Fong Wai Lyn Carolyn *v* Airtrust (Singapore) Pte Ltd and another
[2011] SGHC 88

Case Number	: Originating Summons No 505 of 2010 (Summons Nos 2592, 2593, 2619, 2620 and 5602 of 2010)
Decision Date	: 11 April 2011
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: CR Rajah SC and Muthu Arusu (Tan Rajah & Cheah) (instructed) and Andy Leck, Daniel Chia, Tan Ijin and Liu Zeming (Wong & Leow LLC) for the plaintiff; Quek Mong Hua, Julian Tay and Esther Yee (Lee & Lee) for the first defendant; Davinder Singh SC, Bhavish Advani and Elan Krishna (Drew & Napier LLC) (instructed) and Christopher Anand Daniel and Kenneth Pereira (Advocatus Law LLP)for the second defendant.
Parties	: Fong Wai Lyn Carolyn — Airtrust (Singapore) Pte Ltd and another

Companies

Civil Procedure

11 April 2011

Judith Prakash J:

Introduction

1 On 24 May 2010, the plaintiff filed Originating Summons No 505 of 2010 ("the Leave Application"), seeking leave to bring an action in the name of and on behalf of the first defendant against the second defendant pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). The plaintiff claimed that the second defendant had breached the fiduciary duties which she owed to the first defendant as a director. On the same day, the plaintiff filed Summons Nos 2277 and 2278 of 2010 seeking *ex parte* freezing and search orders (collectively, "the *ex parte* orders") against both defendants. On 26 May 2010, I granted the *ex parte* orders. The court papers and the relevant orders were served on the defendants on 27 May 2010. The defendants then filed various applications to wit Summons Nos 2592, 2593, 2619 and 2620 of 2010 to set aside the *ex parte* orders (collectively, "the Setting Aside Applications"). The defendants argued that there had been material failure by the plaintiff to make full disclosure in her *ex parte* applications and there was no real possibility or risk that the defendants would destroy relevant evidence or dissipate assets.

2 The Leave Application and the Setting Aside Applications were heard together. On 30 November 2010, I allowed the Leave Application in part and also allowed the Setting Aside Applications. The plaintiff subsequently applied for an *Erinford* injunction but I dismissed her application on 2 December 2010. None of the parties was wholly satisfied with my decisions and they have lodged four appeals in total against the same.

Background and parties

3 The first defendant, Airtrust (Singapore) Pte Limited ("AT" or "the company"), is a company doing business in the power, oil and gas industry. During the material period, its primary business was

pipe trading with parties in Indonesia and the People's Republic of China. AT's operations were conducted through various subsidiaries collectively known as the "Airtrust Group of Companies". The second defendant, Ms Linda Kao Chai-Chau ("Ms Kao"), has been AT's managing director since 1996. She is also a registered shareholder of the company holding 13.6% of AT's issued share capital. The plaintiff, Ms Carolyn Fong Wai Lyn ("Ms Fong"), was the eldest daughter of AT's founder Peter Fong ("Peter Fong") and his first wife. Ms Fong is also a non-executive director and a shareholder of AT. There was no dispute that Peter Fong had been AT's controlling mind and will until his death in 2008.

4 At the time this action started, the other directors of AT were Evelyn Ho, Dennis Atkinson, Anthony Stiefel and Chia Quee Khee. Anthony Stiefel was Ms Fong's nominee and was allied with her while Evelyn Ho had worked closely with Ms Kao for many years.

5 In the Leave Application, Ms Fong alleged that Ms Kao had committed several breaches of her fiduciary duties owed to AT during her tenure as managing director. Ms Fong alleged that Ms Kao actively diverted business opportunities away from AT and also caused AT to enter into several agreements and transactions in which she or her relatives had interests. Ms Fong thus sought the court's leave to commence an action against Ms Kao on AT's behalf and to conduct such action. She also applied for access to AT's business records so that she would be able to ascertain the full nature and consequences of the alleged breaches.

Allegations and issues

6 During oral submissions, numerous allegations of purported breach of fiduciary duties concerning a variety of transactions that were linked directly or indirectly to AT were canvassed. However, the instances were rather disconnected and did not take place in an obvious chronological sequence. For ease of reference and to make it easier to deal systematically with the complaints, I directed Ms Fong and her counsel to prepare a list of proposed Points of Claim ("proposed POC") that she wished to pursue.

7 In considering the Leave Application I used the proposed POC as my guide to the claims against Ms Kao that I had to consider. I will make reference to the relevant portions of the proposed POC in the course of this judgment.

Law pertaining to s 216A actions

8 The relevant portion of s 216A of the Act states:

> **216A. Derivative or representative actions**
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> (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.
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> (3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —
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> *(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.

(4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3) (*a*), the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

9 For an applicant to succeed in an application for leave to commence a statutory derivative action, the applicant must satisfy the Act's requirements. There are two facets to these requirements. First, there is an inquiry as to whether the notice requirements have been met. If they have not been, the court must consider whether there is any reason why those requirements ought not to be enforced.

10 Second, there is an inquiry as to the merits of such application. The court must consider whether there is a reasonable basis for the complaint and whether the intended action is a legitimate or an arguable one. If that is satisfied, the applicant must further prove that it is in the *prima facie* interests of the company that such an action be brought. The corollary is that the intended defendant or the company itself can resist a leave application either on the basis that the applicant is not acting in good faith or that it is not in the interests of the company that the action be brought.

11 The analysis thus proceeded along the following lines:

(a) whether Ms Fong had provided sufficient notice;

(b) whether Ms Fong was able to show a reasonable basis for the complaint and that the intended action was a legitimate or an arguable one;

(c) whether Ms Fong was acting in good faith; and

(d) whether it appeared to be *prima facie* in the interests of the company that the action be brought.

(a) Notice

12 Ms Fong gave notice of her intention to commence an application for leave to commence derivative proceedings against the Ms Kao for breaches of fiduciary duties to AT's Board of Directors on 1 June 2010. However, the Leave Application was filed on 24 May 2010, seven days before notice was actually given. Obviously, the 14 days' notice requirement had not been met. Consequently, the issue was whether the court ought to exercise its powers under s 216A(4) of the Act to excuse Ms Kao from the notice requirement.

13 Section 216A(4) gives the court the power to dispense with notice or to make such orders as the court thinks fit for the giving of notice if it is not expedient to give notice prior to the commencement of the action. In *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 1994, Issue 34

(March 2010 release)) ("*Woon's Corporations Law*") (at para 602) the learned authors opined that "[i]n cases where the giving of 14 days' notice is *not practicable*, the complainant may give less notice or none at all before the application is made" [emphasis added]. The burden thus falls on an applicant to show why notice, as required under s 216A(3)(a) of the Act, could not have been given.

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

15 Ms Fong's reasons for not giving the 14 days' notice were that she feared that Ms Kao would instigate the concealment of AT's assets and that there was some basis to suggest that AT's information technology ("IT") system had already been tampered with. The notice, if served, would have likely alerted Ms Kao to the impending discovery of her wrongdoing and spurred her and her associates on to destroy, conceal or forge evidence. Similarly, it would likely have caused Ms Kao to move funds out of AT and into companies she controlled and would have frustrated AT's efforts to find out what had happened or to seek recovery from her.

16 Ms Kao, in response, argued that these reasons were contrived. Given that (a) there was an agreement to perform an audit, (b) an offer had been made to make Ms Fong and Anthony Steifel signatories to several of AT's bank accounts, (c) there had in fact been no tampering with the IT system and (d) there was no risk of dissipation of assets, there was no reason why the notice requirement ought not to be followed. Further, had the 14 days' notice been given, an audit would have taken place. These grounds on which both Ms Fong and Ms Kao relied were substantially the same as those raised in their submissions in the Setting Aside Applications (which I will deal with in greater detail below). In any event, counsel for Ms Fong, Mr CR Rajah SC, pointed out that after notice was eventually given to AT on 1 June 2010, AT did not make any meaningful effort to investigate Ms Fong's claims. In reply, Ms Kao explained that nothing was done because, when the notice was received on the above-mentioned date, the search order was being carried out, and an Extraordinary General Meeting ("EOGM") had been called to, *inter alia*, seek the removal of Ms Kao from her position as a director of AT.

17 On the whole, I agreed with Ms Fong that it was impracticable in the circumstances to adhere to the notice requirements. While I accepted that the factors raised by Ms Kao, *viz*, the lack of evidence establishing the defendants' propensity to dissipate assets and destroy evidence, and the willingness of the other directors to conduct an audit, could affect the court's decision to insist on compliance with the 14 days' notice requirement, I thought her perspective to be overly narrow. Ms Kao's reasons merely depicted the state of affairs at the time the application for leave was filed. "Impracticability" was mentioned by the learned authors of *Woon's Corporations Law*, but I observe that it was neither elaborated nor explained. Perhaps this was justifiable since such an inquiry would be a question of fact, and the court would be entitled to look at the totality of circumstances to determine whether impracticability existed. The scope of matters to be considered thus ought not to be restricted to the state of affairs at the time of filing the application but, in addition, encompass the conduct of the relevant parties after such an application had been brought to the notice of the company.

18 It was a key fact that after notice was served on AT on 1 June 2010, AT did not proceed with any meaningful exercise that amounted to a *bona fide* and determined effort to investigate Ms Fong's claims. The thrust of Ms Kao's explanation was that the company was pre-occupied by the

concurrent search order and EOGM affecting AT. This at best explained the pressures AT faced at the material time. But those events could not overshadow the fact that there was no record of any deliberation between the other directors on the merits of Ms Fong's complaints nor any record of any informed decision on whether her complaints should be pursued, investigated or whether it would be in the best interests of AT to take any action on them. If the purpose of the notice period is to allow a company's board of directors to evaluate and act on the complaints of a disgruntled shareholder, it appeared to me that even if proper notice had been given, this intention would not have been met. There was an absence of any real attempt to independently and diligently investigate and consider Ms Kao's complaints after her Leave Application was filed. Even if I accepted Ms Kao's explanation pertaining to AT's pre-occupation with the search order and EOGM, it was glaring that no action was pursued after those events passed. Rather, AT chose to deal with the matter by merely offering to conduct an independent audit. If AT was indeed sincere in considering Ms Fong's complaints, it should have conducted its own investigations and audit in order to provide the board of directors with an informed and considered decision on the merits of those complaints. Given the totality of the circumstances, there was a strong inference that, had any notice been served, it would have been met with the same response. It was therefore my view that even if Ms Fong had complied with the 14 days' notice requirement, it was likely her notice would have been futile. Hence, I considered that it would be wrong to penalise Ms Fong for her failure to do so.

(b) Reasonable basis of complaint

19 An applicant intending to commence a derivative action has the additional burden of showing a reasonable basis for his complaints 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, see *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 ("*Urs Meisterhans*") at [25], citing *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock CA*") at [16] to [17]; *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 at [8]; and *Teo Gek Luang v Ng Ai Tiong* [1998] 2 SLR(R) 426.

20 Two broad categories of claims were canvassed in Ms Fong's proposed POC. The first set of allegations was that Ms Kao allowed AT to enter into contracts with companies in which Ms Kao or her members of her family had an interest (collectively referred to as the "Offshore Companies"). The relatives so implicated were Ms Kao's sisters (Mandy Kao, Jane Kao, and Joanna Kao) and her brother-in-law (Woo Boon Chong who is Joanna Kao's husband). The other category of allegations involved Ms Kao diverting contracts and business opportunities from AT to several of the Offshore Companies. In regard to both categories, Ms Fong submitted that Ms Kao had never disclosed her or her relatives' interests, or the associated dealings, to AT's board of directors. In support of these allegations, Ms Kao adduced several documents that originated from AT's company secretary, Ms Kuat Bee Bee ("Ms Kuat"), whom Ms Fong wanted the court to believe was the informant who had made public disclosure of Ms Kao's indiscretions.

21 Ms Kao relied on four general defences in reply. First, she claimed that all the Offshore Companies were set up with Peter Fong's approval or on his instructions. The transactions in issue were entered into when Peter Fong was AT's controlling mind and will. These transactions were entered into either with the knowledge of the directors or on the basis that directors were content to let Peter Fong do what he thought was necessary. She stressed that the documents apparently implicating her had been in the possession of the company and the transactions were done with the knowledge and active participation of Evelyn Ho, a co-director, and the company secretary, Ms Kuat. The point made was that Ms Kao had nothing to hide, and that explained how and why Ms Kuat possessed those documents. Ms Kuat was informed of the above matters in AT's ordinary course of business and therefore the documents and information supplied by Ms Kuat ought not to be perceived

as the fruits of a supposed whistle blowing exercise. Ms Kuat was told about the setting up of the Offshore Companies and that was how she had the information and was able to assist. Those documents were said to form part of the common knowledge of the management and staff of AT. The information which Ms Fong utilised in these proceedings was, therefore, freely available within AT's premises. It included the existence of the Offshore Companies, their ownership, bank signatories, agreements, and the payments to Ms Kao's sisters.

22 Ms Kao explained the motivation behind the use of the Offshore Companies and how these companies were utilised for the benefit of third parties: [note: 1]

> 40 The various Offshore Companies were sometimes used for the purposes of multiple projects. As such, the ultimate beneficiaries of the Offshore Companies changed from time to time, depending on which Overseas Third Party was actually using the Offshore Companies. For example, Aaron Group Limited was originally set up for Anton. At all material times, Anton was the sole shareholder of the Aaron Group Limited. When Peter Fong's CNPC friends needed another offshore vehicle for their project in India, Peter Fong got Anton's consent to use Aaron Group Limited for this other purpose. Although the beneficiary of the project was not Anton, there was enough trust and integrity between all parties such that no trust deed or written agreement needed to be put in place for such arrangements.
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> 41 This applied to the Offshore Companies in relation to which Evelyn [Ho], [Kuat] Bee Bee or I were shareholders and/or directors and/or bank signatories. It was always clear that we were accountable to the ultimate beneficiary of each company/bank account/project.

23 She also explained how she and her relatives became involved: [note: 2]

> 21 Peter Fong was also looking at ways to reduce tax liabilities and this led him to begin setting up offshore companies in tax havens. In fact, I believe he had already begun doing that prior to me joining AT. Peter Fong was once questioned at length by IRAS about his business dealings with some Indonesian parties. Although the matter was resolved, Peter [Fong] had expressed grave concerns about tax issues. This also led him to set up offshore companies. Later, he also began to use these offshore companies to help his contacts overseas. In a nutshell, he would ask one of his staff (mainly myself and the corporate secretary) to set up the offshore company in our own names. Whatever profits gained from the particular overseas venture would be held in that offshore companies account. We will then have to arrange for the profits to be distributed to the business partners and AT according to the agreement he had made with them – which was mostly verbal.

This was echoed in a later affidavit: [note: 3]

> 23 ... these [Offshore Companies] were set up in the names of AT's employees (including Evelyn [Ho] and [Kuat] Bee Bee) on Peter Fong's instructions not to expose AT to unnecessary risks and to aid his friends and business associates overseas who faced restrictions imposed by their home countries. There is nothing sinister in any of this ...

24 Ms Kao submitted that the Offshore Companies ought to be understood in the above context when the court decided whether there existed a reasonable basis for Ms Fong's proposed action.

25 The other three general defences were that the Offshore Companies were either fully or partially owned by third parties who had given their consent for Ms Kao to deal with the Offshore

Companies in the way she had; that both Peter Fong and the third parties knew or approved of Ms Kao's or her relatives' involvement in the Offshore Companies; and the transactions or arrangements AT engaged in were ultimately undertaken for the benefit of AT. Details of these explanations will be found below.

Scope of the court's review

26 During oral submissions, Mr Singh intimated that there was no reasonable basis for Ms Fong's claims *per se* since the bulk of the evidence in support of the Leave Application was based on the evidence Ms Kao had supplied in her reply affidavits, all of which came *after* the commencement of the proceedings. In other words, Ms Fong did not have any material of her own to support the complaints of breaches of fiduciary duty asserted when she filed her Leave Application. Had Ms Kao refrained from explaining the relevant transactions, it would have been unlikely that Ms Fong could have crafted any claims of her own. At the commencement of the OS, there was therefore no *prima facie* case. Mr Rajah obviously disagreed with this general proposition and submitted that all affidavits filed (specifically affidavits filed by the opposing party) should be considered by the court in arriving in its decision as to whether a complaint possessed any reasonable basis and semblance of merit.

27 I agreed with Mr Rajah. In *Urs Meisterhans*, Tay Yong Kwang J observed (at [25]) that 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 had any semblance of merit. This position was also taken by Andrew Ang J in *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157. While both of the preceding cases did not directly deal with the issue argued by Mr Singh during oral submissions (and therefore did not articulate the rationale for making the relevant observation), I considered that the learned judges' views were correct in principle.

28 The scope of the court's review ought not to be restricted to the applicant's knowledge at the time the application for leave is filed or to the contents of the applicant's supporting affidavit. It is often the case that a party making the application for leave is not privy and does not have access to significant documents held by the company or its controlling directors. It is not surprising to find that complaints in such proceedings have been partly based upon information received, belief and inference. Conversely, it would be safe to assume that the company or its directors are best placed to explain conduct that is the subject of a complaint. Given the difficulty usually faced by an applicant in having access to the relevant and appropriate information, it would be imprudent and inequitable to confine the scope of analysis to the applicant's supporting affidavit.

KSCCI-Tynley & Ribands-Foraker

29 China National Petroleum Corporation ("CNPC") was a client of AT, and Sino Oil King Shine Chemical Co Ltd ("KSCC") and China Petroleum Technology & Development Corporation ("CPTDC") were its subsidiaries or were related companies. In the proposed POC, Ms Fong alleged that Ms Kao diverted the opportunity to earn service fees from these companies from AT to several of the Offshore Companies:

> 5. [Ms Kao] had diverted maturing business opportunities from [AT] to her Family Companies.
>
> a. She has diverted the opportunity to be the "invoicing agent" for KSCC (a sub-division of CNPC which is a client of [AT]) to KSCC International Pte Ltd ("**KSCCI**"), a company in which her brother-in-law and her sister are directors and shareholders. KSCCI has [earned]/is currently earning service fees for providing this service to KSCC;

b. She has diverted the opportunity to be the "invoicing agent" for CPTDC (a sub-division of CNPC which is a client of [AT]) to Ribands Pte Ltd("**Ribands**"), a company in she and another director, Miss Evelyn Ho are directors and shareholders. Ribands has/is currently earning service fees for providing this service to CPTDC...

...

6. [Ms Kao] had not disclosed such opportunities and her interest and that of her family members in the above companies to [AT].

Tynley / Foraker

7. [Ms Kao] has also set up these BVI companies. She is the sole shareholder, director and signatory in Foraker Limited, whilst she and Evelyn Ho are shareholders and directors of Tynley.

8. These companies were part of the process by which [Ms Kao] diverted business opportunities from [AT] in relation to work done for KSCC and CPTDC, as per paragraph [5a] and [5b] above, and in consequence of which, part of the sale proceeds which remained with KSCCI and Ribands have [been] paid on to Tynley and Foraker respectively. Part of the monies paid to Tynley has been paid to [Ms Kao's] sister, Jane Kao.

9. All monies retained by KSCCI and Ribands and any part of the Tynley and Foraker monies paid to [Ms Kao] and/or members of her family, would have accrued to [AT's] benefit had [Ms Kao] not put in place the arrangements under which these opportunities were instead diverted to KSCCI / Tynley and Ribands / Foraker...

30 KSCC International Pte Ltd ("KSCCI") was incorporated on 12 April 2000 on Ms Kao's instructions. It was a company in which Woo Boon Chong and Jane Kao were directors and shareholders. Ribands Pte Ltd ("Ribands") was incorporated on 3 April 2001 and Ms Kao and Evelyn Ho were its directors and shareholders. Both KSCCI and Ribands, Ms Fong alleged, had been earning service fees at the expense of AT for being the invoicing agents for KSCC and CPTDC respectively.

31 As part of that alleged diversion, Ms Fong further averred, the monies were subsequently diverted to two British Virgin Islands ("BVI") companies, Tynley Holdings Limited ("Tynley") and Foraker Limited ("Foraker"), both of which were formed in 2000. Ms Kao was the sole shareholder, director and signatory of both companies. Importantly, part of the service fees earned by KSCCI and Ribands had been sent by them to Tynley and Foraker respectively. In addition, part of the monies paid to Tynley had been paid to Jane Kao.

32 Ms Fong submitted that all monies retained by KSCCI and Ribands, and any part of the Tynley and Foraker monies paid to Ms Kao or her siblings, or both, would have accrued to AT's benefit had Ms Kao not put in place the arrangements under which these business opportunities were diverted.

33 In response to the above allegations, Ms Kao explained that the KSCCI–Tynley structure originated from one Liu Wei Min. He was one of Peter Fong's contacts in CNPC and he was the contact person for various projects that Peter Fong wanted to pursue in Australia, India, Brunei and Papua New Guinea. Liu Wei Min introduced Peter Fong to key people in various divisions of CNPC, and in return, Peter Fong assisted him in various CNPC related projects using special purpose vehicles registered in Singapore and the BVI. KSCCI and Tynley were examples of such vehicles. Tynley, for instance, was used to keep KSCC profits out of China. This was effected as follows: whenever KSCC supplied a shipment of chemicals, the recipient company would make payment to KSCCI. On KSCC's

instructions (given through Liu Wei Min), KSCCI would transfer part of the amount received back to KSCC and send the remainder to Tynley, to be held pending further instructions (also from Liu Wei Min). For its services, KSCCI received from Tynley a service fee of 1.5% of the sales value, and this was in addition to whatever other monies Liu Wei Min was prepared to pay Jane Kao. A similar arrangement was used in the Ribands–Foraker structure: Ribands would invoice CPTDC's customers and receive payments on CPTDC's behalf, and those monies received by Ribands would be transferred to either CPTDC or Foraker on the instructions of Liu Wei Min. Ribands, in return, received service fees for its services.

34 Ms Kao explained that Peter Fong did not involve AT in this service provided to KSCC. Woo Boon Cheong was made a nominee director and shareholder of KSCCI on Peter Fong's instructions, and Jane Kao was made a director and shareholder with Peter Fong's consent. As for Tynley, Ms Kao admitted that she was its nominee director, shareholder and bank account signatory. However, she maintained that the assets of Tynley were held on trust for Liu Wei Min, and that upon receiving his instructions, she would arrange for monies in Tynley's bank account to be sent to recipients nominated by Liu Wei Min. As for the Ribands–Foraker structure, Evelyn Ho and Ms Kao were made nominee directors, shareholders and bank signatories of Ribands, while only Ms Kao held those positions in Foraker. Ms Kao stressed that the appointments in both Ribands and Foraker were made on the instructions of Peter Fong. Ms Kao also explained that she was the bank signatory for Tynley and Ribands since she had to arrange for the monies in the relevant accounts to be remitted to destinations which Liu Wei Min designated.

35 In light of the above, Ms Kao submitted that Peter Fong was fully aware of the existence of the above companies, and this explained why AT's staff (*ie* Ms Kuat and Evelyn Ho) were involved in their operations. Further, it was on Peter Fong's instructions that the above special purpose vehicles were incorporated. There was no evidence that the schemes were anything other than what Ms Kao explained. Moreover, Ms Kao maintained, AT also benefited from the incorporation of KSCCI, Tynley, Ribands and Foraker. Specifically, when AT required funding in 2005 and 2007 for its pipe trading business, Liu Wei Min permitted funds in KSCCI's bank accounts to be pledged to support the bank facility in favour of AT. Similarly in 2007, Tynley, through KSCCI, made a loan to Ms Kao which was in turn pledged to the bank to support AT's facility.

36 As a preliminary matter, it seemed to me that the transactions concerning KSCCI and Tynley and from Tynley to Jane Kao were beyond the scope of this Leave Application. If any fiduciary duties were owed in these transactions, they were owed to KSCCI and Tynley respectively. Those two companies were the appropriate parties to commence that action, not AT. Those transactions were therefore irrelevant to the proceedings before me.

37 Nevertheless, I found that the complaint concerning the service fees received by KSCCI and Ribands had a reasonable basis and contained some semblance of merit. On the face of the transactions, it was incontrovertible that Ms Kao had *prima facie* benefited from the transactions through the commissions made by KSCCI and Ribands. She was a director and shareholder of Ribands, while Mandy Kao and Woo Boon Chong were the directors and shareholders of KSCCI. Given these directorships and shareholding, the inference was that Ms Kao could have preferred her own or her relatives' interests in KSCCI and Ribands to those of AT. CNPC was a client of AT and, presumably, it would be in the interests of AT to be the one to earn the service fees that were eventually paid to KSCCI and Ribands.

38 Ms Kao further contended that KSCCI and Ribands were set up for the ultimate benefit of Liu Wei Min. Considering the contrasting versions offered by Ms Fong and Ms Kao, I was not entirely satisfied that Ms Kao's explanation adequately rebutted the claims made by Ms Fong. First, there was

no affidavit filed in support of Ms Kao's explanation by Liu Wei Min, Woo Boon Cheong or Mandy Kao confirming that Liu Wei Min was in fact the beneficial owner of the KSCCI and Ribands and that Woo Boon Cheong and Mandy Kao were indeed nominees for Liu Wei Min. Second, Ms Kao's explanation had missed the point of the inquiry. That explanation went as far as proving the background of the creation of companies and who the ultimate beneficiaries were. In addition, Ms Kao also explained how KSCC managed the movement of the invoiced monies after KSCCI's receipt. But that was not the point of the inquiry. What was of concern was the fact that KSCCI and Ribands were earning service fees. The material factual inquiry therefore was regarding the entitlement to the benefit of service fees earned. Obviously, if Ms Kao can show that these service fees ultimately belonged to AT despite the shareholding and directorships that seem to have conflicted with AT's interest, then no breach would arise. However, no evidence had been proffered to show the beneficial ownership of those service fees. Accordingly, I granted Ms Fong leave to commence a derivative action in that respect.

Mega-Bond

39 China Petroleum Pipeline Engineering Corporation ("CPPEC") was a company incorporated in China and it was a client of AT. Mega-Bond was a BVI company incorporated in 2002 and Ms Kao was its sole director and shareholder. In her proposed POC, Ms Fong alleged:

> 5. [Ms Kao] had diverted maturing business opportunities from [AT] to her Family Companies.
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> ...
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> c. She has diverted the opportunity to earn service fees from the China Petroleum Pipeline Engineering Corporation ("**CPPEC**") when CPPEC was bidding for the INPETRO project in Mozambique. This contract went to Mega-Bond Management Limited, a BVI company in which [Ms Kao] is the sole director and shareholder; and
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> ...
>
> 6. [Ms Kao] had not disclosed such opportunities and her interest and that of her family members in the above companies to [AT].

40 Ms Fong claimed that Ms Kao had used her position as AT's managing director to divert contracts that should have gone to AT to her own company, Mega-Bond. On 18 November 2004, CPPEC entered into an agency agreement with Mega-Bond. Under that agreement, CPPEC had to pay Mega-Bond a service fee of 5% of the gross value of a contract CPPEC had entered into with Emirates National Oil Co. Limited (ENOC) LLC to build a petroleum terminal. The value of the ENOC Contract was USD$ 22,476,276.40, and the resulting service fee payable to Mega-Bond would have been USD$ 1,123,813.82. Although the signatory of the agency agreement was one Paul Bertrand (listed as President of Mega-Bond, but a person who Ms Fong said was fictitious), Ms Fong submitted that Ms Kao was Mega-Bond's directing mind.

41 Ms Kao averred that Mega-Bond was incorporated for the benefit of several of Peter Fong's Chinese contacts. As a matter of background, Ms Kao explained that CNPC and China Petroleum Pipeline Bureau ("CPPB") (a subsidiary of CNPC) explored and secured overseas projects without any involvement on the part of Peter Fong or AT. These projects included the Mozambique project that was the subject of Ms Fong's complaints. As Peter Fong had informed Liu Wei Min to look for Ms Kao whenever assistance was required, Liu Wei Min asked Ms Kao to set up another BVI company to handle these overseas projects to assist CNPC and CPPB. Mega-Bond was set up for this purpose and Ms Kao arranged for herself to be the nominee shareholder of Mega-Bond, holding its shares on trust

for Liu Wei Min. Ms Kao also arranged for herself and Ms Kuat to be the joint signatories for Mega-Bond's account with Bangkok Bank in the United Kingdom. By assisting these Chinese companies in the above manner, Peter Fong and AT gained significant goodwill which, Peter Fong believed, would translate into greater business opportunities in the future.

42 This issue was a finely balanced one. Ms Kao averred that Mega-bond was set up ultimately on Peter Fong's instructions (*ie* his direction to assist Liu Wei Min) and her shares in Mega-Bond were held on trust for Liu Wei Min. On the other hand, it was clear that on the face of the records, Ms Kao was the shareholder and director of Mega-Bond and she had preferred Mega-Bond's interests to those of AT. The fact of the matter was that Mega-Bond had secured a contract from a client of AT. As was the case for the KSCCI and Ribands issue, no affidavit has been filed by Liu Wei Min in support of Ms Kao's version. Ms Kao had not been able to show that *all* profits generated by Mega-Bond were transmitted to Liu Wei Min, or any other strong evidence to support her version of events or which could satisfactorily negate any allegation of breach of fiduciary duty.

43 I found that Ms Fong's complaint had a reasonable basis and a semblance of merit. There was only Ms Kao's reply affidavit to go by and I was not satisfied that her explanation necessarily precluded Ms Fong's claim. At the very least, there existed a serious factual question to be tried and I was unable to say Ms Fong's action was bound to be unsuccessful. It appeared to me that there was no reason why AT could not have taken advantage of the opportunity of earning the service fees from CPPEC. Even if there was a suggestion that AT was not interested in exploiting that opportunity, there was no reliable objective evidence to suggest that AT's directors were informed of this opportunity but declined to take advantage of it. I therefore granted Ms Fong leave to commence a derivative action on the Mega-Bond allegation as set out in the proposed POC.

Comeco Entities

44 In her proposed POC, Ms Fong alleged:

> 5. [Ms Kao] had diverted maturing business opportunities from [AT] to her Family Companies.
>
> ...
>
> d. She has diverted the opportunity to earn commission fees from the operations of the Comeco Europe BV and Comeco Gulf (WLL) (collectively, the "**Comeco Entities**") to her sister, Mandy Kao by transferring the Comeco Entities, which were formerly [AT's] subsidiaries, to Eastjet Pte Ltd, a company whose directors and shareholders are Mandy Kao and Jane Kao.
>
> 6. [Ms Kao] had not disclosed such opportunities and her interest and that of her family members in the above companies to [AT].

45 Ms Kao explained that these Comeco Entities were held on trust for one Jennifer Zhang, a former employee of CPTDC. Jennifer Zhang had been Peter Fong's business associate since the 1990s when she was stationed in Singapore. She was subsequently posted to Bahrain to set up a company, Comeco EC, to run a business in Africa. Comeco EC was a wholly owned subsidiary of CPTDC's sister company, China Petroleum Material & Equipment Corporation ("CPMEC").

46 In early 2000, Jennifer Zhang went to Peter Fong with a proposal to form a joint venture company (Comeco Europe BV) in Europe with Comeco EC as a majority shareholder. Ms Kao insisted that from the start AT had no intention of running the Comeco business. Peter Fong told Ms Kao that

he did not want to take up this investment because he was quite concerned about the overheads and operational costs, and AT was in a weak financial position at that time. The Comeco business was a procurement house, sourcing everything that Sudanese companies required for their operations, from refinery equipment to fuses for lights. Peter Fong and Ms Kao considered that that business was unsuitable for AT. Additionally, AT did not want to get involved with the Comeco entities because of issues with Sudan (*ie* strict sanctions on sales to that country, even through third party buyers), and this resulted in the transfer of the entities to other third parties [note: 4]. Whilst Peter Fong declined to be a joint venture partner, he agreed to lend AT's name to the enterprise, *ie* he agreed to AT becoming a 30% shareholder of Comeco Europe BV without any capital injection. This was to project the image that Comeco Europe BV was a joint venture company and not purely a Chinese company. That was the reason why this matter was not recorded in the company's minute book, why Comeco Europe BV was never treated as AT's investment, and why AT did not participate in the company's operations. The only substantive involvement AT had with the Comeco entities related to some advances made at the request of Jennifer Zhang, and some assistance in product sourcing in Singapore (in respect of which AT charged a commission for purchases made).

47 In 2006–2007, CPMEC wanted to close all of its overseas branches and this affected Comeco Europe BV. At the same time, Jennifer Zhang was due to retire from CPMEC. She wished to continue working on her own, but she did not want CPMEC or her colleagues to think that she was using business opportunities she had gained through her employment with CPMEC. Jennifer Zhang therefore needed AT or some other entity to be her nominee shareholder. The constitution of Comeco Europe BV contained a pre-emption clause which meant that the majority shareholders of Comeco Europe BV had to offer their shares to AT before offering them to other parties. In order to enable Jennifer Zhang to keep control of Comeco Europe BV, AT had to be the purchaser. At the request of Jennifer Zhang, AT took over the other 70% of the shares at book value. As AT intended to transfer the shares to other nominee shareholders within a year, the prices paid were not booked as AT's investment. On 22 November 2007, those Comeco Europe BV shares were transferred to Ribands so that AT could pull out completely from this arrangement and recover what it had paid for those shares. Ms Kao submitted that both she and Evelyn Ho, directors and shareholders of Ribands, were holding the shares on trust for Jennifer Zhang.

48 At the end of November 2007, Jennifer Zhang needed a new company in Bahrain. Bahrain's regulations required a corporate shareholder registering a new company to submit its audited reports. Jennifer Zhang requested AT to be the new company's shareholder since AT had the business track record and the audited reports to fulfil these requirements. Peter Fong then assisted Jennifer Zhang by allowing her to use AT's name as the initial shareholder of Comeco Gulf (WLL). This shareholding was meant as a transient measure and AT was to subsequently transfer the ownership to Jennifer Zhang's appointed nominee shareholders. In early 2008, AT's shares in Comeco Gulf (WLL) were transferred to Mandy Kao.

49 As for Mandy Kao's involvement [note: 5] in the Comeco entities, Ms Kao explained that it arose out of a personnel management issue. Jennifer Zhang's original employees had returned to China and she needed new staff for her operations. AT assisted her in recruiting employees as part of the management services provided to the Comeco entities, but in less than a year, Jennifer Zhang ran into some personal difficulties. This resulted in several staff members leaving the entities in 2008. Since Jennifer Zhang and Mandy Kao had been friends since 2001, Ms Kao asked Mandy Kao to help Jennifer Zhang manage the Comeco Gulf operation and her office while Jennifer Zhang returned to China to attend to both her retirement and personal matters. The Comeco Gulf (WLL) shares were transferred to Mandy Kao so that she could process the paperwork during her visits to Bahrain. She was to hold the shares on trust for Jennifer Zhang. Although Mandy Kao's involvement was originally

intended to be short term, Jennifer Zhang was unable to return to work due to her medical condition (though she remained a director of the company). In the event, both Mandy Kao and Jane Kao ended up managing Comeco Europe BV for Jennifer Zhang. Ms Kao explained that since they were the ones running the operations, AT's Comeco BV shares were transferred to their company, Eastjet, at a nominal value so that Jane Kao could become one of Comeco BV's directors and handle the necessary paperwork, accounts and audits. Mandy Kao received a management fee for her services in managing Comeco's operations but all the company's profits remained in the Comeco books for Jennifer Zhang. Additionally, due to Jennifer Zhang's deteriorating health and her decision to wind down the business, AT had recently decided to discontinue the business relationship.

50 Ms Kao submitted that in assisting Jennifer Zhang, AT did not suffer any losses, but gained from receiving management fees and trading income which amounted to $600,000 between 2007 and 2010. Similarly, as a result of Jennifer Zhang's contacts in the Greater Nile Petroleum Operating Co Ltd ("GNPOC"), AT won a steel pipe contract in 2007 which generated a net profit of $477,000. AT also made advances to the Comeco entities at Jennifer Zhang's request. These advances (which were paid back in full) were recorded in AT's books but were not considered as investments in Comeco by AT.

51 In support of Ms Kao's version of events, Jennifer Zhang affirmed a statutory declaration [note: 6], declaring that AT held shares of the Comeco entities on her behalf from June 2007 to November 2007 (for Comeco Europe BV) and November 2007 to October 2008 (for Comeco Gulf (WLL)). She also affirmed that she had known Mandy Kao since 2001 and Mandy Kao had been her nominee for her investments in the above companies and had also been assisting her in the operations of various Comeco entities.

52 In respect of the Comeco claims, it was my view that Ms Kao had offered a sufficient explanation of how AT's shareholding in the Comeco entities found its way to Eastjet and how her sisters were involved in the Comeco operations. Unlike the other complaints concerning KSCCI, Ribands and Mega-Bond, the beneficial owner of the Comeco entities had spoken up in support of Ms Kao's version of events. Jennifer Zhang had affirmed a statutory declaration that Mandy Kao was running the Comeco entities on her behalf and that Mandy Kao was holding the shares as her nominee. In reply, Ms Fong could neither adduce any evidence to cast doubt on Jennifer Zhang's assertion nor cast serious doubt on the explanations Ms Kao provided in her defence. I was satisfied that AT had never beneficially owned the shares in the Comeco entities in the first place, and therefore the eventual movement of the shares to Eastjet had not been tainted by any breach of the fiduciary duty Ms Kao owed to AT.

Wrangwell & IOM

53 There were two IOM vehicles, both of which were used in AT's pipe trading business. The first, International Oilfield Manufacturing Establishment, Vaduz ("the Original IOM"), was a joint venture between AT and one Pak Trisulo, an Indonesian, that was set up for the conduct of a pipe trading business in Indonesia. The company was de-registered sometime in 2006 or 2007. The second was IOM Establishment Limited ("the New IOM"). That company was initially a BVI company known as I-Gate Ltd whose name was changed to its current one in 2004 after it was taken over by Ms Kao. That much was undisputed by the parties.

54 Ms Fong alleged the following in her proposed POC:

> Wrangwell / IOM
>
> 10. [Ms Kao] has also been or is in the process of diverting monies out of [AT]:

a. She has transferred monies out of [AT's] HAT/OCTG account (which is maintained for [AT's] specialized connection pipe trading business conducted through its two subsidiaries ("**HAT**") and Tubular Resources) by "re-classifying" the monies held in that account as monies standing to the credit of "Wrangwell" and subsequently paying out such monies (approximately ... $5 million). Mandy Kao is a shareholder of Wrangwell.

b. Out of a sum of ... $36 million in [AT's] IOM account, [Ms Kao] asserts that only $19.5 million is due to [AT], and that the balance is due to one Anton Suleiman (who is alleged to be the beneficial shareholder of the New IOM). The Original IOM was a joint venture between [AT] and Pak Trisulo set up for the conduct of its pipe trading business in Indonesia, and [Ms Kao] became its sole shareholder in 2001. She became the sole shareholder of the New IOM (formerly known as I-Gate) in 2003.

11. [Ms Kao] has allowed [AT] to enter into agreements with the New IOM ... under which ... [AT's] service fees as IOM's agent have been reduced from 4% in 2005 to 3% in 2006 and to 2% in 2007. Her interest in the New IOM was never disclosed, and it has received a benefit at the expense of [AT].

12. [Ms Kao] ... preferred the interest of the Original IOM to that of [AT] when she caused HAT, a subsidiary of [AT], to forgo service fees of US$20 per tonne of premium pipe products due under a commission agreement dated 15 March 2003 signed by [Ms Kao] on HAT's behalf and by the fictitious "Paul Betrand" on behalf of the Original IOM.

13. [Ms Kao] preferred the interest of Wrangwell to that of [AT] when she caused HAT, subsidiary of [AT], to be replaced by Wrangwell in its contracts relating to the Chevron project or TPCO ...

55 Ms Fong made five claims in respect of the IOM business. First, she complained that Ms Kao was in the process of diverting funds away from AT *via* the IOM account maintained by AT. That account reflected a balance of $36m in favour of AT. Out of this sum, Ms Kao asserted that only $19.5m actually belonged to AT, while the rest was due to one Anton Suleiman. Ms Fong asserted that Ms Kao had continually represented to her that IOM was a vehicle for the pipe trading business of AT and one Anton Suleiman. However, Ms Fong later found out that it was Ms Kao who, since 2001, had been IOM's sole shareholder. Ms Fong alleged that this was an elaborate ploy by Ms Kao to divert funds away from AT, and submitted that the entire $36m belonged to AT.

56 Second, Ms Fong complained that Ms Kao had allowed AT to enter into agreements with the New IOM, under which AT's service fees as its agent had been reduced from 4% in 2005, to 3% in 2006, and finally to 2% in 2007. [note: 7] As a result, the New IOM had benefited at AT's expense. Ms Fong alleged that Ms Kao never disclosed her interest in the New IOM to AT.

57 Third, Ms Fong claimed that Ms Kao preferred the interests of the Original IOM to those of AT when she caused Hunting Airtrust Tubulars Pte Ltd ("HAT"), a subsidiary of AT, to forgo service fees of US$20 per tonne of premium pipe products due under a commission agreement dated 15 March 2003 signed by Ms Kao (on HAT's behalf) and by one "Paul Betrand" (on behalf of the Original IOM). Ms Fong submitted that this amounted to self-dealing and Ms Kao had benefited herself at the expense of AT.

58 Fourth, Ms Fong alleged that Ms Kao had been or was in the process of diverting monies out of the HAT/OCTG (the latter acronym referred to one Oil Country Tubular Goods ("OCTG")) account. She

did this by "re-classifying" the monies held in that account, to monies standing to the credit of Wrangwell Ltd ("Wrangwell") and subsequently paying out sums amounting to approximately $5m. Wrangwell was a company of which Mandy Kao was a shareholder.

59 Fifth, Ms Fong alleged that Ms Kao preferred the interests of Wrangwell to those of AT when Ms Kao caused HAT to be replaced by Wrangwell in AT's contracts relating to the Chevron project or Tianjing Pipe Corporation ("TPCO").

60 In response to the various complaints put forward by Ms Fong, Ms Kao took the general position that the context in which the IOM vehicles had been used ought to be properly understood. The IOM vehicles had been used to host multiple projects, with different beneficiaries at varying points in time. This meant that the shareholder of IOM was a mere nominee for different third parties who used the IOM vehicles during the relevant periods. This, Ms Kao contended, explained why Ms Fong [note: 8] remarked that IOM's shareholding was constantly changing. Moreover, Ms Kao averred that when Ms Fong increased her involvement in AT in 2009, she had in fact briefed both Ms Fong and Anthony Stiefel on how AT was run, including on matters related to IOM.

61 Ms Kao explained the history of the IOM companies. Between 1982 and 1983, Peter Fong had informed her that he set up a Lichtenstein company (the Original IOM) with himself and Mr Trisulo as shareholders in the proportions of 75%:25%. The purpose of the Original IOM was to hold investments in a pipe threading plant in Batam Indonesia (PT Purna Bina Nusa). Not only was this done for tax purposes, but it was also for Mr Trisulo to hide his own involvement in that venture since he was the Commissioner of PT Purna Bina Nusa. Subsequently, in 1996, Anton Suleiman's pipe trading business was also placed under the Original IOM. Ms Kao averred that, in order to simplify matters, Peter Fong directed her to become the sole nominee shareholder of IOM. She was accordingly appointed on 30 May 2001 by a letter signed by Peter Fong. (The letter was addressed to Prasidial-Anstalt, presumably the solicitors of the Original IOM). In time, Anton Suleiman's business dominated IOM's business. In the above transactions, Ms Kao maintained, IOM vehicles were never related to AT.

62 The Original IOM was subsequently de-registered. This was carried out by the Lichstenstein authorities as the Original IOM had not complied with the jurisdiction's disclosure requirements. Reluctant to disrupt the underlying business, another company (a dormant BVI company) was acquired and its name was changed so that it had the same name as the Original IOM. This was the New IOM. This was done with Peter Fong's and Anton Suleiman's full knowledge. The new IOM was to serve the same purpose as the Original IOM. Ms Kao was its initial shareholder but she claimed that she had since transferred the shares back to Anton Suleiman's nominee. She exhibited a transfer trail to the nominee, one Irene Susanto Adikoesoemo ("Irene Susanto").

63 In respect of the sum of $19.5m, Ms Kao explained that this amount represented the profit which AT had derived from IOM during the period from 2006 to 2009. This amount needed to be brought into AT. The amount was reported in AT's books as a performance fee from IOM when that business ended. The pipe trading activity under AT/IOM had come to an end because AT's joint venture investment in Tubular Resources ("TR") (started in 2003) had ended and TPCO Pan Asia (started in 2008) would be taking over.

64 As regards the allegations pertaining to HAT, Ms Kao explained [note: 9] that the service fee of US$ 20 per ton ceased in 2006 when TR had bid for a long term supply contract with Chevron Thailand to supply American Petroleum Institute ("API") with special connection pipes. As a result TPCO had had to offer a more competitive price. It was decided that the US$20 per ton fee reserved for HAT should be terminated. Nonetheless, the services of HAT to TPCO continued. As far as the reduction in fees to AT and HAT under their respective agreements with IOM was concerned, the

decrease was justified since the benefits received by AT and HAT under those agreements were in exchange for very little on their part.

65 With reference to the Wrangwell issue, while Ms Kao admitted that Mandy Kao was Wrangwell's sole shareholder, she averred that Mandy Kao was the nominee for TPCO, and that it was TPCO's decision to use Wrangwell as the vehicle in which they parked their overseas profits. Ms Kao also explained the facts leading up to the incorporation of Wrangwell in 2006. At that time, AT conducted its specialised connection pipe trading business through its two subsidiaries, HAT and TR. HAT itself was a joint venture between Hunting PLC ("Hunting") and AT. Its sole purpose was to hold an investment in a processing facility in China with TPCO as partner. AT maintained a HAT/OCTG account, and the monies therein were earned from the connection pipe business for Chevron Thailand undertaken by the other two subsidiaries.

66 TR was a joint venture between AT, TPCO (which was a Chinese steel mill) and Hunting. TR sold two types of pipes: API pipes (which were standard pipes) and special connection pipes (which were pipes which were threaded with better seals produced through a patented process). TR would buy API pipes from TPCO and sell them to end users. TPCO did not have the patent rights to use the process for upgrading the API pipes to special connection pipes. TPCO used HAT to buy pipes from TPCO and pay the royalties to enable the use of the patented threading process to upgrade these pipes to special connection pipes. TPCO would arrange for the threading to be done in China but wanted to keep the surplus for conducting this upgrading. As HAT was only an investment company, TR's purchases through HAT were booked as amounts owing to/from IOM. Any surplus funds (belonging to TPCO) in IOM's book accounts in HAT would then be remitted to AT. This was reflected as an account owing by AT to IOM under a sub-account name HAT/OCTG (to distinguish it from IOM/OCTG which was a business deal done with Anton Suleiman). In other words, in AT's books, while monies were recorded in the IOM account, it was actually TPCO's monies which AT was holding onto. AT never utilised any of the same. For this hosting service, AT received a service fee of approximately US$770,000.

67 In 2006, TR had a project in Thailand and needed a company in Thailand to carry it out. However, their Thai tax lawyer advised TR not to use a subsidiary or employee of TR as this might make TR itself liable for tax in Thailand. At that time, Ms Kao was the managing director of TR and she asked Mandy Kao to allow TR to use her name as Mandy Kao would qualify as an unrelated party. It was Ms Kao's position that she did this in consultation with, and with the approval of, TPCO, Hunting and AT. Wrangwell then set up OSC (a Thai company) with a few Thai nominees. Three years later, OSC obtained a Foreign Business Licence which allowed OSC to be wholly foreign owned. Wrangwell then arranged for OSC to have the same shareholding as TR (*ie* TPCO, Hunting and AT). This left Wrangwell as a dormant company.

68 Returning to the allegations made by Ms Fong, Ms Kao submitted that that monies were moved to the Wrangwell account to enable the repatriation of funds to TPCO which, she alleged, was the owner of the funds in that account. When Ms Kao was contemplating retiring in 2009, she felt that using IOM to keep these funds would complicate the accounts for anyone taking over AT's management. She informed TPCO about this tidying up exercise and that TPCO was looking for another company to park its overseas profits in. She told TPCO that they could use Wrangwell and they agreed because TPCO was familiar with Wrangwell, having used it previously. Wrangwell was by then a dormant company, with Mandy Kao still as its nominee shareholder. Therefore in 2009, Ms Kao directed that the funds owned by TPCO (but kept by AT) be recorded in AT's books as Wrangwell's. That account was renamed from HAT/OCTG to Wrangwell and no monies were actually transferred to Wrangwell. The monies were eventually paid out on TPCO's directions. This tidying up was carried out in view of Ms Kao's impending retirement and the transactions were made known to Ms Fong and

Anthony Stiefel. Wrangwell thereafter assumed the role of HAT in facilitating TPCO's sale of special connection Pipes to TR. By early 2010, the Wrangwell account was eliminated from AT's books.

69 Considering the evidence put forward by both parties, I was satisfied that there was no substance in Ms Fong's complaints. In relation to the first allegation, I did not find any merit in Ms Fong's complaint that Ms Kao had diverted funds from AT, especially on the mere assertion that Ms Kao had claimed that not all $36 million was due to AT. As explained by Ms Kao, the monies belonged to Anton Suleiman. This evidence was corroborated by Irene Susanto who confirmed that she was Anton Suleiman's nominee shareholder in the New IOM. That confirmation similarly disposed of the second allegation made by Ms Fong. If Anton Suleiman had at all material times been a beneficial owner of the New IOM, Ms Fong's claim pertaining to Ms Kao's supposed interests in the New IOM necessarily failed. It was apparent, and uncontroverted in reply, that the monies parked in the IOM account of AT never belonged to AT beneficially in the first place. What belonged to AT was the portion that represented the performance fee that accrued to it when the IOM business ended (thus explaining why AT was only entitled to $19.5 out of the $36 million on the books).

70 There was also no merit in the third allegation. It might seem that Ms Kao had benefited the Original IOM at the expense of HAT, which amounted to a conflict of interest since she had also been the sole shareholder of the Original IOM since 2001. However, it must be stressed that it was Peter Fong himself who signed off the letter appointing her to this position [note: 10]. Given that it was accepted that Peter Fong was the controlling mind and will of AT at the material time, it has to be inferred that AT approved of Ms Kao's "interest" in the Original IOM. Moreover, Ms Fong could not point to any other evidence to suggest that Peter Fong's approval should not be attributed to AT. Furthermore, Ms Kao explained that the termination of the service fees payable to HAT was to increase the competitiveness of TPCO. This reduction was explained by commercial reasons and Ms Fong could not provide any collateral reason to discredit that explanation. The agreement to terminate the service fee was between HAT and the Original IOM. What was perhaps interesting was the annotation contained therein, which stated that, with the competitive pricing (arising from the elimination of the service fee), the Original IOM would be able to bring in continuous business from the threading plant, which in turn would benefit HAT in terms of more dividends. Given Peter Fong's original approval and that the benefit from the termination of the service fee ultimately accrued to HAT, I was of the view that there was no substance to the allegation that Ms Kao had breached any fiduciary duty owed to AT in this regard.

71 Lastly, I deal with the two claims pertaining to Wrangwell. For the re-classification of monies, there was no dispute that a tidying up exercise had indeed been undertaken by Ms Kao. The objective of the move was to clarify the ownership of the monies. I accepted that the monies due under the HAT/OCTG account ultimately belonged to TPCO. What weighed heavily in favour of Ms Kao's version was TPCO's written letter to TR to confirm that their export of Hunting premium connection pipes to TR was conducted *via* HAT and subsequently Wrangwell [note: 11]. Indeed, I was satisfied that Mandy Kao was merely a nominee shareholder in Wrangwell. Since the monies never belonged to AT, and it was ultimately TPCO's decision to use Wrangwell, I found that there was no merit in the allegation that Ms Kao breached her fiduciary duties in that respect.

(c) Good faith

72 In deciding whether the good faith element had been met, I was guided by the principles established by the local cases of *Pang Yong Hock CA*, *Law Chin Eng and Another v Hiap Seng & Co Pte Ltd* (*Lau Chin Hu and others, applicants*) [2009] SGHC 223, *Agus Irawan v Toh Teck Chye*, and *Poondy Radhakrishnan and Another v Sivapiragasam s/o Veerasingam* [2009] SGHC 228. These principles are:

(a) where there is a *prima facie* cause of action against the wrongdoer by the company, good faith is assumed;

(b) bad faith is usually inferred from the lack of an arguable cause of action or a *prima facie* case;

(c) self-interest, motive and hostility alone are insufficient to evidence a lack of good faith; and

(d) the burden is on the defendant resisting a leave application to show that the plaintiff is not acting in good faith.

73 Given that I found that several of Ms Fong's claims contained some semblance of merit, the burden fell on Ms Kao to show that Ms Fong's Leave Application was made in bad faith. Four arguments were made:

(a) the court was misled by Ms Fong's failure to disclose the full version of events leading up her Leave Application;

(b) Ms Fong had acquiesced in or endorsed the alleged breaches;

(c) Ms Fong sought to use the fruits of the alleged breaches; and

(d) Ms Fong used the leave process for either her personal gain or to fish for her case.

Mr Singh took the position that if this court found merit in any of the above arguments, it would be sufficient to dismiss Ms Fong's Leave Application on the ground of bad faith.

74 First, Mr Singh made the legal argument that Ms Fong ought to be precluded from bringing this action since she herself had committed various similar breaches of fiduciary duties owed to AT. Ms Fong admitted in her first affidavit that she had always been content to let her father (Peter Fong) run the operations of AT with Ms Kao, notwithstanding the fact that she herself been a director of AT since 1995. She was willing to stand aside and allow Ms Kao to exercise full control in running the company. The crux of counsel's argument was that Ms Fong owed AT a duty of reasonable diligence and her failure to actively participate in managing the affairs of AT amounted to a breach of this duty. The issue therefore was whether that alleged breach was sufficient to amount to bad faith so as to preclude Ms Fong's Leave Application. Second, Mr Singh intimated that Ms Fong knew full well how AT structured its businesses, *ie* the use of nominees. Not only did she know of these complex corporate structures, but also, on at least one occasion, she had assisted in the planning and creation of such a structure herself. Specifically, counsel pointed to an Anguillan company called

Airtrust Trading Limited ("ATL") where Ms Fong was the ultimate shareholder. On the basis of the documents exhibited, I accepted that Ms Fong was aware of the use of offshore vehicles for tax purposes and the practice of parking profits outside AT by the use of nominee shareholders related to the company.

75 However, even if I accepted that both of the above arguments had some evidential basis, I did not see how Ms Fong's conduct was relevant to the inquiry of good faith. This was because the law indicates that only conduct that related to the commencement of the derivative application would be relevant to substantiate any alleged lack of good faith. *Woon's Corporations Law* at para 603 pointed out:

> Note that the good faith needed under s216A(3)(b) is good faith *with respect to commencing the derivative action*, not good faith generally in all past conduct of the applicant...
>
> [emphasis added]

76 Third, Mr Singh suggested that prior negotiations pertaining to the parked IOM funds tainted the current application. In this argument, there was a suggestion that Ms Fong herself had breached her fiduciary duties to AT when she attempted to partake in the spoils of the supposed breaches committed by Ms Kao. In rebuttal, the Ms Fong averred that she never:

(a) knew that Ms Kao or her relatives were nominees for other third parties;

(b) knew about the diversion of business opportunities and had not acquiesced in them;

(c) partook in any of service fees obtained by the companies run by Ms Kao or her relatives or had profited from them; and

(d) knew that Ms Kao was in breach of fiduciary duties nor wanted to partake in the spoils.

77 I accepted Ms Fong's explanation. I was unable to accept that anything could be made out of Ms Kao's allegation that Ms Fong knew how AT's business was run. Ms Kao faced the difficult task of proving both that Ms Fong knew of Ms Kao's or her relatives' shareholdings in the Offshore Companies, and that these shareholdings had led to AT's interest being compromised. In other words, even if Ms Kao pointed to instances where Ms Fong knew of nominees *per se*, Ms Kao could not point to any concrete evidence which showed that Ms Fong knew of a diversion of business or of self-dealing by Ms Kao. Curiously, it was Ms Kao herself who indicated that Ms Fong was briefed on how AT was run and I take that to mean that Ms Fong was briefed on the practice of nominees being used. But that in and of itself could not support a further inference that Ms Fong knew of any alleged wrongdoing by Ms Kao. That practice could not, in isolation, be a breach of fiduciary duty if it was AT's way of running its business, and the way the business was run was to AT's benefit. Similarly, I could not infer any wrongdoing from Ms Kao's allegation that Ms Fong herself proposed that an offshore foundation be established to hold monies pending a determination of their true ownership.

78 Further, Ms Kao seemed to suggest that the movement of monies was sufficient to prove a motive by Ms Fong to feather her own nest. I was unable to accept this submission because it

seemed premature. The movement of monies cannot be considered in the abstract and must also be considered in the light of the intention behind, and the result of, such movement. Ms Fong had explained that intention of the move was to hold the monies pending a determination of the true ownership of the monies. This was plausible. Ms Fong asserted that she had no knowledge of the breaches and, *a fortiori*, there could not be any intention to partake in the spoils of Ms Kao's alleged breaches. As regards the final result of such a movement, if Ms Kao wished to prove that Ms Fong intended to share in the "slush fund", she had the burden of proving that Ms Fong knew that these monies arose out a breach of fiduciary duty, and further that Ms Fong had intimated her intention of sharing in those tainted monies. No concrete evidence was adduced to discharge that burden, and accordingly, I found no merit in Ms Kao's assertion.

79 In arguing the above, Mr Singh also raised the more general issue of whether a director, who is herself in breach of duties, should be granted leave to bring a derivative action. He cited the decision of *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2003] SGHC 195 ("*Pang Yong Hock HC*") as authority for the proposition that such wrongdoing would disqualify Ms Fong. That case can, however, be easily distinguished from the present Leave Application. The case of *Pang Yong Hock HC* concerned several unusual transactions entered into by the company. Two shareholders brought an action against the only other two shareholders of the company who had the majority control of the company. Counter-allegations were also made against the applicants who themselves had approved and were fully aware of the *same* transactions that were complained about. What differentiates *Pang Yong Hock HC* from the present case is that the allegations and counter-allegations involved the same transactions that were the subject matter of the derivative action, and it was clear that the opposing parties were pointing fingers at each other and each party shouldered some portion of blame in those transactions. The derivative action was untenable in the circumstances. In the present case, even if I accepted the contention that Ms Fong had herself committed the breaches Ms Kao alleged she did, these purported breaches were *distinct* from the breaches Ms Fong had sought to prosecute in the derivative action. The good faith requirement under the Act must be in respect of conduct commencing the derivative action, not good faith generally in all past conduct of the applicant, see *IGM Resources Corp v 979708 Alberta Ltd* [2004] A.J. No. 1462.

80 Fourth, Ms Kao accused Ms Fong of hatching an improper scheme to seize control of AT by leveraging on the legal proceedings brought against Ms Kao in order to marginalise Ms Kao as a shareholder and director and then to pressurise Ms Kao into selling her shares in AT to Ms Fong. Ms Fong denied the existence of any collateral purpose and argued that such an allegation was a mere red herring to distract the focus away from the alleged breaches committed by Ms Kao. As pointed out by Ms Fong, any collateral purpose was irrelevant to the claim for derivative relief in relation to the wrongs and breaches committed by Ms Kao.

81 In the Canadian case of *Balbir Pathak v Nizar Moloo* (2008) ABQB 389, the court dealt with a Canadian provision which was *in pari materia* to s 216A save that the section provided for "reasonable notice" as opposed to "14 days' notice". There, two shareholders with equal shareholdings, both directors of the company, were deadlocked in negotiations. The complainant then brought an application for a derivative action under section 240 of the Business Corporations Act (R.S.A. 2000, c. B-9) (Canada, Alberta), alleging that the respondent had breached his fiduciary duties to the company by, *inter alia*, appropriating corporate opportunities that favoured the business of a competing corporation operated by the respondent's wife and son, and misusing the company's confidential information. Prior to the action but subsequent to the complainant's knowledge of the breaches, however, the parties had been in some talks to part ways through a buy-out by the complainant of the respondent's shares in the company. These talks eventually failed because the respondent refused to accept the amounts valued. When the talks broke down, the complainant threatened to sue. The court held that this was not evidence of a lack of good faith (at [30]).

82 In essence, the court took the view that shareholder fights leading to a commencement of a derivative action were insufficient to taint the good faith of an application as long as there was a valid basis for the claim. Such a position was similar to the one taken in *Tam Tak Chuen v Eden Aesthetics Pte Ltd & Anor* [2010] 2 SLR 667 [15] – [16], citing *Pang Yong Hock CA*. In cases of this nature, there will always be hostility between the opposing factions involved. Unless the proposed derivative action is purely motivated by spite or a personal vendetta, and the action lacks any basis connected with a legitimate claim, shareholder fights are insufficient bases from which to infer bad faith. In the present proceedings, while Ms Kao's complaint was Ms Fong's proposed buy-out of her shares, I have found that Ms Fong had raised several legitimate claims that AT could pursue against Ms Kao. As a result, such a collateral purpose (even if true) would be insufficient to support any finding of bad faith that could preclude Ms Fong's proposed derivative action.

(d) Prima facie interests of the company

83 Having found that Ms Fong had provided several complaints possessing some semblance of merit, the court had to consider whether Ms Fong's action appeared to be *prima facie* in the interests of AT. In doing so, my task was to weigh all relevant circumstances and decide whether the claim ought to be pursued. I was so satisfied. Obviously, if Ms Fong succeeds in the eventual claim, AT would be entitled to the service fees earned by the entities in which Ms Kao or her relatives have interests. Those fees were, potentially, substantial.

84 I was asked to consider whether there was any good commercial reason to refuse leave to commence the proposed derivative proceedings. The main thrust of Mr Singh's submissions on this issue was that Ms Fong was the only shareholder who sought to institute a derivative action. No other shareholder had come forward to support her. Counsel for AT, Mr Quek Mong Hua, intimated that the company was involved in investment and it was a holding company of subsidiary companies that were still trading. Further, Ms Kao was pivotal to the operations of AT and, if leave was granted, Ms Kao would effectively be unable to run AT. I was not convinced by these arguments. In the present proceedings, any alleged fiduciary breach arising from the service fee arrangements would necessarily mean that AT would stand to benefit from a constructive trust in its favour. The burden of establishing that such an action would *not* be in the interests of the company must be on the parties that oppose the application for leave.

85 The burden thus fell on AT and Ms Kao. Their arguments were insufficient to convince me that it would not be in the *prima facie* interests of AT for the action to proceed. In deciding whether it would be in the *prima facie* interests of the company for a derivative action to be commenced, the court invariably has to undertake a sensitive and difficult evaluation of the various conflicting interests of the company. That was the underlying concern in earlier s 216A applications. The court has to consider the possible benefits the company would receive from a successful claim as against the inconvenience, expense and adverse effects that such a claim may cause the company concerned. It must also consider any possible detriment that could affect the overall value of the company. I did consider AT's and Ms Kao's argument, and recognised that the action may affect AT's and its subsidiary's operations adversely. However, while that was a possibility, it did not seem a probable consequence of my decision. It was undisputed that Ms Kao led the company after Peter Fong's passing and it was also undisputed that Ms Kao had been central to the operations of AT. However, it could also not be forgotten that AT was not a one-man show. There was a fully competent board of directors that could manage AT's operations in the interim when Ms Kao could not take on management functions. Moreover, I could not place much weight on AT's argument that its business operations were ongoing and that its business would be affected. All companies that are the subject of such actions will face these same difficulties. If these difficulties suffice to preclude the commencement of derivative actions, every going concern entity will have a blanket immunity against

any derivative action. I was not persuaded by the defendants' arguments and I agreed that it was in the *prima facie* interests of AT that Ms Fong's derivative action be commenced.

Setting aside of search and freezing orders

Law and Background

86 Four elements are required for a search order, see *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 ("*Asian Corporate Services*"). The court must consider whether the applicant has an extremely strong *prima facie* case, whether there is a real possibility that the opposing party would destroy relevant documents, whether the damage suffered by the moving party would be serious, and whether the effect of a search order would be out of proportion to its legitimate object. Similarly, in respect of a freezing order, see *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng and another* [2009] 4 SLR(R) 365, the court must consider whether the applicant has a valid cause of action over which the court has jurisdiction, whether there is a good arguable case, whether the opposing party has assets within (or outside) the jurisdiction, and whether there is a real risk that the assets may be disposed of or dissipated.

87 The initial basis for Ms Fong's application for a freezing order was that Ms Kao had been dissipating AT's assets and that there was a real risk that Ms Kao would continue to do so given her control of AT and the company's operational structure and practices. Further, Ms Fong deposed that Ms Kao had been causing AT's documents and records to be destroyed or tampered with. This meant that tracing the monies received in breach of Ms Kao's fiduciary duties and the identification of AT's assets would be unduly difficult if I did not grant a freezing order in Ms Fong's favour.

88 The complaints and grounds for the search order were couched in similar terms. Ms Fong claimed that Ms Kao had moved documents which were previously in AT's possession to either her home or to a warehouse in her sisters' names. An allegation was made that Ms Kao has a concealed attic in one of her properties. Had a search order not been ordered, Ms Fong alleged, since Ms Kao possessed the propensity to forge and tamper with evidence, there were good grounds to fear that documents necessary for the action would be destroyed.

Defendants' case

89 Both the freezing and search orders had been granted *ex parte*, and both defendants applied to set them aside. The defendants' positions were aligned on this issue and their arguments were either materially the same or had been adopted by each other during the proceedings. The primary submission was that the search order ought to be set aside because there had been serious abuse in the manner that it was carried out. Tan Poh Tin, Evelyn Ho and Esther Soo all deposed affidavits pointing out various improprieties committed by members of Ms Fong's forensic expert team from Insight Risk Group (the group that conducted the search). They alleged that those representatives overstepped their boundaries allowed by the search order when they employed harsh interrogation techniques and threatened criminal sanctions if the relevant individual refused to answer questions posed during the search. Mr Singh submitted that, as a matter of principle and policy, this ground alone was sufficient to set aside the search order.

90 Additionally, the defendants submitted that the search order was unnecessary and had been wrongfully obtained. Two grounds were advanced. First, there was no basis in the allegations made against both defendants that they were instigating the destruction of evidence related to these proceedings. While there was an admission that several documents were destroyed as Ms Fong claimed, the disposal was made innocently: those documents were more than five years old and AT

was in the process of shifting its office premises at the relevant time. AT had moved to premises half the size of the previous office and so an administrative decision was made to dispose of all general documents that were more than five years old, save for accounting documents which were to be kept for at least seven years. Further, the direction given to dispose of these documents was made in the middle of 2009, well before any allegation was made against Ms Kao. Ms Kao also denied that the attic was "concealed" as claimed since the switch for the retractable ladder was clearly visible. As for the allegation of tampering of the electronic evidence, the forensics team commissioned by AT found no evidence of the malicious activities that Ms Fong had alleged.

91 As for the freezing order, the defendants argued that it ought to be set aside since there was no evidence of a real risk that Ms Kao or AT would dissipate their assets. Ms Kao told the court that she had agreed to allow Ms Fong and Anthony Stiefel to be co-signatories to most of AT's bank accounts on 26 May 2010. Both of them were also briefed on AT's core business and provided with a forecast of its activities during a December 2009 meeting, and there was no attempt to hide any bank accounts from them. In fact, a list of AT's bank accounts was provided. Similarly, since Ms Fong had begun questioning Ms Kao about AT's operations as early as the middle of 2009, and had access to copies of the general ledger in 2009, it would seem that Ms Kao had had ample time to dissipate her assets had she wished to do so before the start of the proceedings in May 2010. The very fact that she did not do any such thing strongly rebutted any notion that there was any real risk of any dissipation by the defendants of their assets.

92 The defendants submitted that the freezing order also ought to be set aside because Ms Fong failed to make several material disclosures during the *ex parte* hearing that led to the granting of that order. Prior to the filing of the Leave Application and her application for a freezing order, Ms Fong was already briefed on AT's operations and, in particular, how AT's business was organised and conducted. It was not the case that Ms Fong suddenly learnt of AT's use of nominees in its operations and that there was a sudden realisation of alleged breaches of fiduciary duties that required immediate action to prevent an imminent dissipation of assets by AT or Ms Kao. This non-disclosure, the defendants submitted, had had the effect of misleading the court hearing the *ex parte* applications into believing that such circumstances existed. Importantly, Ms Fong also did not disclose the fact that she and Anthony Stiefel had already been made co-signatories to most of AT's bank accounts or that Ms Kao had agreed on 21 May 2010 to an independent audit. Further, when Ms Fong's complaints were initially made known to AT's board of directors, Ms Fong also failed to disclose the various steps taken by AT to answer her queries. Proper explanations and supporting documents were provided to Ms Fong, Anthony Stiefel and Alex Fan (Ms Fong's accountant) by Tan Poh Tin and Ms Kao.

Ms Fong's case

93 In reply, Ms Fong relied on the same grounds she raised during her *ex parte* applications for the search and freezing orders. In particular, Ms Fong stressed that she had an extremely strong *prima facie* case (*ie* the proposed POC), that there was a real possibility of evidence being destroyed and that there was still a need for the search order to continue. Ms Fong pointed to the various documents moved out of AT's premises and into the storage premises of Eastjet, the fact that AT's driver had been directed to destroy documents, and that electronic records in AT's IT system showed that it had been tampered with and which also indicated that several email logs were being deleted. With reference to Ms Kao personally, Ms Fong claimed she had a tendency to conceal facts, *ie* the concealed attic in her home. Without the search order, incriminating evidence would be destroyed and irreparable damage would have been caused to Ms Fong's ability to conduct a derivative action against Ms Kao. In the event, Ms Fong also submitted that the search order was not out of proportion to its legitimate object.

94 In respect of the allegations made by the defendants that the interviews were oppressive and unsupervised, Ms Fong submitted that they were without merit. Ms Fong however admitted that two incidents could have caused unjustified distress, *ie* an incident involving Esther Soo where the representative should not have sarcastically asked her if she would have jumped had Ms Kao had told her to, and another incident involving Tan Poh Tin where she was the subject of intense and unfriendly questioning. Other than those two incidents, the Ms Fong denied search order was executed excessively or was improperly carried out.

95 With regard to the freezing order, Ms Fong continued to maintain that she had a good arguable case and that the order was necessary for her s 216A action on the various claims raised in the proposed POC. While it was undisputed that the defendants had assets within and outside the jurisdiction, Mr Fong contended that there was a real risk that the defendants may dispose of or dissipate their assets. The defendants maintained numerous bank accounts globally and AT controlled a n intricate web of offshore companies which were in some way related to Ms Kao or AT. The implication of this submission was that AT's structure was fluid and AT possessed the capability to easily move its assets out of Singapore. Moreover, Ms Fong alleged that AT's records were unreliable and that Ms Kao had full control of the same. In turn, Ms Fong also suggested that Ms Kao had a tendency to conceal facts. In support of this, Ms Fong pointed to several transactions where monies from AT's accounts were moved to Ms Kao personally, or to Jane Kao and Mandy Kao.

My reasons

Search order

96 I agreed with the defendants that the manner in which the search order was conducted was highly questionable. In the supporting affidavits deposed by Tan Poh Tin, Evelyn Ho and Esther Soo, it was clear that the three of them were subject to materially similar interrogatory techniques employed by the team of forensic experts: harsh questioning and threats of criminal proceedings. There was no reason for Tan Poh Tin or Esther Soo to lie about their experiences during the execution of the search order as they were not implicated in any way by Ms Fong's allegations. Evelyn Ho was said to be close to Ms Kao, but no direct allegation was made against her so there was not much basis to question her truthfulness. On the other hand, members of the forensics team, individually, deposed that their conduct during the execution of the search order and their questioning had been "firm". Whether questioning is "firm" or "oppressive" may to some extent be subjective, but the members of the forensics team did not, significantly, deny the particulars of the incidents alleged by AT's staff members.

97 Considering the totality of the evidence before me, it seemed to me that the forensics team misguidedly perceived themselves to be investigation officers who possessed authority to interrogate AT's staff. As correctly pointed out by Ms Kao, nothing in the search order authorised the forensics team to interrogate the individuals present during its execution. Rather, the search order only compelled the people there to provide information to aid the search and examination of the items listed in the search order. The order did not allow questions concerning the purpose or object of the documents found pursuant to the order. What aggravated the already deplorable conduct was that there was no real attempt to explain the terms of the search orders to the employees in a manner that could be readily understood. Ms Kao claimed (and I was inclined to accept) that the employees were unaware that they were entitled to be questioned only if the defendants' lawyers were present and that they were not obliged to answer questions that fell outside the scope of the order. I concluded that an unjustifiably oppressive environment existed during the execution of the search order.

98 In making the above observations, I acknowledge that no comments were made by the supervising solicitors regarding the allegations made by the relevant employees of AT. Comments were limited to the line or scope of questioning employed. There were two possible explanations for this omission. First, that behaviour took place away from the direct attention of the supervising solicitors; and second, that the supervising solicitors found these techniques permissible. If the latter was true, surely they would have noted their observations and acquiescence. The absence of any comment, with the admission made by Ms Fong that Tan Poh Tin was the subject of an intense and unfriendly line of questioning, lent support to the first explanation.

99 I also found it disturbing that Anthony Stiefel had been the director who "supervised" the execution of the search order. It was a clear conflict of interest. As provided under the terms of the search order, the premises concerned must not be searched, and items must not be removed from them, except in the presence of the defendants or a person appearing to be a responsible employee of the defendants. The rationale of this requirement is obvious: it is to ensure proper procedure and fair notice in the implementation of the order. It was thus baffling that Anthony Stiefel, who had filed an affidavit in support of the search order, was the individual who accepted and supervised the execution of the search. Clearly, it would be against his interest as a director of AT in regulating or safeguarding the interests of the defendants during the search when it was in his interest as a supporter of Ms Fong's allegations that a full and uncompromising search was conducted (even if the conduct sailed close to the wind). This was wholly inappropriate in the circumstances. Even if Evelyn Ho could not be reached (an excuse that was raised to justify why Anthony Stiefel had supervised the search), the search order should not have been commenced until an independent director was available. On the facts of this case, I considered that this conflict was sufficient to set aside the search order for a lack of proper implementation.

100 The search order had also to be set aside since I was persuaded that there was no real possibility that the defendants would conceal any relevant evidence. Ms Fong had claimed that documents were transported out of AT's premises or destroyed. I accepted Ms Kao's explanations. These were: first, that the company had conducted a spring cleaning exercise when it moved premises, the move taking place well before any allegations arose; and second, the documents that were eventually found in Eastjet's warehouse facility labelled "ATS-OCTG" were duplicates, and moreover, they did not belong to AT, but to IOM. Ms Kao averred that she was told by AT's accounts executive that those documents were duplicates and the originals were kept by Tan Poh Tin, AT's accountant. These documents were no longer relevant. Relevant profit and loss reports for "OCTG" had already been generated and subsequently reported at a board meeting on 8 December 2009. After this, instead of discarding the documents, Ms Kao thought that as Anton Suleiman was also the beneficiary of IOM's pipe business, it might be prudent to keep those duplicate documents for him. This was why she had directed that these documents be kept in the "Store & Lock" storeroom which Eastjet rented. This explanation was uncontroverted on rebuttal and I found it plausible on the preponderance of the evidence.

101 Similarly, I found that there was no real possibility that the defendants would destroy evidence that was relevant to these proceedings. During the *ex parte* hearing for the search order, Anthony Stiefel deposed an affidavit alleging that there had been unauthorised attempts to access email records of AT's employees, and additionally, there had been a determined effort to eliminate email records of the same. It was on that basis that a search order was deemed necessary, and consequently granted by me. After learning of these allegations, Ms Kao had commissioned a forensic team from a firm of accountants to investigate whether there was any basis for them. That team found that only an administrator of AT's system could access the information contained in either the User or Administrative Logs. However, such an administrator did not have the necessary access which would have allowed him to delete those entries. This meant that Anthony Stiefel's claim that email

logs were deleted was without merit.

102 As regards the purported unauthorised logins, the forensic team found that the login errors complained about might have been due a number of reasons, including innocent reasons where a user may have incorrectly configured an email client application. For example, Gary Wu, AT's administrator deposed that several login error messages originated from him when he had forgotten to update his password in his Gmail when he configured his Gmail to retrieve his work emails from AT's email servers. Contrary to what Anthony Stiefel claimed, these errors did not necessarily arise from a malicious act of another. Curiously, Gary Wu also deposed that he explained the above innocent reasons to Anthony Stiefel before Anthony Stiefel filed his affidavit that alleged that AT's email accounts were the subject of hacking. Anthony Stiefel did not challenge this assertion. The impression that Anthony Stiefel thus gave in his affidavit in support of the application for the search order was therefore misleading. Other than Anthony Stiefel's evidence, Ms Fong had not adduced any evidence that could possibly support the inference that the login errors were anything other than innocently originated. There was therefore no basis for Ms Fong's submission that the defendants would destroy relevant evidence if the search order was set aside.

103 On the whole, I accepted the defendants' argument that a search order was unnecessary in the circumstances. Ms Fong could only point to several isolated instances that, when taken entirely out of context, hinted at the possibility that the defendants were destroying or concealing evidence. These inferences were neutralised by the explanations extended by Ms Kao. Consequently, the best case that Ms Fong could make was to point to the way AT's business was run (*ie* the use of nominees or holding monies overseas), and the lack of paperwork that detailed the purpose of various transactions. At their worst, these instances spoke of shoddiness, or the propensity to conceal the true ownership of the offshore corporate vehicles involved. These facts alone were insufficient to persuade me that there was a real risk that the defendants would disobey any court order to deliver up documents as and when required, see *Lock International plc v Beswick* [1989] 1 WLR 1268.

Freezing order

104 The duty to disclose is not absolute and not every failure to disclose will result in the discharge of an *ex parte* order. Whether a non-disclosure is of sufficient materiality to justify or require an immediate discharge of the *ex parte* order without going into the merits, must depend on the importance of the fact to the issues which were to be decided by the judge on the *ex parte* application, see *Asian Corporate Services* at [45]. In this case, two non-disclosures stood out.

105 First, I found it material that Ms Fong failed to disclose that she and Anthony Stiefel were co-signatories to several of AT's accounts. Had the defendants wanted to dissipate the assets from the relevant accounts, they would have required approval from either of these persons. The capacity, power and malicious propensity of the defendants to move their assets was the primary emphasis of the freezing order, and the non-disclosure was obviously relevant and material to the court deciding on the application. Furthermore, in Ms Fong's first affidavit, she had relied on the fact that her attempts to change the signatories of the bank accounts to require additional approval from herself or Anthony Stiefel were rejected by Ms Kao as a basis to establish the risk of dissipation by the defendants. That risk would either have been entirely eliminated or substantially reduced as a result of their appointment as co-signatories.

106 Second, it was material that Ms Fong failed to disclose that there was already a directors' resolution agreeing that AT should undergo an independent audit. Obviously, the defendants were agreeable to having AT's affairs scrutinized. To dissipate AT's assets after such approval had been given would be foolish. Ms Kao was ready and willing to open up AT's books, and arguably, this

indicated that she had nothing to hide. At the very minimum, the likelihood of a dissipation of assets decreased as a result of this resolution. That non-disclosure was sufficient to set aside the freezing order.

107 In any event, I was also of the view that the freezing order ought to be set aside since it was clear that there was no real risk that the defendants would dispose of or dissipate their assets. All Ms Fong had done was to canvass the uncertainty in the business dealings of AT and that Ms Kao had the capability to dissipate her own or AT's assets. But Ms Fong had to show a "real" risk existed. Uncertainty and capability alone were insufficient; Ms Fong had to show that there was a realistic chance that the defendants would move assets out of the jurisdiction with a malicious or untoward purpose. No such chance was shown to my satisfaction.

Conclusion

108 To recap, I found Ms Fong's complaints concerning KSCCI, Ribands and Mega-Bond possessed some reasonable basis and some semblance of merit. I thus granted her leave to commence derivative proceedings on behalf of AT against Ms Kao on those limited bases. These grounds were listed as paras 5a, 5b and 5c of the proposed POC (see above [29] and [39]). These complaints were brought in good faith and I was of the view that it was in the *prima facie* interest of AT that a derivative action be commenced. As for the defendants' applications to set aside the freezing and search orders, I allowed their application on the grounds stated above. It was on these same grounds that I declined Ms Fong's subsequent application for an *Erinford* injunction.

[note: 1] 2nd Defendant's Bundle of Affidavits Vol 3, Tab 20 at pg 22.

[note: 2] 2nd Defendant's Bundle of Affidavits Vol 1, Tab 1 at pg 7.

[note: 3] 2nd Defendant's Bundle of Affidavits Vol 1A, Tab 11 at pg 8.

[note: 4] Plaintiff's Bundle of Affidavits Vol 4, Tab 19 p 32.

[note: 5] 2nd Defendant's Bundle of Affidavits Vol 3, Tab 20 at pg 46.

[note: 6] 2nd Defendant's Bundle of Affidavits Vol 3A, Tab 20 pg 359.

[note: 7] Plaintiff's Bundle of Affidavits Vol 1 at pg 308.

[note: 8] Plaintiff's 6th Affidavit at [262(a)]; Plaintiff's Bundle of Affidavits Vol 5 at Tab 21 pg 100.

[note: 9] 2nd Defendant's Bundle of Affidavits Vol 1 Tab 1 pg 26.

[note: 10] Plaintiff's Bundle of Affidavits at Vol 1A pg 758.

[note: 11] 2nd Defendant's Bundle of Affidavits Vol 3 Tab 20 pg 314.