Urs Meisterhans *v* GIP Pte Ltd
[2010] SGHC 288

Case Number : Originating Summons No 430 of 2010

Decision Date : 28 September 2010

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Balakrishnan Ashok Kumar and Linda Esther Foo (Stamford Law Corporation) for the plaintiff; Sim Kwan Kiat, Mark Cheng, Jonathan Lee and Lim Huay Ching (Rajah & Tann LLP) for the defendant.

Parties : Urs Meisterhans — GIP Pte Ltd

Companies

28 September 2010

Tay Yong Kwang J:

Introduction

1 This was an application by the plaintiff for leave, pursuant to section 216A of the Companies Act (Cap 50, 2006 Rev Ed), to commence legal proceedings in the name and on behalf of the defendant against two of its current directors, Mr Huber Marcel Fritz ("Huber") and Mr Gut Christian Michel ("Christian") for alleged breaches of fiduciary duties that they owed, as directors, to the defendant.

Background facts

Parties to the dispute

2 The plaintiff is a shareholder and former director in the defendant. He was temporarily taken into custody by Swiss Federal Prosecutors in 2009 to assist the Swiss authorities in some criminal investigations.

3 The defendant is a Singapore-incorporated company in the business activity of "Business and Management Consultancy Services". It is exempted by the Monetary Authority of Singapore ("MAS") from the licensing and business conduct requirements under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") and its related subsidiary legislation but remains obliged to comply with certain provisions of the SFA as well as guidelines issued by the MAS, including the MAS's "Guidelines on Fit and Proper Criteria" ("the Guidelines"). The defendant's sole business is the management of a private energy fund, Stellar Energy Fund ("SEF"), whose trustees are Portcullis Trust (Singapore) Ltd ("the Trustees"). After the plaintiff's removal as one of its directors, the defendant currently has four directors, namely Huber, Christian, one Mr Rainer Jonas ("Jonas") and one Mr Tan Kim Guan ("Tan"). It also has four shareholders, namely the plaintiff, Huber, Christian, and one Mrs Anjuta Aigner ("Mrs Aigner"), whose shareholdings are 24%, 26%, 24% and 26% respectively. Jonas and Tan do not own shares in the defendant.

Background to the dispute

4 The plaintiff was one of the defendant's directors until his removal during an Extraordinary Meeting of the defendant's shareholders held on 13 August 2009. In an email dated 27 February 2010 sent jointly by three of the defendant's directors, namely, Huber, Christian and Jonas, the defendant explained the reasons behind the plaintiff's removal. The defendant said that its directors decided that it would be in the defendant's best interests to remove the plaintiff as its director because first, he had been incarcerated by the Swiss authorities. As the defendant was an exempted entity under the SFA, it was obliged to ensure that all of its directors satisfied the "Fit and Proper Test" set out in the Guidelines. The Guidelines provide that in deciding whether a person was fit and proper, MAS would take into account whether the director or proposed director was the subject of any investigations which may lead to criminal proceedings or investigations by regulatory authorities or government agencies. The defendant said that its directors had requested from the plaintiff, on numerous occasions, details of the investigations by the Swiss authorities but the plaintiff had refused and/or omitted to provide the required details. Save for the plaintiff's assertions, the defendant said that there was no independent evidence that the investigations were no longer going on.

5 Second, the defendant said that in 2009, Hycarbex Asia Pte Ltd ("Hycarbex Asia") raised certain allegations of wrongdoings against the plaintiff. The plaintiff informed Huber that those allegations were without merit and were not of a criminal nature and further volunteered to resign immediately as a director of the defendant if any such allegations were raised against him. However, the defendant's directors subsequently discovered that, as at the date of the plaintiff's representations to Huber, Hycarbex Asia had already proffered criminal charges against the plaintiff before the Swiss Courts.

6 Third, subsequent to the plaintiff's removal as a director of the defendant, the other directors uncovered clear evidence that the plaintiff had acted in breach of his fiduciary duties to the defendant while he was its director. These breaches included entry into unauthorised foreign exchange transactions without the approval of the defendant's board of directors and in breach of the defendant's internal guidelines, as well as a failure to disclose his personal interest in Hycarbex Asia. Further, after he was removed as a director, the plaintiff continued to take steps which were clearly detrimental to the defendant and SEF. Such actions included the continual holding out of himself as a representative of the defendant and/or SEF even though he was no longer a director and wrongfully interfering in the affairs of the defendant and SEF, as well as sending defamatory letters to the Trustees.

The plaintiff's case

7 The plaintiff relied on three main grounds in support of his application for leave pursuant to section 216A of the Companies Act. Apart from the allegation that he had been wrongfully removed as a director of the defendant's, the plaintiff's two other allegations concerned Huber's and Christian's alleged mismanagement of SEF's investments to the detriment of the defendant's financial condition. By conducting the defendant's affairs recklessly and/or negligently, the plaintiff argued, Huber and Christian had failed to act in the defendant's best interests. They should therefore be held accountable to the defendant's shareholders like the plaintiff.

8 The first allegation involved an alleged lack of transparency on the part of the defendant's directors concerning the performance of SEF and the defendant. The plaintiff alleged that the defendant's directors had failed to provide timely updates on SEF's Net Asset Value ("NAV") to SEF's investors. He also argued that the defendant's management refused to provide him with information on SEF's NAV even though he was a shareholder of the defendant.

9 The second allegation concerned the directors' alleged mismanagement of certain key investments of SEF, in particular SEF's loans to REN AG ("the REN Loan") and Hycarbex Asia ("the Hycarbex Loan"). The former was a loan of EUR 3 million which SEF made around August 2006 to REN AG, a Swiss company. This loan was guaranteed by one Mr Werner Kindermann ("Kindermann") ("the Kindermann Guarantee"), who was the beneficial owner of the entire share capital in REN AG. The latter was a loan first extended to Hydrotour Enerji Ltd Sti ("Hydrotour"), a Turkish company, in 2007 but later restructured in 2008 such that Hycarbex Asia, a Singapore-incorporated company, substituted Hydrotour as the principal borrower. The restructured loan was secured by, among other things, share pledges by two of Hycarbex Asia's shareholders (the "Share Pledge"), and a corporate guarantee by Hycarbex American Energy Inc, which was a wholly-owned subsidiary of Hycarbex Asia ("the Hycarbex Guarantee").

10 The plaintiff argued that Huber's and Christian's actions made it highly unlikely that SEF would recover any value from these investments. In respect of the REN Loan, it was the plaintiff's case that the defendant's directors had failed to act promptly to enforce Kindermann's obligations under the Kindermann Guarantee when REN AG was put into liquidation on or around 7 November 2008, despite his repeated reminders to the defendant's directors that the Kindermann Guarantee was only enforceable one year from the date of REN AG's liquidation (*i.e.* by 7 November 2009). Having failed to commence proceedings against Kindermann by that date, the defendant/SEF's claim became time-barred. The plaintiff also argued that given the dismissal of those proceedings, SEF had little prospect of recovering any value from the REN Loan.

11 As for the Hycarbex Loan, the plaintiff argued that Huber and Christian had mismanaged this loan. Among other things, he alleged that they had failed to perfect the Share Pledge as delivery of the pledged shares was not taken. He also alleged that Christian had demanded an unreasonable amount of collateral in return for an extension of time for repayment of the loan, including personal guarantees by Hycarbex Asia's shareholders and the pledging of all of their Hycarbex Asia shares. This led to Hycarbex Asia's decision to default on the Hycarbex Loan, rather than continue with the negotiations. The plaintiff also argued that Huber and Christian caused the defendant to make grossly inadequate provisions for the REN Loan and Hycarbex Loan, resulting in the delay of SEF's audited accounts for the financial year 2009 which would have been released by 30 June 2010.

12 Ultimately, the gist of the plaintiff's case was that it would be in the defendant's best interests for leave to be granted to commence a section 216A action against Huber and Christian. Not only was the action against Huber and Christian a necessary first step to compel both of them to disclose full details of SEF's performance (the plaintiff argued that this was the only recourse that he and investors of the defendant and SEF had for uncovering the defendant's and SEF's true state of affairs), the plaintiff further argued that such action would force Huber and Christian to account for their alleged mismanagement of the defendant and SEF as well as their lack of disclosure to SEF's investors and the defendant's minority shareholders alike. It would also curb their alleged abuse of power and position which they held as the defendant's directors and majority shareholders. The plaintiff had alleged that Huber and Christian appeared to be driven by an overriding determination to deprive the defendant's shareholders and SEF's investors of critical information which the defendant was obliged to disclose, as well as shut the plaintiff out of matters concerning the defendant and SEF, so as to retain full control over the defendant and SEF's management.

The defendant's case

13 In respect of the plaintiff's three main allegations, the defendant had the following responses.

14 On the plaintiff's allegation that he had been wrongfully removed as a director of the defendant,

the defendant argued that this decision was justified as it was not disputed that the Swiss authorities had incarcerated the plaintiff. the defendant, being an exempted entity under the SFA, was obliged to ensure that all of its directors were "fit and proper" persons as required by the Guidelines. The Guidelines provide that, in deciding whether a person was fit and proper, MAS would take into account whether that person was the subject of any investigations which may lead to criminal proceedings or investigations by regulatory authorities or government agencies. The defendant argued that to the best of the knowledge of its directors, criminal investigations by the Swiss authorities could still be on-going. Accordingly, there was no basis for the plaintiff to allege that he was improperly removed as the defendant's director. In fact, after its directors informed the plaintiff that he had been removed as a director, the plaintiff did not object to his removal and even stated that he would resign as a director in any case.

15 Turning to the other two allegations, the defendant's case, in the main, was that the plaintiff's allegations of wrongdoings on the part of its directors (*i.e*. the directors' alleged lack of transparency on SEF's performance as well as their alleged mismanagement of certain key investments of SEF, in particular the REN Loan and Hycarbex Loan) were completely unmeritorious. In any case, even if there was any merit to the plaintiff's allegations, which the defendant categorically denied, those allegations did not provide any basis for an application for leave under section 216A of the Companies Act.

16 With respect to the plaintiff's allegation about the directors' lack of transparency concerning SEF's performance, the defendant argued that its directors had not wrongfully withheld information from SEF's investors as first, there was clear evidence that it had provided, and continued to provide, timely updates on SEF's NAV to investors. In addition, the defendant said that the plaintiff had in fact conceded in his affidavit that he was satisfied that investors were indeed provided with the NAV information for the third and fourth quarters of 2009. Second, the Trustees had responded to requests from investors for information. Third, the plaintiff was aware that quarterly updates of SEF's NAVs were posted on Bloomberg and hence readily accessible. Fourth, the defendant had not received any complaints from any of SEF's investors. The plaintiff's allegations that certain investors were dissatisfied with the lack of information about SEF and the defendant were also unsupported allegations. Accordingly, the defendant argued that the plaintiff's real complaint appeared to be that he was denied access to information which the defendant had provided to SEF's investors but not to him.

17 The defendant also argued that its management had not wrongfully withheld information from the plaintiff as the information which the plaintiff requested, subsequent to his removal as a director, was information which he was not entitled to in his capacity as a shareholder. The plaintiff had not demonstrated any legal basis for his request regarding the information. Additionally, in the light of overwhelming evidence that the plaintiff had been trying to damage and injure the defendant, the defendant argued that it was entirely justifiable for its management to exercise caution in providing the plaintiff with the information which he sought.

18 With respect to the directors' alleged mismanagement of certain key investments of SEF, in particular the REN Loan and Hycarbex Loan, the defendant argued that these allegations were also completely unmeritorious as the decisions which were the subject of the plaintiff's allegations were made by its directors in good faith and the belief that they were in the defendant's best interests. In fact, if the defendant was to commence any legal proceedings in relation to both loans, it would be a claim against the plaintiff for breaches of fiduciary duties and not against the other directors of the defendant.

19 Considering the REN Loan first, the defendant refuted the plaintiff's argument that its directors

had failed to act promptly to enforce Kindermann's obligations under the Kindermann Guarantee by arguing that the plaintiff had not produced any evidence that the defendant's claim against Kindermann was time-barred under Swiss law. In fact, Kindermann himself took the position that his liability to SEF was merely deferred and not that the claim was time-barred. Further, the defendant argued that it had attempted to negotiate an amicable resolution of the dispute with Kindermann. However, the negotiations did not bear fruit due to the plaintiff's continued interference. It was this interference by the plaintiff, despite the defendant's notification to the plaintiff that the latter was not authorised to negotiate with Kindermann on the defendant's behalf, which led the defendant to argue that if any claim was to be made by the defendant in relation to its claim against Kindermann, this claim ought to be made against the plaintiff and not the other directors. The defendant also argued that the plaintiff never raised the issue of time bar prior to his solicitors' letter to the defendant's solicitors dated 17 March 2010. In fact, he had consistently taken the position from mid-November 2009 (*i.e*. after the claim against Kindermann had allegedly become time-barred) that it was not in the defendant's best interests to commence proceedings against Kindermann. As for the plaintiff's assertions that there was no prospect for SEF to recover any value from the REN Loan because of the Swiss Courts' dismissal of the defendant's proceedings against Kindermann, the defendant said that the plaintiff had mischaracterised the nature of the Swiss proceedings and the decision of the Swiss Courts. It was clear from the verdict of the Swiss Courts that the Trustees were entitled to commence fresh proceedings against Kindermann and they had in fact filed a fresh application for summary determination against Kindermann.

20 Turning to the Hycarbex Loan, the plaintiff's original allegation was that the defendant's directors had failed to register the Share Pledge. However, the defendant refuted this allegation by disclosing copies of the Certificates of Registration evidencing the registration of the same. The plaintiff then turned to allege that the directors neglected to take possession of those shares and hence failed to perfect them. Once again, the defendant argued that this allegation was completely unsubstantiated and without merit. On the plaintiff's allegation that the defendant's directors had demanded an unreasonable amount of collateral in return for an extension of time for the repayment of the loan, the defendant asserted that the real motivation behind the plaintiff advocating a less aggressive approach in the defendant's management of the Hycarbex Loan was that the plaintiff had personal and/or pecuniary interests in Hydrotour and/or Hycarbex Asia, which he failed to disclose to the defendant's board of directors. One of the shareholders of Hycarbex Asia, Sinitus Nominees Ltd, was a company controlled by the plaintiff. Additionally, the defendant also asserted that there was evidence that the plaintiff had, without the defendant's knowledge or approval, attempted to secure a secret profit from the Hycarbex Loan for himself when he was still a director of the defendant. In the light of these actions, any claim for breaches of fiduciary duties would have to be against the plaintiff, rather than the other directors of the defendant.

21 Even if the plaintiff was able to convince the court that it was *prima facie* in the defendant's best interests to commence proceedings against some of its directors, the defendant argued that the court should nevertheless not grant leave as the plaintiff's application for leave was not brought in good faith. The defendant alleged that there was clear evidence that the plaintiff had, since his removal as the defendant's director, embarked on a spate of malicious and vexatious measures intended to damage and injure the defendant and its directors. According to the defendant, the plaintiff had taken these measures out of sheer spite or to usurp the defendant's business for the benefit of another company in which the plaintiff had interests. The defendant asserted that the plaintiff had attempted to divert the defendant's management of SEF to Sinitus AG, a company in which the plaintiff was a director and shareholder. It also said that the plaintiff had been sending emails to SEF's investors and the Trustees, making baseless and malicious allegations against the defendant and its management and attempting to incite SEF's investors and the Trustees to interfere with the affairs of the defendant/SEF. The defendant also argued that the plaintiff even threatened

Mrs Aigner, a shareholder of the defendant's and a major investor of SEF, with legal action should she refuse to revoke a power of attorney which she had granted to Huber. Having failed in his attempts to derail the defendant, the plaintiff now sought to abuse the court process so as to injure the defendant.

My decision

22 After hearing the arguments, I decided to dismiss the plaintiff's application with costs.

The law

23 Section 216A(2) of the Companies Act allows a complainant to apply to court for leave to commence an action in the name of and on behalf of a company. Section 216A(1) defines "complainant" to include, among others, "any member of a company" and any person who the court, in its discretion, deems to be a "proper person". The latter category would include a director of the company (*Agus Irawan v Toh Teck Chye and others* [2002] 1 SLR(R) 471 ("*Agus Irawan*")). If leave is granted, the complainant would then proceed to take steps necessary to commence the action in the company's name.

24 The court will not grant leave under section 216A unless it is satisfied that: (a) it was *prima facie* in the company's interests that the action be brought (section 216A(3)(c) of the Companies Act); and (b) the complainant is acting in good faith (section 216A(3)(b) of the Companies Act) (see also *Pang Yong Hock and Another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*")).

25 The phrase "*prima facie*" in section 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, *i.e*. it has a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful (*Pang Yong Hock*, at [16] to [17]; *Agus Irawan*, at [8]; *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426 ("*Teo Gek Luang*"), at [14]). However, this being the leave stage, there is no need to demonstrate that the intended action will or is likely to succeed. The plaintiff need only show that the company will stand to gain substantially in money or money's worth from the intended action (*Pang Yong Hock*, at [16] to [17]; *Agus Irawan*, at [8]). The court is not required to make an extensive inquiry into the merits of the claim and ought not to be drawn into an adjudication on the disputed facts as it is merely determining whether leave for bringing the action ought to be granted and is not trying the action itself (*Agus Irawan*, at [6]; *Teo Gek Luang*, at [15]). In this regard, it would be sufficient for the court to rely on affidavit evidence filed by both sides in support of their claims to ascertain whether the action to be brought in the company's name has any semblance of merit (*Pang Yong Hock*, at [16] to [17]; *Agus Irawan*, at [6]). In considering the requirement in section 216A(3)(c), the court should also consider whether there is an alternative adequate remedy available, such as the winding up of the company (*Pang Yong Hock*, at [22]).

26 As for the requirement of good faith in section 216A(3)(b), the defendant bears the burden of proving that the complainant did not act in good faith as the court is entitled to assume that "every party who comes to court with a reasonable and legitimate claim is acting in good faith - until proven otherwise" (*Pang Yong Hock*, at [18]; *Agus Irawan*, at [9]). Good faith may be best demonstrated by the existence of a legitimate claim which the company's directors are "unreasonably reluctant to pursue with the appropriate vigour or at all" (*Pang Yong Hock*, at [20]). It is generally insufficient to rely on dislike, ill-feeling or other personal reasons such as hostility between the factions involved, pique and resentment to establish that the complainant lacked good faith (*Pang Yong Hock*, at [20]; *Teo Gek Luang*, at [20]). However, where the defendant is able to demonstrate that the complainant

was "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations", *Pang Yong Hock* suggests that this may be sufficient to find a lack of good faith on the complainant's part (at [20]). The Court of Appeal went on to add in *Pang Yong Hock* at [20] that the complainant's good faith would also be in doubt if he "appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor". Such behaviour would also call into question the legitimacy of the intended action, namely, whether allowing the intended action to be brought would be in the company's interests at all (*i.e*. the section 216A(3)(c) requirement).

27 Once it has been established that the complainant is acting in good faith and that the intended action appears genuine, the defendant must then demonstrate why, weighing all the facts and circumstances, it would not be in the company's interests to pursue the intended action (*Pang Yong Hock*, at [21]). This is as much a decision in business as in law, for the company may have genuine commercial considerations or other legitimate concerns for not wanting to pursue certain claims. For example, the Court of Appeal postulated at [21] of *Pang Yong Hock* that a company may not want to "damage a good, long-term, profitable relationship", or "generate bad publicity for itself because of some important negotiations which are underway".

Application to the facts

28 Having set out the applicable legal principles, I now turn to their application in the context of the present matter.

The section 216A(3)(c) requirement

29 Considering the section 216A(3)(c) requirement of whether it would *prima facie* be in the defendant's interests that the plaintiff's intended action be brought, I decided that the plaintiff had not discharged his burden of showing that the intended action was a legitimate or arguable one, such that the company would stand to gain substantially in money or money's worth. In summary, the intended action bore no reasonable resemblance of merit as I was of the view that the plaintiff's allegations that: (a) the defendant's directors and management had wrongfully withheld information from SEF's investors and/or himself; and (b) the defendant had mismanaged SEF, were all without merit.

Alleged lack of disclosure

30 On the plaintiff's allegation that the directors had failed to make proper disclosure of SEF's performance to SEF's investors, there was clear evidence that the defendant had provided, and continued to provide, updates on SEF's NAV to the investors of SEF:

(a) In a letter dated 15 April 2010 ("the 15 April 2010 Letter") from the Trustees to the defendant, the former confirmed that in response to requests by the latter, they (the Trustees) had provided SEF's 3rd Quarter NAV (as at 30 September 2009) and 4th Quarter NAV (as at 31 December 2009) to SEF's investors on 10 November 2009 and 9 April 2010 respectively. This letter was corroborated by the plaintiff's own evidence at paragraph 45 of his affidavit filed on 5 May 2010, where he conceded that the 3rd Quarter NAV and 4th Quarter NAV had indeed been provided to SEF's investors. The 15 April 2010 Letter also confirmed that the defendant had informed SEF's investors on 5 February 2010 that the 4th Quarter NAV would be slightly delayed as the defendant had commissioned Stone Forest Corporate Advisory Services Pte Ltd to conduct an independent valuation of certain investments of SEF ("the SFCA Independent Fund Valuation Report");

(b) In an email dated 19 July 2010 ("the 19 July 2010 Email") from the Trustees to certain SEF's investors, the Trustees responded to requests by those investors for information regarding SEF, including various NAV Reports and the SFCA Independent Fund Valuation Report. This rebuts the plaintiff's allegation at paragraph 20 of his reply affidavit filed on 20 July 2010 that those requests had gone unheeded. The plaintiff also produced a letter dated 14 July 2010 from the solicitors for one of the investors which stated that a request for information had been made but no information was forthcoming. However, the plaintiff omitted to mention that the Trustees did respond to that request, albeit five days later, on 19 July 2010.

31 There was also no clear evidence to support the plaintiff's allegations that certain investors were dissatisfied with the lack of information from SEF and the defendant. The plaintiff's allegation of the defendant's failure to provide updates to SEF's investors on SEF's NAV was first raised via an email dated 3 March 2010 ("the 3 March 2010 Email") to the defendant's management. In that email, the plaintiff alleged that some investors whom he had introduced to SEF were dissatisfied with the lack of information from the defendant and/or SEF and threatened to encourage them to resort to legal action against the defendant to compel disclosure of the necessary financial information and to replace the defendant's management. However, when the defendant's management asked the plaintiff to provide details regarding the identities and contact particulars of these allegedly dissatisfied investors so that it may assure them that it would provide them with copies of all updates for the past 12 months, the plaintiff did not respond to the defendant's request. Had the plaintiff's allegations been genuine, the plaintiff would have readily provided the details which the defendant had requested.

32 The plaintiff's allegation about the defendant's failure to provide information to him is also without merit. The plaintiff did not dispute that the defendant did in fact provide him with some of the documents and information which he had asked for after his removal as a director of the defendant. These were documents and information which the plaintiff was legally entitled to in his capacity as a shareholder of the defendant. In respect of documents and information which the defendant had requested but which the defendant did not provide, I found the defendant's refusal to provide these documents and information to be justified as there was no legal basis for the plaintiff's request to these items to be acceded to.

33 On the whole, I was of the view that should the plaintiff be allowed to commence a section 216A action on the basis of his allegation that the defendant's directors and management had wrongfully withheld information from SEF's investors and/or himself, this would mean permitting the plaintiff to commence proceedings in the defendant's name against the defendant itself, thereby compelling the defendant to produce SEF's NAVs and other information to the plaintiff and its investors; It would not be a claim against any of the defendant's directors. Thus, by filing the present application, the plaintiff was essentially using section 216A to obtain more information about SEF and the defendant than he was otherwise entitled to as a shareholder of the defendant. This was an abuse of the court process.

Alleged mismanagement of SEF

34 I now consider the plaintiff's allegation that the defendant had mismanaged SEF. In respect of the REN Loan, I found that Kindermann himself did not allege that the defendant's/SEF's claim against him was time-barred. Rather, he had taken the position that, as a result of an agreement between the plaintiff and himself, his liability was deferred to 1 January 2011. Turning to the plaintiff's assertions that given the dismissal of the proceedings against Kindermann by the Swiss Courts, SEF had little prospect of recovering any value from the REN Loan, I found that the plaintiff had mischaracterised the nature of those proceedings as well as the decision of the Swiss Courts. The

proceedings which SEF commenced against Kindermann were summary proceedings. SEF had sought an order for a provisional dismissal of Kindermann's defence. As the application ought to have been made in the Trustees' name, rather than SEF's, the Swiss Courts refused to grant that order. However, the Swiss Courts also held that the Trustees could commence fresh proceedings against Kindermann through properly authorised solicitors. Indeed, the Trustees have since filed a fresh application for summary determination against Kindermann. The Swiss Courts also did not rule on either the merits of SEF's/the Trustees' claim or the defences raised by Kindermann. Hence, it cannot be said definitively that SEF faced little prospect of recovering any value from the REN Loan. As for the plaintiff's allegations that he had repeatedly reminded the defendant's directors of the issue of time bar, the evidence suggested that this issue was never raised prior to the plaintiff's solicitors' letter to the defendant's solicitors dated 17 March 2010. In fact, correspondences between the plaintiff, Christian and the Trustees after the claim against Kindermann had allegedly become time-barred (*i.e*. after 7 November 2009) indicated that the plaintiff had taken the position that it was *not* in the defendant's best interests to commence proceedings against Kindermann. On 11 November 2009, the plaintiff wrote to Christian saying that it was of "paramount importance" that outstanding amounts in respect of Kindermann be recovered by end 2009 or "restructured properly avoiding any expensive legal disputes and litigation". The very next day, on 12 November 2009, the plaintiff emailed the Trustees, expressing his concerns that SEF would have to "enter into lengthy and costly litigation" against REN AG/Kindermann. Finally, I noted that the plaintiff's persistence in continuing to negotiate with Kindermann, despite being informed of a decision reached on 29 June 2009 by the majority of the defendant's directors at a Board meeting that only one of its directors, namely, Huber, and the defendant's Swiss lawyer would negotiate with Kindermann, could have jeopardised the defendant's on-going negotiations with Kindermann.

35 As for the Hycarbex Loan, I found that there was no evidence that the defendant's directors had neglected to "perfect" the Share Pledge. I was also of the view that the amount of collateral demanded by the defendant's directors in return for an extension of time for the repayment of this loan did not justify the court's interference with the directors' decision. Similarly, judicial interference with the directors' decisions regarding provisions for the REN Loan and Hycarbex Loan was neither necessary nor appropriate. As said in *ECRC Land Pte Ltd (in liquidation) v Ho Wing On Christopher and others* [2004] 1 SLR(R) 105 at [49]:

> The court should be slow to interfere with commercial decisions taken by directors (see *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064). It should not, with the advantage of hindsight, substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interests of the company, even if those decisions turned out subsequently to be money-losing ones.

I also noted the fact that the plaintiff controlled Sinitus Nominees Ltd, one of the shareholders of Hycarbex Asia and that he omitted to disclose this to the defendant's board of directors. There was however insufficient evidence to suggest that the plaintiff had negotiated a secret profit for his brokerage of the Hycarbex Loan.

Alleged wrongful removal as a director of the defendant

36 Under the "Fit and Proper Test" set out in the Guidelines, whether or not a person is the subject of any investigations which might lead to criminal proceedings or investigations by regulatory authorities or government agencies is a factor which would be taken into account in deciding whether that person is fit and proper to carry out the activities regulated by MAS. The defendant was obliged to ensure that all of its directors satisfied the "Fit and Proper Test". While it was not disputed that the plaintiff had been the subject of criminal investigations by the Swiss authorities in 2009, there

was insufficient evidence to show that the criminal investigations against the plaintiff had ceased. The defendant also relied on a letter dated 20 July 2010 from the Swiss Public Prosecutor's office which intimated at least that criminal investigations against the plaintiff were still ongoing.

The section 216A(3)(b) requirement

37 Turning to the section 216A(3)(b) requirement of good faith, I found that there was sufficient evidence to show that the plaintiff had not acted in good faith in making this application. First, it appeared to me that the plaintiff had attempted to divert the defendant's sole business of managing SEF to Sinitus AG, a company in which the plaintiff was a director and shareholder. On 5 January 2010, the plaintiff sent an email ("the 5 January 2010 Email") to Mrs Aigner and Franz Aigner ("Franz") (collectively, the "Aigners"), alleging that the defendant had been mismanaging SEF and then volunteering the services of Sinitus AG, which he claimed was a "successful trustee and management company". Having received no response from the Aigners, the plaintiff then sent a further email to Franz on 17 March 2010, urging him to take action soon or risk SEF transforming into a "Ponzi scheme". The plaintiff argued that the defendant had misconstrued the 5 January 2010 Email as he was merely proposing to strengthen the defendant's management with resources from Sinitus AG, in particular, his expertise, rather than divert the defendant's business to Sinitus AG. I was of the view that it was not unreasonable to infer from the 5 January 2010 Email that the plaintiff was attempting to divert the defendant's business to Sinitus AG. At the very least, the email was evidence that the plaintiff was attempting to convince the Aigners that the defendant had acted in dereliction of its duties as SEF's managers. Such allegations were not supported by the evidence and therefore uncalled for.

38 Second, there was also evidence to suggest that the plaintiff had been sending emails containing unsupported allegations against the defendant and its management to SEF's investors and the Trustees, inviting them to intervene in the affairs of the defendant and/or SEF. By an email dated 18 March 2010, the plaintiff attempted to convince two alleged representatives of a major investor in SEF that the management had not been providing full disclosure of SEF's development. About a month later on 21 April 2010, the plaintiff sent an email ("the 21 April 2010 Email") to the officers of the Trustees, alleging that the defendant had been mismanaging SEF and asserting that unless the Trustees intervened, SEF's financial position would deteriorate significantly within the next four weeks. He also invited the Trustees to request that the defendant retroactively refund the management fees charged for the preceding two years as a precaution. The plaintiff then forwarded to MAS the 21 April 2010 Email which he had sent to the Trustees. As a result, MAS requested the Trustees and the defendant to provide an explanation of "the background of the matters raised, the action(s) [they] intend to take, and [their] assessment of the matters alerted", which it eventually found to be satisfactory.

Conclusion

39 In the result, as I was of the view that it would not *prima facie* be in the defendant's interests that the plaintiff's intended action be brought and that the plaintiff, in making this application, had not acted in good faith, I dismissed the application and ordered that costs fixed at $8,000.00 be paid by the plaintiff to the defendant. I also directed the Accountant-General to release to the plaintiff's solicitors the amount of $10,000.00 held as security for the defendant's costs. The plaintiff's solicitors would then arrange to pay to the defendant's solicitors the $8,000.00 costs out of the said security.

40 In dismissing the present application, I am satisfied that my decision is consonant with Parliament's intention behind section 216A of the Companies Act, which is to provide a procedure for protecting "genuinely aggrieved minority interests" and for "doing justice to a company" while

preventing the company's directors from being "unduly hampered in their management decisions by loud but unreasonable dissidents attempting to drive the corporate vehicle from the back seat" (*Pang Yong Hock*, at [19]). The plaintiff has appealed to the Court of Appeal against my decision.