving justice for the Company, we were satisfied that the Appellant was acting in good faith.

Issue 2

64 There were two sub-issues in so far as Issue 2 was concerned: (a) the appropriate legal criterion to be applied in an application under s 216A in

order to ascertain whether or not the company concerned would diligently prosecute the *on-going* proceedings concerned; and (b) whether the Appellant had satisfied the criterion. We deal with each in turn.

The appropriate legal criterion to be applied

65 The Judge held that a different threshold applied in a case where an application was brought to take control of the prosecution or defence of an *on-going* action as compared to the commencement of proceedings (GD at [21] and [28]). The Judge held that the Appellant had to demonstrate that the Company was not prosecuting or defending the action with diligence (GD at [29]). For ease, we set out the trunk of the Judge's analysis as follows:

> When proceedings are already underway, the applicant seeking to take over conduct or, in the words of s 216A(3), the prosecution of proceedings should show that there was something wanting in the company's management or conduct of those proceedings before he is permitted to take over. This simply flows from the fact that proceedings are already underway: the company has not stood in the way of the commencement of the action and the active steps taken in relation to the matter. The company's resources would also already have been utilised, whether in the form of management or board oversight of the litigation, or in the incurring of costs relating to litigation. The direction and conduct of the matter should thus be left with the company, if only to minimise disruption, unless it can be shown that the company's prosecution of the matter can be impugned, for instance in situations of dilatory prosecution or when the prosecution is only a sham or façade.

66 As the Judge had observed, this was an apparently novel point which had yet to be considered by courts in Singapore. While there was no requirement expressly spelt out in s 216A itself, the parties were in agreement that the court had to ascertain whether or not the Company would diligently prosecute the *on-going* proceedings, *ie*, Suit 215. We agreed. While such a

requirement was not expressly spelt out in the section, it was clearly an implicit requirement.

67 Section 216A(3)(*a*) provides that a complainant had to give 14 days' notice to the directors of the company of his intention to apply to court for leave under sub-s (2) *if the directors of the company do not bring, **diligently prosecute or defend** or discontinue the action*. Implicit in this is some sort of failure on the part of the directors of the company concerned which a complainant had to demonstrate. This stems from the fact that decisions pertaining to litigation, including the commencement, conduct and discontinuance of an action, are management decisions within the purview of the directors. As explained in 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) at p 342:

> The procedural requirement, the second element of a section 216A application, is that the complainant must, before applying to court for leave, have given fourteen days' notice to the directors of the company of his or her intention to apply to the court if the directors do not bring, diligently prosecute or defend or discontinue the action, as the case may be. This requirement is eminently sensible. The board of directors is the preferred body to make litigation decisions. *It is only when it declines to discharge its functions properly that an individual shareholder may be allowed to apply to court to be given the authority to conduct legal proceedings.* [emphasis added]

68 In this regard, reference should 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) (at

paras 10.050−10.051) where the same points are made. The upshot is that leave should only be granted to intervene in an *on-going* suit after the court has ascertained that the company concerned would not diligently prosecute or defend the action (as the case may be). The more controversial point, however, is the appropriate legal criterion to apply: does the complainant have to demonstrate an *actual* lack of diligent prosecution by the company concerned ***or*** is it sufficient for him to demonstrate that it is *probable* that the company concerned would not diligently prosecute the action? The Respondents submitted that it is the former. This also appeared to be the approach taken by the Judge.

69 Section 216A is modelled on s 239 of the Canada Business Corporations Act (RSC 1985, c C-44), and is also *in pari materia* with s 236 and s 237 of the Australian Corporations Act 2001 (Cth). We thus considered the criterion applied in these jurisdictions in determining the proper approach that ought to be taken in Singapore.

70 While the equivalent Canadian statutory provisions are worded in similar terms to s 216A (see, *eg*, the Business Corporations Act, SBC 2002, c 57 (Can) s 233), no Canadian cases on point were cited to us in argument. In Australia, however, the Corporations Act 2001 (Cth) s 237 expressly provided the proper legal criterion to be applied:

> (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 full responsibility for them, or for the steps in them.
>
> [emphasis added in bold italics]

The Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 observed that the above "criteria [sought] to strike a balance between the need to provide a real avenue for applicants to seek redress on behalf of a company where it failed to do so and the need to prevent actions proceeding which had little likelihood of success" (at para 6.33).

71 In our view, there was nothing to suggest that the balance was struck differently in s 216A. While the Canadian jurisprudence appeared to be silent on the legal criterion to be applied, we noted that support for the Australian position may be found in McGuinness, *Canadian Business Corporations Law* (LexisNexis, 2nd Ed, 2007) at para 13.204 (bearing in mind the fact that the relevant Canadian provision is, like the Singapore one, silent on the proper legal criterion to be applied):

> It is doubtful whether the common law derivative procedure permitted a complainant to intervene in a proceeding brought by the company. Section 246 (and corresponding provisions in other business corporation legislation) not only authorize the initiation of proceeding but also the intervention by a complainant in an existing proceeding, either for prosecuting it or for defending it, or to bring about its discontinuation… However, it is very difficult to imagine a situation in which a complainant should be allowed to interfere in litigation brought in good faith by the corporation in order to terminate the claim against the corporation's wishes. *The normal situation in which an order will be made under section 246 of the OBCA occurs when the corporation is not pursuing a claim to which it is entitled with sufficient diligence; and in nearly all cases, the reason for the lethargy is that the claim exists either against the person or persons who have effective control of the corporation or against some person who is not at arm's length to the person in effective control. An order permitting a derivative action should not be made where the corporation has instituted proceedings or authorized institution of proceedings in the matter concerned,* ***and it seems reasonably likely*** *that the corporation will itself diligently pursue the claim.* [emphasis added in italics and bold italics]

72 In our judgment, the legal criterion to be applied in Singapore for an application for leave under s 216A to intervene in *on-going* proceedings involving the company is that the complainant has to demonstrate that it was *probable* that the company would not diligently prosecute the action. In our view, the bar would be set at too high a level if the complainant had to demonstrate an *actual* lack of diligent prosecution. Take for example the obvious case of a sole director who blatantly commits a wrong against the company. Assuming, for the sake of argument, that the director farcically caused the company to sue him in an effort to prevent a minority shareholder from using the statutory mechanism to cause the company to sue him, it makes no sense to require an *actual* lack of diligent prosecution before the minority shareholder would be allowed to take control of the conduct of the suit commenced by the director. On the contrary, the minority shareholder should be allowed to take control of the conduct of the suit from the outset or early on in the proceedings. In certain cases, it may well prove *too late* if the minority shareholder had to wait for an *actual* lack of diligent prosecution before he was permitted to take control of the conduct of the suit on behalf of the company.

73 We pause to note that in the usual application for leave under s 216A to *commence* an action on behalf of a company, the company's failure to commence an action is easily ascertained. Put simply, despite being put on notice, the company has failed to commence action within the statutorily stipulated time period of 14 days. Where a company has commenced an action and, in the face of an application by a member under s 216A to control the conduct of proceedings on behalf of the company, takes the position that it is and will continue diligently prosecuting the action, the inquiry into whether it is *probable* that the company would not diligently prosecute the action is less

straightforward. At the risk of stating the obvious, however, we stress that the probability that the company would not diligently prosecute the action must be a *real one* as opposed to a mere fanciful or speculative one.

74 While we eschew setting a closed list of considerations to be kept in mind when deciding whether or not it is probable that a company would not diligently prosecute an action, the degree of conflict of interest of the present directors where the proceedings are concerned would, in most cases, be highly relevant. Further, the actual steps taken by the company in the *on-going* proceedings ought to be taken into account. Ordinarily, this would mean that the later in the day an application is made under s 216A in respect of *on-going* proceedings, the more difficult it would be for an applicant to successfully obtain leave, provided that the company had otherwise (and hitherto) been diligently prosecuting the proceedings. This may be so *even if* there were slight conflicts of interest on the part of the directors. *Every case must of course turn on its precise facts*. As we will come to in a moment, there could be cases (such as the present) where, even though there was no evidence to indicate that the Company was not actually prosecuting the action diligently thus far, the court would still grant leave because of the *grave* conflicts of interest on the part of the directors in control of the company.

75 With this, we turn to the facts.

Whether the Appellant had satisfied the criterion

76 In our judgment, the Appellant had demonstrated that it was probable that the Company would *not* diligently prosecute Suit 215. Before us, counsel for the Company, Mr Daniel Koh ("Mr Koh") from ELD, which was the firm representing the Company in Suit 215, was at pains to stress that he had not

received any instructions from Goh to conduct the suit without the required diligence. He also pointed out that the Company had recently defended a striking out application brought by Pang. He argued that any objections that the Appellant had regarding the manner in which the striking out application was conducted was down to a difference in litigation strategy.

77 In our judgment, however, even though the Company appeared to be conducting the suit with diligence, the conflicts of interest on the part of the directors were sufficient to demonstrate that it was probable that the Company would not, going forward, prosecute the action diligently. We turn first to the conflicts of interest on the part of JL.

78 While JL was no longer a director of the Company, her actions were relevant as she played a major role in obtaining legal advice for the Company once she became a director with Goh. There were clear and troubling conflicts of interest on the part of JL. JL was Pang's niece. Not only was the Company of which she was a director suing her uncle, JL's husband, Andrew Ho, was defending Pang in Suit 215. Given the fact that JL was one of two directors in the Company, there was an obvious conflict of interest on her part.

79 Moreover, JL had obtained legal opinions from QWP before Pang filed his defence in Suit 215. Curiously, Pang's defence, which was filed by Andrew Ho, raised strikingly similar points to those raised in QWP's advice to the Company. This included the defence of frustration, unreasonable restraint of trade and even that the IC Agreement did not apply to the Dolphin Products. None of these points was raised by Pang in his reply to the Company's letter of demand (see above at [18]). This again raised serious questions as to the independence of JL.

80 After JL's resignation, Goh became the sole director of the Company. Mr Koh stated during the hearing that at all times it was Goh who was instructing him and that it was Goh who signed his warrant to act on behalf of the Company in Suit 215. In our view, Goh was also not as independent as Mr Koh suggested. On the evidence, Goh, too, appeared to be in a position of conflict. To start, after the Appellant had sent the 30 November email (see [15] above), Goh replied with an extremely caustic email:

> I STATE VERY CLEARLY to you:
>
> DON'T YOU DARE TAKE MY 5% SHARE OF THE COMPANY ASSETS.
>
> AFTER YOU LEAVE, IF YOU HAVE ANY SHAME FOR THE DAMAGE YOU HAVE DONE, DO NOT EVER STEP FOOT IN SOLOMON EVER AGAIN.
>
> GOOD RIDDANCE!
>
> [block capital letters in original]

81 This email was clear evidence of the bad blood that existed between the Appellant and Goh. Goh was also the Head of Administration for Ritz, a company in which HC had an interest. The Appellant submitted that this demonstrated that HC and Goh were on the same page, so to speak. The Appellant also submitted that HC and Pang were working together as witnessed by the 24 November Meeting in which they had taken positions against the Appellant. In our view, the Appellant's submissions had merit especially considering that Andrew Ho represented Pang, Goh and HC in Suit 1023, in which they were sued for minority oppression by the Appellant. This strongly suggested that their interests were aligned.

82 All of this coupled with the fact that Goh was content to leave JL, who was in a clear position of conflict, to obtain advice on the Company's merits in Suit 215 suggested that going forward, it was *probable* that the Company

would not diligently prosecute Suit 215. The grave conflicts of interest on the part of JL and Goh were, to put it mildly, troubling.

83 Before we leave this point, we make one further observation. The Judge appeared to regard the fact that the Company commenced the action as significant (at [29] and [43] of the GD). With respect, this overlooked one vital fact – the Appellant was solely in control of the Company when Suit 215 was commenced. This watered down any weight to be attached to the fact that the Company itself commenced the action in deciding whether or not it was probable that the Company would diligently prosecute Suit 215. Such a situation was manifestly different from a situation where an independent board decides to commence an action and an applicant under s 216A attempts to usurp the management powers vested in the board through the statutory mechanism in s 216A. In such cases, it would be rare that the court would grant leave, especially where the board of directors was independent. As we have stated, each case must of course turn on its own facts.

Issue 3

84 Issue 3 required us to consider if the Appellant had demonstrated that the Judge erred in finding that it did not appear to be *prima facie* in the interests of the Company that the action be prosecuted or defended by the Appellant.

85 In *Ang Thiam Swee*, this court explained (at [55]) that the standard of proof required under this limb is low, and only the most obviously unmeritorious claims will be culled. In this case, it could not be seriously contended that the claim in Suit 215 was obviously unmeritorious. The Judge also reached a similar conclusion (at [42] of the GD). In our view, the fact that

the Company resisted a striking out application strongly suggested that the claim was legitimate and arguable.

86 The Judge, however, held that it was not *prima facie* in the interests of the Company *for the Appellant* to take control of the conduct of Suit 215. Support for the Judge's approach may be found in *Ang Thiam Swee* at [13]:

> … This creates a crucial link between the requirement of good faith in s 216A(3)(*b*) and the requirement in s 216A(3)(*c*), in that an applicant whose judgment is clouded by purely personal considerations may not honestly *intend* to serve the company's interests, ***and also may not be the proper party to represent the company's interests.***
>
> [original emphasis in italics; emphasis added in bold italics and underlined bold italics]

87 Thus, the court had to consider not only whether it was *prima facie* in the interests of the Company that the action be prosecuted but also whether the Appellant was the proper party to represent the Company's interest. Such an approach is also supported by the cases cited by the Judge: see *Porter v Anytime Custom Mechanical Ltd* [2014] AJ No 350; *Transmetro Corp Ltd v Kol Tov Pty Ltd* [2009] NSWSC 350 and *McEvoy v Caplan* [2010] NSWCA 115.

88 The Judge found that the Appellant was not the proper person to represent the interests of the Company because of the clear conflicts of interest that would arise if the Appellant could control the conduct of Suit 215 (see above at [35]). In our view, while the Judge was eminently correct in pointing out the various conflicts of interest that would arise if the Appellant was granted leave, the Judge, with respect, failed to consider if these conflicts could be managed using the court's power under s 216A(5).

89 Section 216A(5) reads as follows:

> (5) 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 or arbitration;
> >
> > (*b*) an order giving directions for the conduct of the action or arbitration by the person so authorised; and
> >
> > (*c*) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action or arbitration.

90 The power conferred under s 216A(5) is broad allowing the court to make such orders as it thinks fit in the interests of the justice. As we mentioned at the outset, the court should, as far as possible, utilise the broad powers conferred by s 216A(5) to strike an appropriate *balance* between the parties in a s 216A application, especially since it is not unexpected for parties, especially in the context of small private companies, to have an intertwined relationship that goes beyond the mere application for leave under s 216A and the proposed suit for which control of the conduct of is sought. The Judge had noted the Appellant's submissions on the conflicts of interest on the part of Goh and JL but held that it did not outweigh that of the Appellant (at [40] of the GD; see also above at [36]). In our view, the Judge should, with respect, have gone further to consider if an appropriate *balance* could be struck by imposing conditions which minimised or reduced the conflicts of interest of the Appellant.

91 In our judgment, the conflicts of interest which might have arisen on the part of the Appellant if he were permitted to control the conduct of Suit 215 on behalf of the Company *could* be adequately managed by imposing

certain conditions. Before we turn to those conditions, we ought to note that the Appellant, presumably seeing the force in the Judge's reasoning, expressed a willingness to make certain undertakings. He was prepared to undertake that in the event Pang was successful in the counterclaim, he would indemnify the Company in full against any damages which the Company might be ordered to pay Pang. He was also prepared to undertake to withdraw his claim for indemnification and/or contribution against the Company and to be responsible for the Company's costs from the point of taking over conduct of Suit 215.

92 The Respondents submitted that there was no evidence that the Appellant had the financial wherewithal to make good his undertakings which they argued were a belated and last ditch attempt to ameliorate any conflicts of interest on his part. The Respondents also submitted that the Appellant should be made to undertake to be responsible for the costs of the Company not merely from the point of taking over conduct of Suit 215 but from its inception because it was the Appellant who had caused the Company to commence Suit 215.

93 In our judgment, the arguments raised by the Respondents had merit. In the circumstances, the proposed undertakings of the Appellant did not go far enough to strike the appropriate balance. We therefore set out the following conditions that the Appellant had to fulfil before he would be allowed to take control of the conduct of Suit 215:

> (a) The Appellant withdraws the Third Party Notice issued to the Company for contribution and/or indemnification for damages arising out of the counterclaim in Suit 215;

(b) The Appellant indemnifies the Company for all costs incurred in Suit 215 from the commencement of suit till disposal in the event the Company is unsuccessful in Suit 215;

(c) The Appellant indemnifies the Company for all damages arising out of the counterclaim in Suit 215, if any; and

(d) The Appellant provides security for costs the Company would likely have to pay if it was unsuccessful in prosecuting the action in Suit 215. Such security is fixed at $50,000 and is to be provided by way of a solicitors' undertaking or in such other manner as might be agreed between the parties, within 3 weeks from the date of our judgment [on 2 November 2016], with liberty to apply to the High Court for further security if subsequent circumstances justified it.

94 In our judgment, the above conditions sufficiently ameliorated any conflicts of interest that would arise if the Appellant were allowed to take control of the conduct of Suit 215 on behalf of the Company without more.

Conclusion

95 In conclusion we were satisfied that the Judge, with respect, erred in finding that the Appellant had acted in bad faith. Secondly, we were also satisfied that it was probable that the Company would not diligently prosecute Suit 215 against Pang given (a) the grave conflicts of interest on the part of JL, and (b) the conflicts on the part of Goh, who was the only director of the Company. Thirdly, we were satisfied that allowing the Appellant to take conduct of Suit 215, with certain conditions attached, appeared to be *prima facie* in the interests of the Company.

96 In the premises, we allowed the appeal and granted the Appellant *conditional* leave under s 216A (see above at [93]) to control the conduct of Suit 215 on behalf of the company.

97 In so far as the issue of costs was concerned, we ordered that JL and Goh were to pay costs of $15,000 each to the Appellant (inclusive of reasonable disbursements), with the usual consequential orders.

Andrew Phang Boon Leong	Judith Prakash	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge of Appeal

Josephine Chong (Josephine Chong LLC), Kelvin Lee, Esther Yeo and Samantha Ong (WNLEX LLC) for the appellant;
Koh Choon Guan Daniel and Wong Hui Yi Genevieve (Eldan Law LLP) for the first respondent
Choo Zheng Xi and Jason Lee (Peter Low LLC) for the second and third respondents.