Wong Lee Vui Willie *v* Li Qingyun and another
[2015] SGHC 297

Case Number	: Originating Summons No 254 of 2015 (Summons No 2996 of 2015)
Decision Date	: 12 November 2015
Tribunal/Court	: High Court
Coram	: Aedit Abdullah JC
Counsel Name(s)	: Goh Kim Thong Andrew, Lee Jia En Gloria (Fortis Law Corporation) for the plaintiff; Lai Kwok Seng (Lai Mun Onn & Co) for the first defendant; The second defendant unrepresented.
Parties	: Wong Lee Vui @ Willie Wong Lee Vui — Li Qingyun — Fen Sheng Construction Pte Ltd

Companies – Oppression – Minority shareholders – Bringing statutory derivative action

12 November 2015

Aedit Abdullah JC:

1 In this case, two shareholders of a company each holding equal shares, were at loggerheads. One applied to the court for leave to commence an action against the other through the company, alleging wrongdoing on the part of the other and relying on facts which, at best, only raised a suspicion of wrong doing at most. The circumstances were not such for such leave to be granted, particularly as no benefit was shown to accrue to the company if leave was given.

Background

2 The 2nd Defendant ("the company") was incorporated in 2009 and it operates in the construction business. The 1st Defendant was one of its founding directors. Shortly after incorporation, the Plaintiff became a director alongside the 1st Defendant. At the material time, both the Plaintiff and the 1st Defendant were equal shareholders and were joint signatories to the company's bank account.

3 The Plaintiff, who had 21 years' worth of experience in the building and construction industry, joined the company on the basis that he was to contribute that experience to the running of its construction business. The 1st Defendant, whose experience lay primarily in ceiling and partition works, had comparatively less or little experience in building and construction and supposedly wanted to tap on the Plaintiff's experience and skills in that area. The precise role of each person in the running of the company was in some dispute. The Plaintiff claimed that projects in the company were run separately under two separate main departments: (a) a department handling ceiling and partition works, which was under the charge of the 1st Defendant; and (b) a second department under the Plaintiff handling construction projects. The Plaintiff contended that each was responsible for the workers and management of the projects under their respective purviews. The 1st Defendant, by contrast, alleged that the Plaintiff was left to run the day to day management of the company and was hence appointed Managing Director. The 1st Defendant said his role lay primarily in the securing of financing for the company's projects. The 1st Defendant stated that the Company's initial specialisation was in ceiling and partition work but that it had since branched out into bidding for appointment as the main contractor for projects.

4 Disputes arose between the parties as to a number of matters, including the hiring of workers, the management of projects, and whether the 1st Defendant was making secret profits at the expense of the company. Eventually, the 1st Defendant was sent a letter by the solicitors for the Plaintiff in November 2014 wherein it was alleged that he had, *inter alia*, interfered with the management of the company. On 17 February 2015, the Plaintiff's solicitors wrote to the company's board of directors to inform them that the Plaintiff intended to commence a derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) (I will refer to this provision as "s 216A" and the statute as "the Act"). On 23 March 2015, the Plaintiff commenced Originating Summons No 254 of 2015 ("the present application") seeking leave to commence an action on behalf of the company against the 1st Defendant under s 216A.

The Plaintiff's case

5 It was argued that the Plaintiff had *locus standi* to commence the application. The fact that the Plaintiff held 50% of the shares did not disbar him. Requisite notice for a meeting under the Act was also given by the Plaintiff. While there was an issue raised as to the scheduling of the meeting, that difficulty only arose because of a late request by the 1st Defendant, who had in any event informed that he did not intend to settle any dispute.

6 The Plaintiff argued that he was acting in good faith in making the application. Hostility between the parties, it was argued, was not indicative of lack of good faith. In support, the Plaintiff cited the decision of the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") and the decision of this court in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980. He also submitted, citing *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*"), that the requirement of good faith could still be satisfied even if the derivative action were taken out in furtherance of the applicant's self-interest. He argued that what was required was proof that there was a valid basis for the claim and that the application had not been brought *only* for personal motives, without any possible benefit accruing to the company.

7 In addition, he argued that the application was *prima facie* in the interests of the company in the sense that the company's claim would be legitimate and arguable. He argued that all that needed to be shown was that the contemplated claim possessed a "reasonable semblance of merit", citing [53] of *Ang Thiam Swee* in support of that submission. It was also emphasised that the Court should not adjudicate on the disputed facts.

8 The contemplated claim was in respect of directors' duties breached by the 1st Defendant. These arose out of a number of issues: namely, the hiring of workers by the 1st Defendant, secret profits purportedly made by him, and the mismanagement of a project at Boat Quay (the "Boat Quay Project"). The Plaintiff elaborated on the claim as follows.

9 The 1st Defendant was responsible for the hiring of workers from China. The Plaintiff alleged that the 1st Defendant exercised preference for these workers in terms of the payment of the salaries, pointing to the high salaries being paid to them over the market rate and the hiring of more workers than what was needed. Further, salaries were paid to workers who were not employed by the company and the 1st Defendant gave unreasonable quotations to clients to give the appearance of a demand for such workers. Though the Plaintiff could manage his own projects, including whom to hire and what salaries to pay, the work permit applications were controlled by the 1st Defendant, who kept a tight rein on hiring matters. The Plaintiff deferred to him on the payment of salaries and did not pay attention to the monthly lists of workers being paid.

10 There was also evidence that secret profits were made by the 1st Defendant. The Plaintiff pointed to the following: there were no arrangements for accommodation; excessive numbers of workers were recruited with no regular salaries; the workers were not seen actually working; "levies" or surcharges were imposed on the workers by the 1st Defendant; and payments to workers were also falsified (with the aim, the Plaintiff claimed, of inducing payment by the company). Furthermore, the Plaintiff averred that the 1st Defendant had also, on one occasion in 2009, informed him that he had "made some money 'outside'", which he wished to split with the Plaintiff. After being told that any such money should be put back into the company for its use, the 1st Defendant did so, but (without the Plaintiff's knowledge) instructed the accounts clerk to record these entries as "directors' loans". This was a further reason for suspecting that the 1st Defendant had made secret profits.

11 The 1st Defendant took on the Boat Quay Project against the advice of the Plaintiff and other key employees of the company and eventually mismanaged it, causing the company loss. The 1st Defendant also insisted on hiring a subcontractor, T, against the advice of the Plaintiff, who had recommended that their usual reliable sub-contractor be appointed instead. T's failure to complete the lift shaft on time delayed the completion of the project, leading to liquidated damages in the sum of $224,000 being claimed from the company. While the 1st Defendant had claimed that that the Plaintiff wanted this project, the 1st Defendant's assertion was based on misleading evidence and was against the weight of the evidence. The Plaintiff contended that, within the company, projects handled by each department were run separately (see [3] above).

12 Allegations were also raised about the improper employment of persons by the company because of the 1st Defendant, including that of his daughter. Issue was taken as well with the credibility of the 1st Defendant, it being alleged that there were clear instances of the 1st Defendant doctoring documents, or making allegations in bad faith.

13 The Plaintiff tendered one supporting affidavit from a safety manager at the Company to rebut the 1st Defendant's allegations about the imposition of 'levies' on the workers, and another affidavit from a former quantity surveyor to support the Plaintiff's version concerning the management of the Boat Quay project.

The 1st Defendant's case

14 The 1st Defendant cited *Foss v Harbottle* (1843) 2 Hare 462 as authority for the proposition that the proper plaintiff for any wrong done to the company was the company itself. That being the case, and following the cases, the Court should take a cautious rather than a liberal approach to granting leave under s 216A. Furthermore, the 1st Defendant argued, ss 216A and 216B of the Act could not be used to interfere with internal management decisions. Given that the present case involved a deadlock between the only two directors of the company (who are equal shareholders), the 1st Defendant submitted that it should be viewed as a matter of internal management which the court should not interfere with.

15 It was contended that insufficient notice was given since the only board meeting held to consider the issue of the contemplated claim was attended by the Plaintiff alone, in the absence of the 1st Defendant. This was because the Plaintiff had unilaterally rescheduled the board meeting at the last-minute, in an abuse of his power and control over the company. In the circumstances, the company could not determine whether the action should be taken up. The procedural requirement of notice not having been met, the application should fail on that ground alone.

16 It was further contended that good faith was absent as the Plaintiff's application was

motivated by a desire to take over the company. His intentions were clear from the letters exhibited, which the Plaintiff sought to expunge from the affidavits. Various allegations in those letters were referred to in the 1st Defendant's submissions.

17 The 1st Defendant also argued that the action was not in the interests of the company since no reasonable or arguable basis for the claim was shown. The application was for the personal benefit of the Plaintiff rather than that of the company. As a result of the action, deadlock currently existed in the company, which affected its financial position and risked pushing it to insolvency. The 1st Defendant deposed that the company was, in April when that affidavit was given, on the verge of insolvency. The 1st Defendant submitted, citing *Pang Yong Hock*, that leave to commence a derivative action would be denied where winding up would be a better solution, as was the case here.

18 As for the allegations made in support of the application, the 1st Defendant averred that he played a limited role in the company and was not involved in the Boat Quay Project or any other "big building and construction projects" undertaken by the company. He was only involved in ceiling and partition works. The Plaintiff was in charge of dealing with employers, building professionals, suppliers, the Ministry of Manpower; he was also responsible for the deployment, management and control of workers; and he took charge of the management and completion of projects. The 1st Defendant denied that there had been any improper employment and that, if anything, it was the Plaintiff who had made improper payments to a former employee he hired. In relation to foreign workers, it was the Plaintiff who handled matters or who gave instructions to other officers of the company. The Plaintiff was also the one who prepared payment vouchers for the company's foreign workers. His approval of the claims of these workers was shown by the fact that he had signed off on cheque payments to them. Further, and as evidenced by the affidavits of several witnesses, namely Chen You Xing and Li Yun Jie, he was well aware of the rates paid to the workers. Higher rates were paid to overcome the refusal of some workers to work; this was agreed to by the Plaintiff. It was therefore argued that no wrongful loss was incurred by the company in relation to the management, hiring, and payment of the workers. The 1st Defendant stated that he had a number of affidavits filed by various workers hired by the company which supported his version of events.

19 The Plaintiff had also caused the company to become a supplier of labour. Through this, the Plaintiff collected a levy from the workers which would sometimes be deducted from the workers' salaries. Following a discussion with the Plaintiff, the levies obtained by the Plaintiff and the 1st Defendant were put into the company and recorded in the books as directors' loans. The 1st Defendant stated that he eventually found out that this practice was prohibited and had taken steps to return his share of the levies to the workers. The 1st Defendant also argued that some of the directors' loans which the Plaintiff sought to question were start-up funds which he had injected into the company and were therefore *bona fide* loans.

20 As for the Boat Quay Project, this was taken on as the Plaintiff himself was keen and confident about being able to do the job. Though the 1st Defendant had signed the contract, it was the Plaintiff who, on behalf of the company, managed the contract.

21 The 1st Defendant tendered a number of supporting affidavits filed by various workers in the company to support his version of what went on.

The Decision

22 While the Defendants took issue with both, I was of the view that Plaintiff had succeeded in showing both in showing that he had complied with the formal requirements of s 216A of the Act and

that he had brought the present application in good faith. I found, however, that despite these findings, the Plaintiff did not show that it was *prima facie* in the interest of the company that the action be allowed to proceed.

23 The Court must be satisfied that there is a *prima facie* case for an action to be brought. Although the requirement imposed by law is low, the Plaintiff's allegations were not sufficiently made out. The allegations, taken as a whole, only raised a *suspicion* that the 1st Defendant might have breached his duties and obligations as a director of the company. Furthermore, once the counter-allegations and evidence raised by the 1st Defendant were considered, the Plaintiff's evidence was further weakened. In my judgment, therefore, this was not therefore an appropriate case for leave to be granted.

24 Also, I did not think that an action commenced by the company against the Defendant would not be the best solution. There were clearly differences in opinion in the management and running of the company. Given this, and the manifest problems in the relationship between the two sides, it seemed to me that there were other more appropriate mechanisms to resolve the parties' difficulties with each other.

Basis of the application

25 The argument made by the 1st Defendant that the Plaintiff was not the proper party to commence the action completely missed the mark. It was precisely because of the rule in *Foss v Harbottle* that the Plaintiff sought leave of court under s 216A to bring a derivative action against the 1st Defendant. This is what s 216A was for: it is a statutory mechanism provided by the legislature to address problems arising out of the rule in *Foss v Harbottle.*

Requirements of the Statute

26 Section 216A(3) states the requirements for leave to be granted for an action to be brought in the name of the company:

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

Giving of notice and good faith

27 As these matters were found in favour of the Plaintiff, I will not discuss these at length.

28 While there was some dispute about the scheduling of the meeting, I found that sufficient notice was given. The objective of the notice requirement is to allow the company, through its board, to consider whether it wishes to pursue the action, and therefore obviate the need for any application under s 216A. The information that needs to be disclosed should also be weighed against

that objective; in some contexts, it may be that the information provided should be as detailed as that found in a statement of claim. However, much will depend on the context. Where, as is the case here, the board consists of the protagonists of the dispute and there can be little uncertainty about what is disputed, no great granularity of detail is required.

29 While *Ang Thiam Swee* or *Lee Seng Eder v Wee Kim Chwee and others* [2014] 2 SLR 56 both referred to the Parliamentary debates accompanying the passage of the Companies (Amendment) Act 1993 (Act 22 of 1993), which introduced s 216A, as underscoring the need for strict compliance with the notice provisions, I did not consider these to be authorities against the approach I adopted. The portion of the Parliamentary speeches referred to the need to ensure that there be no abuse or unjustified court proceedings. Neither concern is engaged when one is faced with a deadlocked board.

30 In any event, the gist of the 1st Defendant's complaint was that he was only informed the day before (*ie*, 26 February 2015) that the meeting which was supposed to be rescheduled would go on as planned. However, the issue surrounding the rescheduling of the board meeting is neither here nor there. The short point is that notice had been given on 17 February 2015, when the Plaintiff's solicitors wrote to the company's board of directors to inform them that the Plaintiff intended to commence a derivative action under s 216A. This was more than 14 days before the present application was filed (on 23 March 2015) so the notice requirement under the Act had clearly been satisfied.

31 While the requirement of notice had been satisfied, I nevertheless found that there was no arguable case against the 1st Defendant and that, further, it was not in the interests of the company that the case be pursued. These requirements flow from s 216A(3)(*c*) of the Act, which requires that the Court be satisfied that "it appears to be prima facie in the interests of the company that the action or arbitration be brought" before a derivative action under s 216A(2) may be brought.

Basis for the complaints

32 The Plaintiff's allegations were raised to provide a basis for action against the 1st Defendant as a director for breach of his duties which included the following: acting in good faith in the interests of the company, to act for the proper purposes of the company, and to ensure that the affairs of the company were properly administered. In addition, the Plaintiff also alleged that the 1st Defendant had been in breach of his general duties, owed both under the Act and at common law, to exercise reasonable care, act honestly, and use reasonable diligence in the discharge of his duties as a director.

33 Though the contentions and allegations of the Plaintiff would perhaps raise some suspicion of untoward conduct, these were not sufficient to appear to raise a *prima facie* case that the action was in the interests of the company. What was required of the Plaintiff was that he show that there was some reasonable semblance of merit in his claims. In *Ang Thiam Swee*, Court of Appeal laid down the approach that should be adopted under s 216A(3)(*c*) in determining whether a proposed action "appears to be prima facie in the interests of the company". At [18], the Court in *Ang* cited, with approval, the observation of Choo Han Teck JC (as he then was) in *Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471 at [8] wherein he said:

> … The terms "legitimate" and "arguable" must be given no other meaning other than what is the common and natural one, that is, that the claim must have a reasonable semblance of merit; not that it is bound to succeed or likely to succeed, but that if proved the company will stand to gain substantially in money or money's worth. …

34 At [54] of *Ang Thiam Swee*, the Court of Appeal also cited with approval the statement of Tay Yong Kwang J in *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 at [25] wherein he opined that:

> The phrase "*prima facie*" in s 216A(3)(*c*) requires the complainant to show that there is a reasonable basis for the complaint and that the intended action is a legitimate or arguable one, *ie*, it has a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful …

The Court of Appeal then emphasized at [55] that:

(a) the standard of proof required is low;

(b) only the most obviously unmeritorious claims would be eliminated; and

(c) illegitimate actions would not be considered to be *prima facie* in the interests of the company.

As noted by the Ontario High Court in *Richardson Greenshields of Canada Ltd v Kalmacoff* (1995) 123 DLR (4th) 628 at 636 and by the editors of *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 9.80, a cautious approach is to be adopted. What is needed is that there be a reasonable basis for the complaint and that the action is arguable.

35 In the present case, I found that the Plaintiff's allegations, when considered against the explanations given by the 1st Defendant, only raised, at most, a possible suspicion of wrongdoing. For that reason, his application for the commencement of a derivative action was unmeritorious. This applied to each of the three sets of claims into which the Plaintiff's allegations could be grouped:

(a) control and management of the workers;

(b) the making of secret profits;

(c) mismanagement of projects.

36 In my assessment, I was mindful that the requirements on the part of the Plaintiff should not be pitched too high since readily allowing rebuttal by a defendant on flimsy grounds would ill serve the needs of the Act. But in the present case, the allegations only hinted at a possibility of wrongdoing by the 1st Defendant. Such suspicion, alone, could not be said to be a sufficient basis upon which to conclude that the action had a reasonable semblance of merit. Many actions or transactions could conceivably be perceived on the surface as being tainted or coloured, only to be cleared when the evidence is sufficiently tested. Claims founded only on suspicion are bound to be unsuccessful at the end of the day. To permit claims to proceed only on the basis of suspicion would, to my mind, create great difficulty in the administration of companies, especially once friction arises between the directors or shareholders, as it invariably does.

Control and management of the workers

37 While the Plaintiff took issue with the control, management and payment of the salaries of the workers, the allegations were not, to my mind, sufficiently arguable.

38 In support of his submission that the 1st Defendant had breached his director's duties in respect of the control and management of workers, the Plaintiff pointed to the following:

(a) more workers were hired than were needed;

(b) some of the workers were paid salaries above the market rate;

(c) some of the workers hired could not be accounted for in terms of the work assigned.

39 Such evidence, even if taken at face value, and assessed either separately or together, was not sufficient to establish the commission of any breach of duty by the 1st Defendant. An inference may be drawn that there may be some wrongdoing but the strength of such an inference could only be described as a mere suspicion and fell well short of establishing a *prima facie* case. What the Plaintiff was alleging was not a direct allegation of withdrawal of funds from the company's accounts, for instance. While I was mindful that the Plaintiff did not have to prove his case at this stage and that all that was required of him was proof that the claim had some reasonable semblance of merit, the Plaintiff still adduce some evidence that what the 1st Defendant did constituted a breach of his duty as a director. He could do this by showing, for instance, evidence of a diversion of funds or negligence in the performance of duties. What the Plaintiff had done here were perhaps first steps in that direction, but he did not tie the various threads together to show specifically what breach was committed — there were only hints of misdeeds and the casting of doubt as to the propriety of the 1st Defendant's actions. Mere suspicion of wrongdoing fell short of the requisite standard and it was not, in my judgment, appropriate to expose the company to the costs and burden of an action in these circumstances.

40 In addition, while there may some questions as to the proper management and control of the workers, this arose on both sides. What I found was that there was clearly disagreement on who held the management and control of the company, its activities, and its workers.

41 There was, at the end of the day, nothing more than a suspicion that something untoward was happening. It may be that there could have been better ways of hiring, managing, and deploying such workers. However, the Plaintiff's evidence before me was not sufficient to trigger a sufficient concern about the conduct of the 1st Defendant. The 1st Defendant gave an explanation about the hiring of workers and why they were paid at the rates they were. The 1st Defendant also maintained that it was the Plaintiff who had control over management and this was supported by the testimony of various witnesses, mostly foreign workers, who swore affidavits. I also noted that the documentation showed that the Plaintiff signed off on payments to the workers and must have known of what was happening. When weighed against this documentary evidence, the Plaintiff's assertion that he did not know of the payments had to be doubted.

42 While the Plaintiff had some evidence from workers of the company that the 1st Defendant controlled the hiring and management of workers and there was also evidence casting some doubt on the 1st Defendant's explanation about the "levies", the evidence did not, at the end, amount to anything more than a suspicion of wrongdoing. Even if this evidence about the Defendant's lack of credit or credibility were accepted, this would not be sufficient to show that 1st Defendant was doing anything wrong in the management of the company. In other words, should the 1st Defendant's credit be discounted because of the evidence of the Plaintiff's witnesses, it did not follow that the Plaintiff had shown that the 1st Defendant did anything wrong in the hiring and management of the workers. In the end, the Plaintiff had to rely on tenuous inferences to be drawn as to malpractices involving the workers founded on the back of mere suspicions of misconduct.

43 Further, based on the evidence before me, I had to conclude that the 1st Plaintiff was probably aware of what was happening with the workers, given his involvement in the paperwork. I could not accept that a person of many years of business experience would sign off on the documents without

question. Additionally, while titles do not always reflect reality, I had to consider that the 1st Plaintiff was formally the managing director. He did not show in his evidence that this was an empty title. Given that, I had to conclude that he had at least the usual ability to look into the company's affairs. Even if the 1st Defendant was in effective control of the company's hiring of workers, I would have found it odd, in the absence of any evidence that he was effectively ousted as a managing director, that he did not know what was happening or that he could not obtain information from the company's records as to what was happening.

The making of secret profits

44 The second set of allegations was that the 1st Defendant had been making secret profits. In my view, there was nothing concrete in these allegations and, at most, the Plaintiff had a suspicion that secret profits were being made, but nothing more. The Plaintiff was only able to point to the following: (a) there were discussions about money being made outside the company, (b) more workers were hired than was necessary, and (c) not all the activities of these workers were accounted for. The fact that money may be made outside the company by the 1st Defendant, even if true, was neither here nor there. What had to be shown was that such money was being made in breach of the 1st Defendant's fiduciary duties. In that regard, all the Plaintiff could point to was the earlier set of allegations about the hiring of the additional workers and the absence of information about what they were deployed for and the accommodation that was provided to them. Again these matters were all disputed but, even if they were true, they raised nothing more than a possible suspicion of defalcation or misuse of funds or mismanagement by the 1st Defendant. The allegations were not sufficiently specific or concrete and they did not point to any specific instance of misconduct. That being the case, at best, they only hinted at a possible breach of the 1st Defendant's duties and no *prima facie* case was made out.

Mismanagement of the Boat Quay project

45 The Plaintiff contended here that the 1st Defendant mismanaged the project awarded to the company at Boat Quay. He refused to listen to advice and chose not to appoint the usual subcontractor for that project and his choice of subcontractor caused delays which caused the company loss. It was further contended that the 1st Defendant gave misleading evidence on the matters in question. By contrast, the 1st Defendant's version was that the issues in management were caused by the Plaintiff himself.

46 Again, the allegations where were not to my mind the sort to justify a claim of breach of directors' duties or any other action by the company. The mismanagement of a single project would not, to my mind, invariably form a sufficient basis for an action against a director for the breach of his duties. A lot will turn on the precise allegations and the explanations proffered by the director in question. Only if it could be shown that such negligence falls short of the standard of a reasonable person would this conceivably be actionable. While there was evidence given by the Plaintiff that may put into question the wisdom of the 1st Defendant's decisions, they did not bring home that there was a breach of the requisite standard of care. There was, for instance, no evidence that the actions of the 1st Defendant as alleged could not have been taken by any reasonable director. The Plaintiffs evidence and assertions hinted at possible breaches but did not suffice to establish a case with a reasonable semblance of merit. For instance, what the plaintiff relied upon was the Defendant's choice of subcontractor, T, whom he had advised against hiring. Even if it could be shown that T was inexperienced, this would not be not sufficient evidence of mismanagement, negligence or lack of *bona fides* by the 1st Defendant. It had to be shown that it was the 1st Defendant's decision to hire T was wholly unfounded or unjustified and that it was this act of mismanagement that led the company to suffer losses.

47 In any event, there was again considerable conflicting evidence before me about the respective roles of the Plaintiff and 1st Defendant. The Plaintiff adduced evidence, in the form of an affidavit sworn by the company's quantity surveyor, that the 1st Defendant was the one running the project at Boat Quay. However, given the objective evidence before me, including the fact that the Plaintiff at attended site meetings, I had to conclude that the Plaintiff had not proven that the 1st Defendant was *solely* responsible for the Boat Quay project.

Interests of the Company

48 Taking the allegations on both sides, I was of the view that the situation between the parties was one in which there were clearly differing perceptions and views about the running of the company. Such differences are not uncommon. In a case of such a nature, where the contesting parties are essentially deadlocked, or close to deadlock, I did not think it would be appropriate to sanction a derivative action.

49 The statute expressly refers to the proceedings being in the interests of the company. Assoc Prof Pearlie Koh has argued that, since *Ang Thiam Swee*, the position in Singapore has been that the courts would concern themselves mostly with the objective legal merits of the claim and that consideration of the commercial merits of the claim is *not obligatory* (see Pearlie Koh, "Shareholder Litigation – Corporate Wrongs" in Hans Tjio, Pearlie Koh, and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 10.65. In so holding, Assoc Prof Koh argued that the Court of Appeal in *Ang Thiam Swee* (at [55] and [56]) adopted a different approach from previous cases such as *Pang Yong Hock* and *Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)* [2009] SGHC 223, both of which required that it be shown that the company would benefit from the proceedings. With respect, I do not read *Ang Thiam Swee* as bringing in a different approach. The focus of the Court of Appeal's observations at [55] and [56] was about the standard of proof required in establishing a prima facie case in terms of the allegations or claim put forward by the claimant there. I do not think the Court of Appeal intended to suggest that considerations of commercial merit are of secondary importance. Ultimately, it is my view that in considering the question of whether proceedings are in the interests of the company, the matter has to be looked at in the round. This seems to me to be to be consistent with the approach taken in *Ang Thiam Swee* where, at [57], the court ultimately concluded that the court ought not to grant leave for a derivative action to be commenced because it "offers no *practical or commercial merit* for the Company" [emphasis added].

50 In examining the interests of the company, a number of factors readily come to mind:

(a) the costs and benefits of the proposed action;

(b) the likelihood of success of any action; and

(c) the availability of alternative measures.

51 This list is not intended to be exhaustive, but illustrative. The court should look broadly at the matter and consider whether it is appropriate, in the light of all the facts before it, for it to permit the applicant to commence a derivative action. In doing so, the court should be mindful that the evidence before it would not have been fully tested and also that the applicant may not, because of the nature of things, have access to all the information. The Court thus needs to make a robust assessment balancing the different considerations and interests. Section 216A is intended to allow persons not in control of the company to act through the company to address wrongdoing against the company. However such actions would have to be in respect of wrongs committed against the company concerning rights or interests which the company *as a whole* would want to vindicate.

52 The present case was essentially one of disagreement about the management of the company by equal shareholders who were close to, if not actually at, a position of deadlock in the management of the company. Each of the allegations raised by the Plaintiff were met by a number of counter allegations by the Defendant and, as indicated above, determining the truth of the matter on the affidavits would not be a simple exercise. Given the state of affairs, it was conceivable that the 1st Defendant himself may conceivably seek his own derivate action by the company against the Plaintiff. It seemed to me that to grant leave to one party would only invite the other to respond in kind, leaving the company in an inextricable bind. This would not be in the best interests of the company.

Miscellaneous Issues

53 A number of other miscellaneous matters arose at the hearing, each of which I will explain and deal with in turn.

Letters expunged

54 First, the Plaintiff had applied, by way of Summons No 2996 of 2015, to expunge certain letters that had been relied upon by the 1st Defendant in his affidavit of 5 May 2015 on the ground that they were privileged correspondence. These letters were exchanged in the course of settlement negotiations and the 1st Defendant had exhibited them in order to refute some of the allegations that the Plaintiff made against him. I accepted the Plaintiff's argument that these letters were subject to settlement privilege and therefore allowed the Plaintiff's application to have them expunged from the evidence. I did not refer to them in considering the present application.

General credit

55 Second, the Plaintiff also took issue with the 1st Defendant's general credibility, pointing to various instances in which it was alleged that he had manipulated evidence, tampered with documents, and allegedly deliberately misled the court. It is difficult to make findings of such malfeasance in an application for leave under s 216A of the Act unless the evidence discrediting the defendant is very clear. In the circumstances, I did not find that the present evidence was of that level and therefore made no findings in relation to these allegations.

Additional Affidavit Filed

56 Third, the Plaintiff also filed a late affidavit without leave, which was objected to by the 1st Defendant. I was minded to allow it to remain on the record provided that the 1st Defendant was given time to adduce a further reply affidavit. However, the Plaintiff chose to withdraw the proposed affidavit so nothing more came of this.

Conclusion

57 In conclusion, I found that it had not been shown that there was a *prima facie* case that the proposed action would be in the interests of the company. I therefore dismissed the application and ordered that the Plaintiff pay costs to the 1st Defendant.