EOW FUN SIEW & ANOR

v.

MUTUAL LIFE SDN BHD

High Court Malaya, Kuala Lumpur
Noorin Badaruddin J
[Originating Summons No: WA-24NCC-166-04-2016]
25 April 2017

Company Law: *Derivative action — Application for — Plaintiffs alleged being denied access to audited account — Whether derivative action brought in the interest of company or to achieve personal gains — Whether plaintiffs had acted in good faith and came with clean hands — Whether plaintiffs had exhausted all available internal remedies — Whether allegation of breach of fiduciary duties supported with cogent evidence — Whether there was reasonable commercial sense for allowing derivative action*

The plaintiffs filed the present application under ss 181A, 181B, 181C, 181D and 181E of the Companies Act 1965 ('the Act') seeking leave to commence derivative action for and on behalf of the defendant in the defendant's own name against the defendant's three other directors namely Choo Hon Yip ('Choo'), Yap Keat Choong ('Yap') and Fang Chong Meng ('Fang') (collectively referred to as 'the three directors') and also a company known as LMM Advisory Services Sdn Bhd ('LMM Company'). The grounds of the application were: (a) the three directors and LMM Company had acted either individually or in concert to the detriment of the defendant; (b) the three directors and LMM had unjustly enriched themselves at the expense and to the detriment of the defendant; (c) the three directors had failed to attend to the preparation and submission of the audited accounts of the defendant to the relevant statutory bodies; (d) the three directors had put the defendant at risk of being wound up. The plaintiffs had earlier filed a writ in the Kuala Lumpur High Court ('the 441 Suit') against the three directors and LMM. The High Court ordered that the suit be discontinued save for the application to file a derivation action. Hence, the plaintiffs filed this action to obtain leave from this court.

Held (dismissing the plaintiffs' application with costs):

(1) This proposed action was for the collateral purpose to achieve the plaintiffs' personal interest and there was not a reasonable prospect for the derivative action to succeed as the plaintiffs had glaringly portrayed that they had an ulterior motive and collateral purpose to achieve personal gains and were merely using the company for the same. The plaintiffs had shown that what they wanted were personal reliefs against the three directors and LMM and merely using the company as a vehicle to do so in this leave application similar to what they did in the 441 Suit. This was a failed attempt on the part of the plaintiffs to justify that they were acting in the interest of the company in order to obtain the audited account when the 1st plaintiff wanted to transfer

her shares out in the company for her own personal interest and seeking for the purported personal loss of income of RM720,000.00 and the 2nd plaintiff who wanted to resign from the company in the 441 Suit. The plaintiffs failed to show that they really had the interest of the company at heart but instead were merely advancing their own interest. There existed a strong basis that the plaintiffs were actuated by an ulterior motive and/or collateral purpose. (paras 92-93)

(2) In exh "CHY-9" in the defendant's Affidavit affirmed by Choo ('Choo's Affidavit'), there was a letter by the three directors to the company secretary, Inde Management Consultant Services requesting for all banking documents requested by the 2nd plaintiff in his letter. The company secretary's letter showed that the 2nd plaintiff had acknowledged receipt of accounting documents i.e. Bank Statements and the Public Bank Bhd Credit Card Statements ('the PBB credit card statements'). The company secretary further informed that the said accounting documents had been handed over to the 2nd plaintiff. The solicitor acting for the defendant and the three directors then wrote a letter to the 2nd plaintiff demanding for the return of the accounting documents including the PBB credit card statements for the purpose of preparing the company's accounts, audited financial statements for submissions to the CCM. The 2nd plaintiff through his solicitor replied denying the receipt of the PBB credit card statements. The denial of receipt by the 2nd plaintiff was a blatant lie as the 2nd plaintiff could produce the same statement ie the PBB credit card statements in the 2nd plaintiff's AIS. This denial was illogical as the PBB credit card statements produced by the 2nd plaintiff had the same account number and date and they were the same documents requested by the defendant and the three directors in the Letter of Demand. (paras 95-97)

(3) The meetings convened on several occasions clearly showed that the three directors had attempted their best to solve the defendant's accounts. The genuineness of the three directors to resolve the accounts issues was reflected in their letter to the 2nd plaintiff. The 2nd plaintiff's contention that he refused to attend the meeting due to the fact that no proper minute of meetings was prepared was lame. The plaintiffs even submitted that the three directors allegedly held a board meeting after the present application was filed. This was not true. Sufficient notices had been given and the purpose of the meetings was none other than to resolve the accounts of the defendant. In his letters, the 2nd plaintiff raised frivolous contentions on the vagueness of the notices when it was crystal clear that the notices of meetings were to discuss the accounts that the plaintiffs were complaining about all the while. He chose to be absent and opposed to those meetings. The conduct of the plaintiffs clearly showed that they did not place any importance towards the business of the defendant. (paras 101-102)

(4) The plaintiffs submitted that at this stage, it was only an application for leave to bring an action against the three directors and that if leave was granted and if the three directors were willing to cooperate in the future, the plaintiffs did

not see how it would cause any harm upon the three directors. This submission was perplexing and fortified the fact that the motives of the plaintiffs in bringing this action were suspect. The plaintiffs themselves had hindered the efforts by the three directors to prepare the accounts and all the plaintiffs did was to vent their personal dissatisfaction towards the three directors by way of objecting towards the Board Meeting which coincided with their intention to leave the company. The plaintiffs could not be said to have the genuine intention to assist the company to comply with the requirement to submit the Audited Account to the Companies Commission of Malaysia. (para 103)

(5) The plaintiffs had clearly not exhausted all internal remedies. The plaintiffs merely wrote and requested orally for accounts to be prepared. As a director of the company, the 2nd plaintiff had in fact many options under the Act to seek what he was purportedly claiming for. The plaintiffs' submission that accounts could only be prepared with a court order could not hold water. Furthermore, the 2nd plaintiff as the Director of the company was entitled under art 79 of the 4th schedule, Table A of the Act at any time to summon a meeting of directors to discuss the accounting issues. This, the 2nd plaintiff did not do or just refused to do. (para 108)

(6) The plaintiffs alleged that there had been assets and money wrongfully transferred out from the defendant's bank accounts by the three directors. The 2nd plaintiff claimed that the plaintiffs discovered documents and office equipment being shifted out since early 2010. The 2nd plaintiff lodged police reports alleging as such in 2012. However, the plaintiffs failed to show contemporaneous documents of their objections towards any purported wrongdoings by the three directors at that material time. These allegations were premised on suspicion and speculation and these could not be the basis for a derivative action. (para 110)

(7) It did not appear that *prima facie* the proposed derivative action was in the best interest of the company for leave to be granted. The commercial interest of the company must be looked into to see whether the company would gain substantially in money in the proposed derivative action even if the application was made in good faith and might be meritorious. The facts of the case revealed that the company was not a profit-making entity. Even if the derivative action was allowed and the plaintiffs succeeded, the company would only be getting Orders for Audited Financial Statements to be prepared by the three directors. That would not change the current financial position of the company. The large scale of a derivative action which generally was costly did not commensurate with the reliefs proposed to be sought for by the plaintiffs. (paras 121-122)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 2 MLRA 63 (refd)

ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 2 MLRH 725 (refd)

Ang Thiam Swee v. Low Hian Chor [2013] SGCA 11 (refd)

Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 2 MLRA 202 (refd)

Dato' Daljit Singh Gurdev Singh v. Forefront Online Sdn Bhd [2010] 13 MLRH 399 (refd)

Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor [1985] 1 MLRH 459 (refd)

Loh Yoon Sang v. Ivory Pearl Sdn Bhd [2003] 2 MLRH 760 (refd)

Suhaimi Ibrahim & Anor v. Hi-Summit Construction Sdn Bhd & Ors [2015] 2 MLJ 669; [2014] MLRAU 479 (refd)

Legislation referred to:

Companies Act 1965, ss 167(1), (4), (6), 170(1), 181A(4)(a), 181B(2), (4), 181C, 181D, 181E

Counsel:

For the plaintiffs: Jasbeer Singh (Noor Syakirah Khalil, K Revathi & Baljit Singh with him); M/s Jasbeer, Nur & Lee

For the defendant: Alvin Lai Kok Wing (Ryan Chu Soon Wei with him); M/s Justin Voon Chooi & Wing

JUDGMENT

Noorin Badaruddin J:

[1] This is the plaintiffs' application filed under ss 181A, 181B, 181C, 181D and 181E of the Companies Act 1965 ('the Act') seeking leave to commence derivative action for and on behalf of the defendant in the defendant's own name against the defendant's three other directors namely Choo Hon Yip ('Choo'), Yap Keat Choong ('Yap') and Fang Chong Meng ('Fang') (collectively referred to as 'the three directors') and also a company known as LMM Advisory Services Sdn Bhd ('LMM Compan').

[2] The grounds of the application as stated in the OS, *inter alia*, are as follows:

a) The three directors and LMM Company have acted either individually or in concert to the detriment of the defendant;

b) The three directors and LMM have unjustly enriched themselves at the expense and to the detriment of the defendant;

c) The three directors have failed to attend to the preparation and submission of the audited accounts of the defendant to the relevant statutory bodies, *inter alia*, but not limited to the Companies Commission of Malaysia ('CCM');

d) The three directors have through their wilful and/or neglect acts and/or defaults put the defendant at risk of being wound up.

The Plaintiffs' Case

[3] In 1988, the 2nd plaintiff obtained licence from Lembaga Insuran Am Malaysia (hereinafter referred to as LIAM) to carry on the business as an agent at Universal Life and General Insurance to sell life insurance policies.

[4] According to the 2nd plaintiff, around 1989, he recruited Yap and Fang to be his agents to carry on the business of procuring the purchase of life insurance policies. The 2nd plaintiff stated that due to the good quality of services rendered to his clients, they (the clients) not only purchased life insurance policies from him but were also desirous of purchasing general insurance policies. As a result of this, the 2nd plaintiff then decided that he wanted to venture into the procurement of general insurance policies in addition to the procurement of the purchase of life insurance policies.

[5] The 2nd plaintiff was promoted by ING Insurance to the rank of Agency Supervisor, then Unit Manager and finally in 1996 as Agency Manager. At this time, the prospect of being an agent for the procurement of the purchase of general insurance business was said to be very good.

[6] The 2nd plaintiff then formed the intention of setting up a corporate agency for the sole purpose of procuring the purchase of general insurance policies. The 2nd plaintiff stated that he had promised his agents who were selling life insurance policies that if they were promoted to the rank of agency managers by ING Insurance Berhad (now known as AIA Berhad) then he would give them a share in the company that he intended to set up solely for the purpose of procuring the purchase of general insurance policies. The defendant was then incorporated on 2 February 2005.

[7] Hence, when Yap, Fang and one Tan Seen Wai (hereinafter referred to as "Tan") were promoted to agency managers, the 2nd plaintiff gave them one shares each of the four initial share that were subscribed in the defendant.

[8] When the defendant was set up, Tan was appointed as the Financial Manager of the defendant. In 2006, Tan was found to have mismanaged the funds of the defendant and was asked to resign from the defendant in which he did.

[9] Sometime in August 2006, the 1st plaintiff who is wife of the 2nd plaintiff and a director and shareholder in the defendant was said to have constantly orally requested Fang and Yap to prepare the management accounts for approval and audit but no accounts were prepared. Within six months after the financial period had ended, there was still no audited accounts presented to the members at its first Annual General Meeting to be held.

[10] Choo was also brought into the defendant to solve the issue of financial mismanagement caused by Tan Fang, Yap and Choo ie the three directors were said to have been groomed by the 2nd plaintiff from the day they were

appointed as agents until they were promoted as Agency Managers. As such, the 2nd plaintiff averred that he had full trust in them to manage the defendant's accounts.

[11] In 2007, Choo had been promoted to Agency Manager by ING Insurance in respect of the 2nd plaintiff's life insurance business and hence was also made a shareholder in the defendant pursuant to the incentive scheme that the 2nd plaintiff had mentioned in the earlier paragraphs. Choo was said to have also expressly promised to solve all the financial issues faced by the defendant. The 2nd plaintiff was only an ordinary director and did not sign any cheques.

[12] From August 2006 until 28 January 2008, the 1st plaintiff was said to have continued to ask the three Directors to provide the accounting records for the purpose of preparation and submission of the audited accounts to the CCM for the financial years during this time. During this time, it was averred that despite the numerous aforesaid requests of the 1st plaintiff, Fang and Yap were said to have promised the 1st plaintiff that they would attend to the same and do the necessary.

[13] In 2007, the 1st plaintiff was said to have been exasperated and absolutely frustrated that the three directors were refusing to provide the accounting records for the purpose of preparation and submission of the audited accounts particularly since the 2nd Financial Year had ended in 2008 and the audited accounts could not be filed and therefore resigned as a director of the defendant.

[14] By a Director's Circular Resolution in Writing Pursuant to the Company's Articles of Association dated 28 January 2008, it was resolved that the 2nd plaintiff is appointed as a director of the defendant and that the 1st plaintiff's resignation as a director of the defendant was accepted. However, since the audited accounts were never filed, the 1st plaintiff was unable to transfer her shares. Hence, the 1st plaintiff remains as a shareholder of the defendant.

[15] The 2nd plaintiff stated that he immediately reminded the three directors to settle the long overdue outstanding matter of preparation of the defendant's accounts in compliance with the provisions of the Act and they were said to have collectively promised to do so.

[16] By 28 February 2009, almost 3½ financial years had passed the three directors failed to have the accounts of the defendant prepared.

[17] Sometime on or about 24 December 2009, it was contended that after much persuasion, the three directors finally engaged one Ms Lim May Ling (hereinafter referred to as "Ms Lim") of Messrs Inde Management Service to prepare the accounts.

[18] The 2nd plaintiff was said to be worried and constantly followed up with Ms Lim on the progress and stage of completion for accounts of the years in question and she was stated to have informed the 2nd plaintiff that in the

course of her work, she discovered various transactions which could not be reconciled as Choo had refused to provide further accounting information. This resulted in incomplete accounting records with insufficient details to enable the accounts to be audited.

[19] Ms Lim was said to have also informed the 2nd plaintiff that documents pertaining to financial transactions between the defendant and LMM were provided by Choo but Choo would not explain or provide further information when requested and as a result of this, she could not proceed to draw up the accounts *inter alia* in regard to those transactions.

[20] The 2nd plaintiff then conducted a search at the CCM and discovered that LMM was incorporated by the three directors who are also the directors of LMM from the date of LMM's incorporation with each of them holding one subscriber's share.

[21] Ms Lim informed the 2nd plaintiff that the financial transactions recorded in the bank statements evidenced that cheques were issued from the defendant's account in favour of LMM. It is the plaintiff's case that a substantial portion of the monies or the profits of the business of the defendant was effectively transferred to LMM as the defendant is a licenced agent for ING and Allianz while LMM had no such licence.

[22] According to the plaintiffs, the defendant had never appointed or authorised LMM with the 2nd defendant's knowledge and/or consent to be its sub-agent to deal with general insurance at any time.

[23] It is the plaintiffs' case that there is a very distinct possibility that the monies or a portion thereof and business profits of the defendant for certain insurance contracts executed with ING or Allianz were transferred from the defendant to LMM without the plaintiffs' knowledge by the acts/commission and/or design of the three directors.

[24] By transferring monies of the defendant in such a manner to favour LMM without his knowledge or consent, the 2nd plaintiff contended that the three directors had committed a breach of their fiduciary duties as the defendant's officers who have failed to exercise their powers for a proper purpose and in good faith in the best interest of the defendant. According to the plaintiffs, this amounts to an act of misfeasance by the three directors against the defendant.

[25] The plaintiffs submitted that when the three directors incorporated LMM, they made improper use of defendant's property, position, corporate opportunity or competed with the defendant. The 2nd plaintiff believes that monies and/or profits were transferred from the defendant directly to LMM, hence depriving the defendant of, *inter alia*, the profit margin that rightly belongs to the defendant as the defendant is the licenced general insurance agent whereas LMM does not have such a licence.

[26] According to the plaintiffs, sometime on or about 28 December 2009 while the 2nd plaintiff was away in Shanghai, China on personal business, the whole business operation of the defendant was removed from the premises located at ING headquarters, without the 2nd plaintiff's knowledge or consent.

[27] When the 2nd plaintiff returned on 2 January 2010 from Shanghai, he found that all the defendant's documents and equipment had been removed from Suite 13.02, 13th Floor, Menara ING, 84, Jalan Raja Chulan, 50200 Kuala Lumpur and relocated to Suite 2.02, 2nd Floor, ING Shemelin Business Centre, Jalan 4/91, Taman Shamelin Perkasa, 56100 Kuala Lumpur. The 2nd plaintiff have lodged a police report in relation to this incident.

[28] According to the plaintiffs, the Directors who were involved in this exercise are the three directors. It is the plaintiffs' contention that the three directors were also involved in the business of life insurance and informed the 2nd plaintiff that the said shifting of premises was done to separate the life insurance business from the general insurance business. The plaintiffs further contended that the three directors however, took away the defendant's office, all documents, files accounting records, computers and client details, including the only staff in the employment of the defendant. Hence, effectively the core business of the defendant in general insurance was transferred to the new address which caused a disruption in the administration and business of general insurance being the core business of the defendant. The 2nd plaintiff was said to have protested but to no avail.

[29] Fang then was said to have informed and assured the 2nd plaintiff that the accounts of the defendant involving general insurance will be prepared and finalised in 2010 but this according to the plaintiffs never happened.

[30] Ms Lim informed the 2nd plaintiff that she could not prepare and finalise the accounts as the accounting records were incomplete for purposes of preparation of the final accounts.

[31] Ms Lim was stated to have informed the 2nd plaintiff:

a) That she had made further inquiries and discovered that since the date of incorporation, there were no proper accounting records of transactions at all by management of the defendant, which was managed by the three directors namely Choo who was in charge of finance and accounts, Fang who was in charge of operations and administration and Yap who was in charge of operations; and

b) that in the course of her duties, she made several inquiries about certain accounting entries in the defendant's bank statements with Choo and was told by Choo that some transactions could not be reconciled as there was no proper accounting done in regards to a related company ie LMM.

[32] By a letter dated 19 April 2012, the 2nd plaintiff wrote to Inde Management Consultant Services and addressed the letter to Ms Lim with the intention to discover what happened and why the accounts were not being maintained properly or the reasons behind why the accounts could not be prepared for accounting and auditing despite the numerous requests made to the three directors since the 2nd plaintiff was appointed as a director of the defendant. The 2nd plaintiff contended that he was powerless to make the three directors comply with the law.

[33] The plaintiffs further contended that Choo had breached his fiduciary duties as a director of the defendant when he diverted payments payable to the defendant by using his personal credit cards to effect the said payments so that he could obtain rebates from the credit cards and statements of Choo's credit card usage reflect these rebates.

[34] The plaintiffs averred that Choo was then reimbursed for these credit card payments by cheques issued by the defendant. These rebates according to the plaintiffs were not credited to the defendant. Further, Choo did not inform either the 2nd plaintiff or the 1st plaintiff that he had obtained these rebates.

[35] By letter dated 23 May 2012, the 1st plaintiff requested the board of directors of the defendant for "certified true copy of the duly audited financial statements together with all the reports thereon".

[36] By the 2nd plaintiff's letter dated 10 June 2012 to the board of directors of the defendant, the 2nd plaintiff, *inter alia*, complained that he did not receive any accounts or audited accounts for the first and all subsequent financial years and further that an annual general meeting of the defendant had not been convened from the date the defendant had been incorporated.

[37] The 1st plaintiff by letter dated 15 June 2012 sent to the Board of Directors of the defendant a reminder as a follow up to her earlier letter of 23 May 2012.

[38] By letter dated 3 September 2012, the 1st and 2nd plaintiffs sent the board of directors a final reminder as a follow up to their letters dated 23 May 2012, 10 June 2012 and 15 June 2012.

[39] There was no response to all these letters by the three directors.

[40] By letter dated 24 September 2012, the CCM issued a Notice to show cause why the defendant should not be struck off from the Register of Companies as the Registrar of the CCM stated that he had reason to believe that the defendant was not carrying business or operating as a company.

[41] On 16 October 2012, in view of the various contraventions of the Act by the three directors, the 2nd plaintiff lodged a police report bearing the reference number: BANDAR KINRARA/006523/12, in order to protect the interests of the company.

[42] On 22 October 2012, the 2nd plaintiff forwarded a letter to CCM, *inter alia* informing that the defendant was still actively carrying out its business.

[43] On 22 November 2012, the 2nd plaintiff forwarded a complaint to CCM containing a report signed by the 1st plaintiff which sets out the various contraventions of the Act by the three directors.

[44] The 2nd plaintiff further made a police report on 26 November 2013 bearing report number DANGWANGI/047627/13, *inter alia* complaining about the transfer of the defendant's monies to LMM by Choo.

[45] The plaintiff had filed a writ in the Kuala Lumpur High Court Suit 22NCC-441-11-2014 in 2014 ('the 441 Suit') against the three directors and LMM. However, the High Court on 21 April 2015 ordered, *inter alia* as follows:

> "(2) Plaintif-plaintif dibenarkan untuk memberhentikan keseluruhan tindakan ini terhadap defendan-defendan tanpa kebebasan untuk plaintif-plaintif memfailkan semula tindakan ini kecuali bagi tindakan terbitan ("derivative action") yang dibawa bagi pihak plaintif Ketiga (Mutual Life Sdn Bhd) untuk menuntut kerugian yang dialami oleh plaintif Ketiga sepertimana yang dinyatakan dalam tindakan ini;".

[46] Hence, the plaintiffs filed this action to obtain leave from this court.

[47] The plaintiffs argued that they have satisfied the threshold for leave to be granted and that they have acted in good faith in bringing this action. The plaintiff submitted that this is a situation whereby there have been wrong doings in the management of the company and the wrongdoers in the form of the three directors are the majority that controls the company. Since the three directors are the majority and in control of the company, the company is not able to initiate legal proceeding against the three directors.

[48] The plaintiffs argued that they fall under the exception of the 'Proper plaintiff' rule as stated by the Court of Appeal in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 2 MLRA 63.

[49] The plaintiffs submitted that they fall under the category of complainant under s 181A(4)(a) of the Act to initiate this suit to obtain leave from the court as the 1st plaintiff is the shareholder of the company whilst the 2nd plaintiff is the director of the company.

[50] The plaintiffs further stated that they have also met the requirement of s 181B(2) of the Act as the notice to the individual directors of the company was sent to all the three directors and the purpose of the notice is to enable the three directors to exhaust any internal process before this application is filed. However, according to the plaintiffs, upon receiving the notice, the three directors had failed to resolve the issue of the company accounts which has never been done since the company was incorporated.

[51] The 2nd plaintiff contended that he did not attend the company meetings as the notice given for the meetings are not proper. According to the plaintiffs, there are no minutes of the previous meetings attached together with the notice. The plaintiffs submitted that even if the 2nd plaintiff does not attend the meeting, the other three directors being the majority could still proceed with the meetings and pass the relevant resolutions.

[52] The plaintiffs further submitted that they have also satisfied the third condition for leave to be granted as they are acting in good faith in bringing this action. The plaintiffs argued that as the defendant failed to present the company's account despite numerous oral reminders, they are convinced that the three directors have no intention to prepare the same as it probably would reveal mismanagement of the money belonging to the company and as such, the plaintiffs are left with no choice but to take this action against the three directors. It is the plaintiffs' argument that once the accounts are prepared, the company would benefit from the accounts whereby profit and losses of the companies as well as the misuse of funds of the company can be seen.

[53] Lastly, it is the plaintiffs' contention that in bringing this derivative action it is only in the best interest of the company that the accounts be prepared.

The Defendant's (The Three Directors) Case

[54] It is the defendant's case that prior to 2010, the 2nd plaintiff and the three directors are agency managers who focused on life insurance for ING Insurance Bhd which had an office at 13th Floor, Menara ING, No 84, Jalan Raja Chulan, 50200 Kuala Lumpur ('ING Office') at that point of time.

[55] The three directors are also agency manager who have their own insurance agents and have their own customers that bought general insurance from them, from time to time.

[56] It is the defendant's case that for purpose of easing the burden of their insurance agents so that the said agents can focus on life insurance, the 2nd plaintiff, Yap and Fang decided to establish the company ie the defendant to handle the management and operations of the general insurance for their respective agents and in actual fact, the business for general insurance is not profitable and merely provide services to their existing clients as and when they require or wish to buy general insurance policy.

[57] In light of the aforesaid circumstances, the defendant was established on 2 February 2005 with a total authorised capital of RM100,000.00 divided into 100,000 ordinary shares operating in the ING Office. At its inception stage, the defendant had four directors whom respectively held one share each. The 1st plaintiff at that point of time was one of the four directors and shareholders.

[58] On or about 28 January 2008, the 1st plaintiff resigned from her position as the director of the defendant. On the same day, the 2nd plaintiff ie the husband

of the 1st plaintiff was appointed as one of the directors of the defendant. At all material times, the 2nd plaintiff as the director of the defendant has full access to the bank accounts of the defendant. This is shown by:

(i) The resolution of the defendant company passed on 21 February 2008 pertaining to the opening of AmBank (M) Berhad bank account, authorised the 2nd plaintiff as one of the four joint signatories.

(ii) The defendant's resolution on 5 June 2008 pertaining to the defendant's Public Bank Account authorised the 2nd plaintiff as one of the four joint signatories; and

(iii) The defendant's resolution on 9 June 2008 resolved that the 2nd plaintiff alone, be appointed as the corporate user for the defendant's application for E-Banking services offered by the Public Bank account.

[59] It is the defendant's case that the 2nd plaintiff has been involved in the business and administration of the defendant. According to the defendant, the overly used term of "non-executive director" by the plaintiffs to describe the role of the 2nd plaintiff in the defendant is clearly misconceived.

[60] On or about December 2009, the plaintiffs and the three directors have decided not to continue with the business of the defendant. This is because the relationship between the 2nd plaintiff and the three directors have become strained and the business of the defendant is not making money from the very start.

[61] The establishment of LMM in Suite 2.02, 2nd Floor, ING Shamelin Business Centre, Taman Shamelin Perkasa, Kuala Lumpur ('shamelin office') about the same time ie December 2009 when all parties agreed consensually that the defendant's business is to be closed, have brought to the attention of both the plaintiffs with no objections by them.

[62] At the same time, the three directors had no objections towards the operation of the company known as 'Metlife Sdn Bhd (799965-U) ('Metlife') established by both plaintiffs since 18 December 2007 and stationed also in ING Office. As of to date, the plaintiffs are the only directors and shareholders of Metlife. Since 2010, the plaintiffs have also utilised a sole proprietorship business known as "Metlife Risk Management" ('Metlife Risk') which has the same address at ING Office.

[63] All parties were in agreement that with the closure of the defendant's business, the plaintiffs by themselves and the three directors would operate their own businesses respectively, parting ways with each other since December 2009.

[64] According to the defendant, it was only on or about 2012, the plaintiffs started making frivolous complaints and allegations against the three directors alleging that they did not prepare proper financial records and accounts from the date of incorporation of the defendant.

[65] The 441 Suit was then filed by both the plaintiffs and also the defendant against the three directors and LMM Company on 20 November 2014 in the High Court in Kuala Lumpur.

[66] According to the defendant, what the plaintiffs did not highlight to this court was that the relief prayed for in the suit by the plaintiffs are almost similar to the reliefs that the plaintiffs are seeking for purportedly on behalf of the defendant in this proposed derivative action based on the present application which are essentially as follows:

(i) That the three directors of the defendant to hand over the defendant's statement of accounts;

(ii) That the three directors of the defendant to hand over any documents which can prove any contracts that have been entered by the three directors of the defendant with LMM; and

(iii) That all the 'secret profits' obtained by the three directors of the defendant through the defendant's accounts are to be paid back.

[67] Pursuant to the Court Order dated 21 April 2015, both the plaintiffs were allowed to withdraw their personal claim in the suit against the three directors of the defendant and also LMM with no liberty to file afresh except for a derivative action on behalf of the defendant's company.

[68] The defendant highlighted that after more than a year since the court Order in the 441 Suit, the plaintiffs have now come before this court by filing the present application seeking leave to file a derivative action for and on behalf of the defendant.

[69] The defendant contended that the plaintiffs have failed to satisfy the threshold and the two essential elements required to be fulfilled under s 181B of the Act for leave to be granted ie the plaintiffs are not acting in good faith in filing this present application and they are not acting in the best interest of the company.

[70] It is the defendant's contention that from the very start, the plaintiffs have intended to leave the defendant respectively as the shareholder and the director of the defendant and they take no interest towards the administration and business of the defendant.

[71] The defendant contended further that the 1st plaintiff has by herself in this present application and in the 441 Suit which was filed by the plaintiffs personally against the three directors has admitted that she wanted to sell her

shares in the defendant in order to withdraw her position as the licence holder of the AIA and Allianze. The 2nd plaintiff had also in the 441 Suit prayed for an order for his resignation as the director of the company to take effect. Even worst, the defendant contended that the 2nd plaintiff has also not shown that he was acting in good faith in the events leading up to the filing of this application as he has not come clean with the three directors at the expense of the company.

[72] The defendant further argued that the main reliefs sought by the plaintiffs in this proposed derivative action shows that the plaintiffs' purported cause of action are, *inter alia*, flimsy, unsustainable and destined to fall.

[73] It is the defendant's contention that in the main reliefs, the plaintiffs are merely seeking for account to be disclosed to the plaintiffs. On one hand, the plaintiffs alleged that they do not have the documents, but on the other hand, they alleged that they have a case to sue the three directors for 'secret profit' even though they do not have the documents. The defendant argued that this proposed action on behalf of the company is clearly a 'fishing expedition' for more documents on the suspicion that 'secret profit' have been made by the three directors. As such, it is submitted by the defendant that the plaintiffs do not have a complete cause of action and the proposed action against the three directors are premature.

[74] In any event, the defendant argued that the 2nd plaintiff as the director of the company may apply under s 167 of the Act to obtain those accounting documents. There is no such necessity for the plaintiffs to file a derivative action on behalf of the company and to incur unnecessary cost and time.

[75] In fact according to the defendant, the 2nd plaintiff has complete access to whatsoever accounting documents of the defendant and he has also obtained some of the defendant's accounting documents prior to this. According to the defendant, it is the 2nd plaintiff's own evasiveness and uncooperative conduct when called upon for director's meeting that have caused disturbance in the preparation of the defendant's accounts.

[76] More importantly, the defendant stated that the three directors have no objection for the plaintiffs to have a copy of the company's accounting documents in their possession and as such, there is no such necessity to apply for discovery of the company's documents in this proposed derivative action.

[77] It is also contended that any purported cause of action as alleged by the plaintiffs have accrued since 2005 and the plaintiffs are time-barred to bring this proposed derivative action as against the three directors.

[78] Finally, the defendant argued that there is also no commercial sense for the defendant to bring this proposed statutory derivative action against

the three directors as the company and the three directors did not make any profit and it does not make any commercial sense to spend substantial amount of time and money for the proposed derivative action.

Evaluation And Findings

[79] The plaintiffs must satisfy the following elements pursuant to s 181B(4) of the Act before leave can be granted. Section 181B(4) of the Act states:

> "181B(4) In deciding whether or not leave shall be granted the Court shall take into account whether:
>
> (a) the complainant is acting in good faith; and
>
> (b) it appears *prima facie* to be in the best interest of the company that the application for leave to be granted."

[80] The court is always reminded that the statutory requirements under ss 181A and B of the Act must be interpreted strictly and must not treat it as any other 'leave application'. The leading case on the interpretation and application of ss 181A and 181B of the Act is the decision of the Court of Appeal in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 2 MLRA 202. The court of Appeal in overturning the decision of the High Court in granting leave to the complainant, has set a higher threshold for the statutory derivative action in this country. Abdull Hamid Embong JCA (as he then was) in his judgment for the Court of Appeal stated as follows:

> "[8]... The intention of ss 181A to E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. As such, leave to bring a derivative action must not be given lightly (see *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was "only an application for leave" and relying on the low threshold used under O 53 RHC (application for judicial review) ie to determine if an application for judicial review is not frivolous or vexatious by relying on cases like Clear Water. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s 181A of the CA are met. A low threshold of merely determining if there existed a *prima facie* case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s 181A of the CA, and compliance to those statutory requirements. (see *Charlton v. Baber* 21 ACIC 1671)."

[81] The legal perimeters set out and used by the courts in deciding whether a complainant is acting in good faith can be found again in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak (supra)*. In adopting the Australian Court approach, the Court of Appeal applied two inter-related guidelines in deciding the element of 'good faith' and they are:

(i) Whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success; and

(ii) Whether the applicant is seeking to bring the derivative suit for such collateral purpose as would amount to abuse of process.

[82] In addition, the Singapore Court of Appeal in a similar fashion approached the element of 'good faith' by analysing the actual motives of the applicant in seeking leave to commence the statutory derivative action. In *Ang Thiam Swee v. Low Hian Chor* [2013] SGCA 11, the Singapore Court of Appeal found the evidence suggested in that case shows that the respondent had several motives in seeking leave to commence a statutory derivative action. It was held:

"(4) The evidence suggested that the respondent had several motives in seeking leave to commence a statutory derivative action. The overriding impression was that the respondent felt he either had been or would have been wronged, and was using the statutory derivative action not as a means of pursuing the interests of the Company, but to secure and/or advance his own interests within the Company."

[83] It is admitted by the plaintiffs that this leave application is filed in order to enable the defendant to prepare accounts which has never been prepared since the incorporation of the company in 2005. The plaintiffs submitted that they are reverting to pursue this action in court after having repeatedly reminded the other three directors to prepare the account as they were the one who were in charge of doing so.

[84] The plaintiffs themselves in their submission admitted that the true fact is that the 441 Suit and the current application are similar because the plaintiffs cannot change what has happened in the past and that the fact would remain the same. But at the same time, the plaintiffs submitted heavily that the suit filed earlier has no relevancy here and the defendant should not rely on the pleadings in the 441 Suit.

[85] This court is of the different view with what the plaintiffs are contending. The similarities between what the plaintiffs were seeking for in the 441 Suit with the present intended derivative action are relevant. From what were pleaded in the 441 Suit and based on the 2nd defendant Affidavit In Support of this present application ('AIS'), this court finds that the plaintiffs are attempting to achieve what they could not have personally achieved in the earlier suit filed for their own personal benefits as they are not allowed to file afresh their personal claim.

[86] In the 441 Suit, the 1st plaintiff pleaded in paras 45 to 47 of the Statement of Claim ('SOC') that she cannot transfer her shares out of the defendant and this has hindered her future earnings and from her pursuance of other suitable professions. Paragraphs 45 to 47 of the SOC are reproduced as follows:

"45. Akibat daripada kegagalan menyediakan akaun yang telah diaudit untuk tahun-tahun sebelum ini, satu bahagian (25%) saham yang dipegang oleh plaintiff pertama dalam plaintiff ketiga (the defendant) tidak boleh dipindahkan kerana tiada akaun yang telah diaudit tersedia untuk penilaian saham duti oleh Lembaga Hasil Dalam Negeri.

46. Sehubungan dengan itu, plaintiff pertama juga telah disekat daripada menarik balik kedudukannya sebagai penama berlesen daripada AIA dan Allianz, sehinggga menganggu pendapatan yang bakal di peroleh daripada menjalankan dan melaksanakan kareer professionalnya dengan sesuai

47. Disebabkan tiada akaun yang telah diaudit boleh diberikan untuk penilaian setem duti ke atas pemindahan saham plaintif pertama kepada plaintif Kedua di plaintif Ketiga, plaintif pertama juga tersekat tanpa apa-apa pilihan utk memberhentikan penglibatannya dengan defendan pertama, defendan Kedua dan defendan Ketiga."

[87] It is therefore clear that what the plaintiffs stated is that without the audited account the 1st plaintiff cannot transfer her shares in the company and as a result, she cannot withdraw herself as the insurance licence holder of AIA and Allianz and it has hindered her from getting income from practicing in her professional career somewhere else. This clearly shows that the plaintiffs are trying to use the company to sue the three directors for the audited accounts so that she can withdraw herself as licence holder in AIA and Allianz for her own interest.

[88] The 1st plaintiff prayed for her shares in the company to be transferred out to one of the three directors ie Choo. The 2nd plaintiff at the same time in para 1 (xi) of the same SOC prayed for his resignation from the defendant to be taken effect from the date of the Order.

[89] In this present application, the 1st plaintiff again expressed her clear intention to transfer her share in the defendant at paras 24 and 25 of the 2nd plaintiff AIS.

[90] Meanwhile, exh "C-13" in the 2nd plaintiff's AIS, is the 1st plaintiff's resignation letter dated 28 January 2008 which reveals that she resigned as a director of the company and stated that she has thereby released the company from any claim which she may have on any account whatsoever. In the same letter, the 1st plaintiff stated that she would like to sell her shares in the company. In this letter, the 1st plaintiff did not express any purported disappointment of any unprepared accounts by the three directors. All the 1st plaintiff wanted from the beginning was to sell her shares in the company. This court finds that the contents and the manner in which the resignation letter was written at the material time, is clearly inconsistent with the plaintiffs' claim herein that they have constantly requested for accounts to be prepared. The 1st plaintiff who had claimed she has been exasperated in asking for the accounts could at the very least have requested for the accounts in that resignation letter of hers. This

court finds that any allegations pertaining to the unprepared accounts by the 1st plaintiff is clearly rebutted by her very own resignation letter.

[91] It cannot be gainsaid that the plaintiffs whom by themselves expressed their intentions to leave the company by leaving their respective position as the shareholder and the director can be said to have filed this present application for the benefits and interest of the company. To compound the matter, the plaintiffs even particularised the 1st plaintiff's purported loss of 'personal' income of RM720,000.00 in the SOC in the 441 Suit and also prayed for the said income against the three directors and LMM.

[92] This court finds that it is clear this proposed action is for collateral purpose to achieve the plaintiffs' personal interest and based on the 2nd plaintiff's AIS, this court is of the considered view that there is not a reasonable prospect for the derivative action to succeed as the plaintiffs had glaringly portrayed that they have an ulterior motive and collateral purpose to achieve personal gains and are merely using the company for the same. This court agrees with the submission of the defendant that the plaintiffs have shown that what they wanted is personal reliefs against the three directors and LMM and merely using the company as a vehicle to do so in this leave application similar to what they did in the 441 Suit.

[93] This is a failed attempt on the part of the plaintiffs to justify that they are acting in the interest of the company in order to obtain the audited account when the 1st plaintiff wanted to transfer her shares out in the company for her own personal interest and seeking for the purported personal loss of income of RM720,000.00 and the 2nd plaintiff wanted to resign from the company in the 441 Suit. The plaintiffs failed to show that they really have the interest of the company at heart but instead is merely advancing their own interest. There exists a strong basis that the plaintiffs are actuated by an ulterior motive and/or collateral purpose.

[94] In *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak (supra)*, the Court of Appeal stated:

> "[21] Next, we address the second limb of the lack of good faith submission that there was a strong basis to find that the respondent was actuated by an ulterior motive in making this application ie: the collateral purpose argument. It was argued by the appellant's counsel that the learned judge had failed to sufficiently take into account that the respondent had commenced a personal action in the KL High Court vide D6-22-1568-2007 (D6 action) which is virtually identical to this derivative action and with identical reliefs sought. The respondent had sued the appellant as one of the defendants in that personal action, based on the same subject matter and same cause of action. Comparing these two actions, there appear to be an inconsistency in that in the D6 action the respondent is suing the appellant for damages whilst in this derivative action he is purportedly trying to recover damages on behalf of the appellant. It would seem to us that the respondent's stand is not coherent and this brings to the fore a suspicion on the true motive on his part in bringing

this action. We therefore conclude that this action is suspect, and that the respondent does not really have the interest of the company at heart but is merely advancing his own interest. The law does not allow bringing a personal action against the company and then simultaneously to seek leave to bring a concurrent and inconsistent statutory derivative action against it on the same causes of action. In such a situation leave should not have been granted. Since it was apparent that the respondent was not acting in good faith, we hold that leave was wrongly granted."

[95] Moving on, the plaintiffs submitted that they have repeatedly requested for accounts to be prepared and the preparation of such accounts is for the interest of the company. Here again, this court finds the plaintiff is not acting in good faith. In exh "CHY-9" in the defendant's Affidavit affirmed by Choo ('Choo's Affidavit'), there is a letter dated 26 October 2015 by the three directors to the company secretary, Inde Management Consultant Services requesting for all banking documents requested by the 2nd plaintiff in his letter of 19 April 2012. The company secretary's letter of 27 April 2012 shows that the 2nd plaintiff had acknowledged receipt of accounting documents ie Bank Statements and the Public Bank Bhd Credit Card Statements ('the PBB credit card statements'). The company secretary further informed that the said accounting documents have been handed over to the 2nd plaintiff. The solicitor acting for the defendant and the three directors then wrote a letter dated 4 November 2015 to the 2nd plaintiff demanding for the return of the accounting documents including the PBB credit card statements for the purpose of preparing the company's accounts, audited financial statements for submissions to the CCM. The 2nd plaintiff through his solicitor replied denying the receipt of the PBB credit card statements.

[96] However, the defendant highlighted to this court that the denial of receipt by the 2nd plaintiff is a blatant lie as the 2nd plaintiff could suddenly produce the same statement ie the PBB credit card statements in the 2nd plaintiff AIS. At paras 49(c), (d) and (e) of the 2nd plaintiff's AIS, the 2nd plaintiff produced exactly the same PBB credit card statement which the defendant had requested for in exhs "C28", "C29" and "C30" of the 2nd plaintiff's AIS.

[97] It is true as submitted by the defendant that the 2nd plaintiff clearly did not come with clean hands when the 2nd plaintiff denied that the PBB credit card statements are in his possession after the defendant and the three directors requested for the same. Of course, the 2nd plaintiff denied again and to remedy the dishonesty, the 2nd plaintiff stated in his affidavit and claimed that the PBB credit card statements do not belong to the company but to one of the three directors. This court is in agreement with the defendant that this denial is illogical as the PBB credit card statements produced by the 2nd plaintiff have the same account number and date and they are the same documents requested by the defendant and the three directors in the Letter of Demand.

[98] In *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor* [1985] 1 MLRH 459, VC George J (as he then was) stated:

> "He is before the court with unclean hands and is not entitled to and will not obtain the assistance of the court. The application to set aside the judgment has to be dismissed with costs."

[99] In this case, it is more detrimental as it is the statutory requirement that the plaintiffs must be acting in 'good faith'.

[100] The dishonesty and evasiveness of the 2nd plaintiff is further reflected from the affidavit filed by the defendant (Choo's Affidavit). Apparently, prior to this present application being filed, a notice of Extraordinary General Meeting for the defendant dated 19 November 2012 (exh "CHY-14 in Choo's Affidavit) was issued to discuss about the defendant's accounts for the year 2006-2012 but was opposed by the 2nd plaintiff. There is also a notice dated 9 March 2012 calling for Board Meeting of the defendant on 20 March 2013 being issued to discuss about the defendant's accounts for the year 2006-2012 but was opposed by the 2nd plaintiff (exh "CHY-12" of Choo's Affidavit). A Board of Directors' Meeting of the defendant was held on 30 October 2013 to discuss the "preparation of accounts for the year 2006-2012 (exh "CHY-13" of Choo's Affidavit) but the 2nd plaintiff did not attend. A Board of Directors' Meeting of the defendant was held on 20 May 2015 "to discuss and approve a method to prepare the Company accounts for the year 2006-2012" (exh "CHY-15" of Choo's Affidavit). Again, the 2nd plaintiff did not attend.

[101] The above meetings convened clearly shows that the three directors had attempted their very best to solve the defendant's accounts. The genuineness of the three directors to resolve the accounts issues is reflected in their letter to the 2nd plaintiff dated 28 October 2013 at para 5 which states:

> "Therefore we sincerely hope that you will attend the said meeting and expressing your view to solve the Company's accounting problem before the SSM may take action on the Company for the compliance with any sections of the Companies Act, 1965."

[102] The 2nd plaintiff's contention that he refused to attend the meeting due to the fact that no proper minute of meetings was prepared is lame. The plaintiffs even submitted that the three directors allegedly held a board meeting on 20 May 2015 which was after the present application was filed. This is not true. This present application is filed in 2016. This court finds that sufficient notices have been given and the purpose of the meetings is none other than to resolve the accounts of the defendant. In his letters of 19 March 2013 and 26 October 2013, this court finds that the 2nd plaintiff raised frivolous contentions on the vagueness of the notices when it is crystal clear that the notices of meetings were to discuss the accounts that the plaintiffs are complaining about all the while. He chose to be absent and opposed to those meetings. The conduct of the plaintiffs clearly show that they do not place any importance towards the business of the defendant.

[103] The plaintiffs submitted that at this stage, it is only an application for leave to bring an action against the three directors and that if leave is granted and if the three directors are willing to cooperate in the future, the plaintiffs do not see how it would cause any harm upon the three directors. This submission is perplexing and fortified the fact that the motives of the plaintiffs in bringing this action is suspect. The plaintiffs themselves had hindered the efforts by the three directors to prepare the accounts and all the plaintiffs did was to vent their personal dissatisfaction towards the three directors by way of objecting towards the Board Meeting which coincides with their intention to leave the company. The plaintiffs cannot be said to have the genuine intention to assist the company to comply with the requirement to submit the Audited Account to CCM.

[104] In *Ang Thiam Swee v. Low Hian Chor (supra),* VK Rajah JA in delivering the judgment of the court stated:

> "When annealed with the elements of disgruntlement, spite, and self-preservation, the prospect of pure personal gain appears to sharpen the edge of Low's motivations, and raises serious questions about his good faith"

[105] In *Dato' Daljit Singh Gurdev Singh v. Forefront Online Sdn Bhd* [2010] 13 MLRH 399, (in the High Court of Kuala Lumpur, Commercial Division) [Originating Summons No D-24NCC-395-2010] Dr Haji Hamid Sultan bin Abu Backer J (as His Lordship then was) found and stated:

> "From the facts of the case there was ongoing dispute between the individuals as early as 2004. The facts will show that it is not a fit and proper case to grant leave as this action is clearly a collateral step to advance the dispute among the respective parties. In consequence, the plaintiff's action lacks *bona fide* and ought not to be entertained."

[106] Based on the facts of the present case, the plaintiffs' intention to leave the company and their personal claim against the three directors comes hand in hand with their conducts of not coming clean and also evasive. The present application is indeed a vigorous approach taken by the plaintiffs at the expense of the company.

[107] Another pertinent point that the defendants raised is the question of whether the plaintiffs have exhausted all their internal remedies in respect of the preparation of accounts of the company before filing this leave application. In *Suhaimi Ibrahim & Anor v. Hi-Summit Construction Sdn Bhd & Ors* [2015] 2 MLJ 669; [2014] MLRAU 479, the Court of Appeal stated that the court needs to be satisfied that internal process of the company is satisfied before leave can be granted. In dismissing the appeal to obtain leave from the court under s 181A of the Act, the Court of Appeal held:

> "(1) It was apparent that the parties had not exhausted their internal remedies for various reasons. For the court to be satisfied that it was in the interests of the company to allow a statutory derivative action to be maintained,

> the internal process of the company needed to be satisfied. The court preferred to have a clear resolution of the company on this ..."

[108] This court finds that the plaintiffs have clearly not exhausted all internal remedies. The plaintiffs merely wrote and requested orally for accounts to be prepared. As a director of the company, the 2nd plaintiff has in fact many options under the Act to seek what he is purportedly claiming for. The plaintiffs' submission that accounts could only be prepared with a court order cannot hold water. Section 167(1) of the Act provides that every company and the directors and the managers thereof shall cause to be kept such accounting and other records and for such records to be properly audited. Section 167(4) provides that the accounting and other records shall at all times be open to inspection by the directors. Section 170(1) of the Act provides that a copy of every profit and loss account and balance sheet which is laid before a company in general meeting accompanied by a copy of the auditor's report be sent to all persons or members entitled to receive notice of general meetings of the company. Pursuant to s 167(6) of the Act, the plaintiffs as shareholder and director of the company are entitled to seek for the relief to inspect the accounts. Furthermore, the 2nd plaintiff as the director of the company is entitled under art 79 of the 4th schedule, Table A of the Act at any time to summon a meeting of directors to discuss the accounting issues. This, the 2nd plaintiff did not do or just refused to do.

[109] The court must place emphasis on the importance of the internal remedies being exhausted first. There are no short cuts by coming to the court and using it as a vehicle to lament failure in complying with a statutory provision when the plaintiffs themselves played a part to such non-compliance. This court found for a fact that the defendants have in fact endeavored to come up with the company's audited account. It is the plaintiffs who refused to come forward to resolve the issues. In exh "CHY-15" of Choo's Affidavit, it is revealed that in the company's board meeting held on 20 May 2015, the three directors have taken steps to appoint an Account Executive to finalise the company's accounts for the financial year ended from 28 February 2006 until 28 February 2015 but the three directors faced hurdles in preparing the accounts as a result of some misplaced records. The 2nd plaintiff did not come forward to resolve these issues. The plaintiffs have also raised in their submission that due to the failure of the defendant to file the audited accounts, the three directors are currently being investigated by the relevant authorities. As such, it is not the duty of the plaintiffs to take action on behalf of the company.

Breach Of Fiduciary Duties

[110] The plaintiffs alleged that there have been assets and money wrongfully transferred out from the defendant's bank accounts by the three directors. The 2nd plaintiff in his AIS claimed that the plaintiffs discovered documents and office equipment being shifted out since early 2010. The 2nd plaintiff lodged police reports alleging as such in 2012. However, the plaintiffs failed to show

contemporaneous documents of their objections towards any purported wrongdoings by the three directors at that material time ie 2010. What is more deplorable is the fact that these allegations are premised on suspicion and speculation and these cannot be the basis for a derivative action.

[111] The plaintiffs claimed that there is a 'possibility' that contracts of the company have been diverted to LMM and there is merely a belief that money and/or profits have been transferred out from the defendant to LMM. In fact, one of the proposed relief in the proposed derivative action is merely for the documents in relation to LMM to be produced and to be hand over to the plaintiffs. The court could not be expected to grant leave to conduct an investigation based on suspicion and belief. Leave cannot be granted for fishing expedition. The allegations only hinted at the possibility of wrongdoings by the three directors. There are no cogent or credible evidence to support the allegations by the plaintiffs. The plaintiffs are clutching at straws. Claims based on suspicion and unmeritorious are bound to be unsuccessful. A mere suspicion would fall short of the standard required for leave to be granted. In the absence of a proper basis and justification for discovery of documents, the disclosure of documents as prayed by the plaintiffs must be dismissed.

[112] In *ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd* [2003] 2 MLRH 725, where the defendant appealed against the decision of the senior assistant registrar in dismissing the defendant's application for discovery of documents, Vincent Ng J (as he then was) stated his findings as follows:

> "In light of the fact that the defendant had not to date tendered any credible, cogent or even plausible evidence to support their allegations of the plaintiff overcharging, this court is inclined to the irresistible conclusion that the defendant had embarked on a fishing expedition with the view to formulate their counterclaim. The law on discovery is well settled; that in the absence of proper basis for an order for discovery, disclosure should not be allowed.
>
> Mustil LJ in *Berkeley Adminstration Inc v. McClelland* [1990] FSR 381 at 383 held that:
>
> > It is plain... that the plaintiff just do not believe anything that the defendants have said in the course of this discovery, and would like to hunt around the documents in the hope that something useful would turn up enabling them to controvert what the defendants have said on oath. That is not what discovery is about at all.
>
> When a similar situation occurred in *Australian Diary Corporation v. Murray Goulburn Co-operative Co Ltd* [1990] VR 355, the Supreme Court of Victoria held that an order for discovery of a range of documents of an uncertain width, description and identity would be attended by substantial injustice. The order was held to be too wide and uncertain and was directed to the discovery of documents, which did not appear to be relevant to any question of issue to be decided on the pleadings.

Fullagar J had this to say:

> I agree... that the order of the learned judge, like the order of the master, is too wide upon any view of its ambit, and I also agree with his view that it aids the defendant in an illegitimate fishing expedition. I would not deny that the Peruvian Guano case* (referred to below) allows some 'fishing' within certain limits.
>
> (**Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55).
>
> I am completely *ad idem* with the above mentioned judgments.
>
> Conclusion
>
> I hold that the defendant has failed to establish their entitlement to an order for discovery and inspection as the order cannot be made in the absence of any particulars of justification. Considering this, the ingenious use of the discovery and inspection mechanism to uncover any document which may later be used to justify the defendant's bare allegation of overcharging by the plaintiff, clearly amount to fishing for evidence."

[113] The plaintiffs also contended that when the three directors incorporated LMM, they (the three directors) have made improper use of the defendant's property, position, corporate opportunity or competed with the defendant. The 2nd plaintiff contended that he believes that monies and/or profits were transferred from the defendant directly to LMM, depriving the defendant of, *inter alia*, profit margin that rightly belongs to it as the defendant is a licenced general insurance agent whereas LMM does not have such licence. The 2nd plaintiff then alleged that when he was away, the whole business and operations of the defendant was removed from the premises located in ING building without his knowledge.

[114] This court finds the 2nd plaintiff's allegations about him having no knowledge on the establishment of LMM cannot be true. He has knowledge that LMM Company was set up. The 2nd plaintiff himself had in fact establish his own business in the form of "Metlife" which equally has the same business of "General and Life Insurance" (exh "CHY-4" of Choo's Affidavit). The knowledge on the part of the plaintiffs of the establishment of LMM since early 2010 can be gleaned from Choo's Affidavit.

[115] Apparently, sometime in 2010, LMM initially took over the photocopying machine "Canon" from one NY Life (another company jointly owned by the 2nd plaintiff and the three directors) in their Shamelin office paying the monthly rental of RM240.00. The 2nd plaintiff then requested the three directors to allow Metlife to take over the said photocopying machine to be used by Metlife which is owned by the 2nd plaintiff in the ING office as the rental is much cheaper. It was agreed by the 2nd plaintiff for LMM to take over the other photocopying machine which was being used by the 2nd plaintiff in ING office with a higher rental of RM700.00 for LMM's

usage in the Shamelin office. The rental agreement shows that LMM was renting the photocopying machine on a monthly rental of RM700.00 whilst the documents in the form of invoices found in exh "CHY-6" in Choo's Affidavit show that Metlife takes over the other photocopying machine on a monthly rental of RM240.00. From the facts and the arrangements between the parties, it can be easily imputed that the plaintiffs have knowledge of the existence of LMM in Shamelin office as early as 2010 when they took over the photocopying machine from the 2nd plaintiff's office in ING office. Further, from the exh "CHY-7" in Choo's Affidavit, expenses for the ING office are still being paid by two out of the three directors of the company to Metlife in 2010 at the request of the 2nd plaintiff. It is unbelievable that the plaintiffs do not have knowledge of the shifting of the office document and equipment of the company when the 2nd plaintiff at the same time has been receiving the money from Metlife.

[116] In para 35 of Choo's Affidavit, it is stated that pertaining to the allegation of unlawful money transacted out of the company's accounts, it was agreed between the plaintiffs and the three directors that pending the closure of the defendant's business, the defendant company will be used by the three directors in Shamelin office for the general insurance business. Commission was to be paid to LMM wherein 60% of the commission will be paid to the insurance agents and 40% will be used for the expenses incurred for the operation of the company's general insurance business in Shamelin office. There is nothing before this court to show how the three directors and LMM obtained personal gains and that the company suffers losses.

[117] This court agrees with the defendant's submission that the plaintiff's conduct in the light of the surrounding circumstances estopped them from now claiming that there were any wrongdoings on the part of the three directors. The undue delay and/or laches by the plaintiffs in taking any action implicates that they have knowledge and in fact consented to the shifting of the business out of ING office by the three directors.

[118] The plaintiffs in their submission stated that the company had never applied for any credit card from any bank. Hence, it is their contention that there can never be any credit card statements. Further, the credit card reflects the name of Choo. As such, the plaintiffs submitted that it was never a credit card of the company.

[119] The above submission is misconceived. The credit card statements for Choo shows that the money transactions dated back to year 2007 (exh "C-28 of the 2nd plaintiff's AIS) was for the payments of insurance premium for the defendant and for its use. The 2nd plaintiff himself had requested for account documents of the defendant as can be seen from the 2nd plaintiffs AIS from the company's secretary through his letter dated 19 April 2012 and he has also requested for "directors personal or company

credit card statements". The company's secretary had furnished the credit card statements of one of the three directors in their letter dated 27 April 2012 (exh "C-25" of the 2nd plaintiff's AIS). The plaintiffs themselves had requested for this credit card statements as part of the company's accounting documents. It is perplexing that the 2nd plaintiff is now using this issue to be one of the basis for this leave application when the plaintiffs knew at the material time of this occurrence. Even in their submission, the plaintiffs conceded that once the accounts are prepared, the defendant would benefit from the accounts whereby profit and losses of the defendant as well as misuse of the it's funds can be seen. In other words, the plaintiff themselves are uncertain whether they have any cause of action pertaining to the cause of action of breach of fiduciary duties on the part of the three directors. As such, the plaintiffs' submission that substantial portion of the monies or profits of the business of the company was effectively transferred to LMM is just bare allegation without any proof.

[120] This court finds that the plaintiffs failed to prove how the company would stand to benefit substantially premising on the facts of the case for a leave to be granted. The plaintiffs failed to show a valid claim by the defendant for a substantial sum against the proposed three directors.

[121] It does not appear that *prima facie* the proposed derivative action is in the best interest of the company for leave to be granted. The commercial interest of the company must be looked into to see whether the company will gain substantially in money in the proposed derivative action even if the application is made in good faith and may be meritorious. The facts of the case revealed that the company is not a profit-making entity. Based on the banking transactions of the company reflected in exh "C-26" of the 2nd plaintiff's AIS, the company was in fact not making substantial profits. As at 31 December 2009 before the alleged wrongdoing by the three directors, the company had only the balance of RM28,307.84 in its bank account. As at 28 February 2010, it only had RM18,665.45. No dividends were sought by or distributed to the shareholders of the company. The total amount that was allegedly transacted out of the company's accounts based on para 35 of the 2nd plaintiff's AIS is close to only RM25,000.00 which is also not secret profit to the three directors as the allegation of the unlawful money transacted out of the defendant's accounts was agreed between the parties that pending closure of the defendant's business, the defendant company is to use by the three directors in the Shamelin office for the general insurance business wherein 60% of the commission will be paid to the insurance agents and 40% will be used for the expenses incurred for the operation of the company's general insurance business in Shamelin office.

[122] Even if the derivative action is allowed and the plaintiffs succeed, the company would only be getting Orders for Audited Financial Statements to be prepared by the three directors. That will not change the current financial position of the company. The position will be the same even if no

derivative action was filed because the three directors have at all material times endeavoured to come out with the Audited Financial Statement of the company. The large scale of a derivative action which generally is costly does not commensurate with the reliefs proposed to be sought for by the plaintiffs. No commercial sense can be seen in this proposed action in any event.

[123] In *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak (supra)*, the Court of Appeal stated:

> "[28]...The test of the interest of the company can be found in the Singapore case of *Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd* [2004] SGCA 18, in this passage:
>
> > Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands "to gain substantially in money or in money's worth" (per Choo JC in Agus Irawan) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial consideration for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.
>
> And from Canada, in the case of *Ontario Ltd v. Bernstein* [2000] OTC Lexis 3480) (2000 OTC 758), we quote this passage:
>
> > Justice Brandeis (as quoted by Justice Nemetz in *Re Bellman et al and Western Approaches Ltd* [1982] 130 DLR (3d) 193 at p. 202) in *United Copper Securities So Et al v. Amalgamated Copper Co et al* [1917] 244 US 261 at p 263-4 stated:
> >
> > > Whether or not a corporation shall seek to enforce in the courts a course of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment.
>
> [29]This application, in effect, seeks to the unwinding of the entire MGO and we agree with appellant's stand that it would now be a laborious, costly and complicated process. It would also have a disastrous effect on the appellant's credibility and market reputation. It would further entail the return of every shares acquired by TM under the MGO back to all shareholders who chose to sell their shares over six years ago, which in

turn would cause substantial hardships to all those shareholders especially those who have expended the monies received. Further, there have been changes in shareholders many times over. We agree with the appellant that the learned judge here had failed to appreciate that there was no reasonable commercial sense of this proposed derivative action. His Lordship we feel, had also failed to seriously take into account the interests of the appellant and its former shareholders when allowing this leave application. This issue is of course a mandatory ingredient in considering whether to allow leave, as is expressed in s 181B(4) which needs repeating:

(4) In deciding whether or not leave shall be granted, the court shall take into account whether:-

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

To us, *prima facie*, it is apparent that the whole unwinding exercise is counter productive to the appellant's interest."

[124] In *Ang Thiam Swee v. Low Hian Chor (supra)* in finding that the proposed derivative action claiming for a lump sum of S$200,000.00 to have no practical gain on the company, the Singapore Court of Appeal held:

"57. This passage is particularly pertinent to the High Court's concern about the significant amount of money which has been disbursed from the Company's bank account (see [7] of the Judgment). While the Company might have an interest in recovering any misappropriated funds, it is difficult to see what practical gain the Company could obtain from the present matter if it is allowed to proceed further (ie if Low is given leave to bring a statutory derivative action). This is a situation where the parties are pointing accusatory fingers at each other, and neither party appears to be wholly without blame."

[125] The facts remain that the 2nd plaintiff has access to the company's accounting and banking documents as he was able to produce the company's resolutions, bank statements and credit card statements. It is not a situation where he is denied to have access to the company's documents and accounts. The availability of alternative measures exists. As stated earlier and *a fortiori*, the 2nd plaintiff as a director of the company may apply for any accounts of the company to be provided to him under s 167(6) of the Act. In *Loh Yoon Sang v. Ivory Pearl Sdn Bhd* [2003] 2 MLRH 760, Balia Yusof JC (as His Lordship then was) stated:

"Having considered the whole circumstances of the case and the evidence produced before me and to borrow the words and following the reasoning of Jacobs J in *Funerals of Distinction Pty Ltd* [1963] NSWR 614, referred to in *Haw Par Bros Pte Ltd v. Dato Aw Kow (supra)* I am of the similar view that s 167 (6) is in aid of the absolute right of a director under s 167(3) and it would need a very strong case to be made out to refuse an order under s 167(6)."

Conclusion

[126] On the totality of the above evaluation and considerations, this court finds that the plaintiffs have clearly not acted *bona fide* and the proposed derivative action would definitely not be in the interest of the company. The application was therefore dismissed with costs.