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TAI MAY CHEAN v. UNITED EASTERN RESOURCES SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
HADHARIAH SYED ISMAIL JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1955-10-2019]
21 SEPTEMBER 2021

C **Abstract** – *The applicant director and shareholder of company sought leave to bring an action in the name of the company against a vendor company, who, having received full purchase price of a property from the company, had refused to transfer the property to the company. In such an instance, the applicant ought to be allowed order in terms for having acted in the best interest of the company and in the absence of any collateral purpose intended by her action.*

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COMPANY LAW: *Derivative action – Application for leave – Applicant sought to commence proceedings in name of company for transfer and registration of property purchased by company from third party – Whether applicant acted in good faith and in best interest of company – Whether conduct in pending suits negated conduct of good faith and acting prima facie in best interest of company – Whether hostility between parties equated to lack of good faith or raised presumption of collateral purpose on part of applicant – Test in assessing element of good faith – Whether pending winding-up proceedings against company bar to application – Whether delay in filing application reasonable – Companies Act 2016, ss. 345, 347 & 348*

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The appellant, Tai May Chean ('TMC'), is the daughter of the second respondent, Ng Pik Lan ('NPL'), both of whom were the directors and shareholders of the first respondent ('company"). The company had purchased a property from one TYY Resources Sdn Bhd ('TYYR') and on 27 June 2011, paid in full to TYYR, the redemption sum for the said property. Despite having received the full purchase price for the property, TYYR had to date, refused to transfer the property to the company. On 25 June 2019, TMC commenced proceedings by way of originating summons ('OS') and applied for leave to bring an action in the name of the company pursuant to ss. 345, 347 and 348 of the Companies Act 2016 ('Act') against TYYR for the transfer of the property by TYYR to the company and for TYYR to account for all rentals received by it from the occupants of the property.

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There were also several pending suits between TMC and NPL namely (i) the mental health proceedings filed by TMC; (ii) an oppression action filed by NPL which was consolidated with a suit filed by TMC, the common issue in both of which pertained to whether TMC was the owner of the share held by her in the company or was she merely a nominee for NPL; and (iii) a winding-up petition filed by NPL against the company ('winding-up petition'), in respect of which TMC had sought a stay, pending disposal of the mental health proceedings. There was also a criminal prosecution against TMC for criminal breach of trust in respect of the company's funds based on a complaint lodged by NPL and in respect of which TMC's acquittal in the Sessions Court was subsequently replaced by a discharge not amounting to an acquittal by the High Court and Court of Appeal. The Judicial Commissioner ('JC'), despite finding that there was a good *prima facie* cause of action by the company against TYYR and that the documentary evidence of payment of the redemption had not been rebutted, dismissed TMC's application. The JC held, *inter alia*, that (i) there was a lack of good faith on the part of TMC in commencing this fresh action given that there were other actions in which TMC was appealing and had sought a stay of proceedings; and (ii) delay on the part of TMC in bringing this action and the pending winding-up petition. Hence, the present appeal by TMC against the JC's findings of lack of good faith, on the grounds that the JC had applied the wrong test; that the mere fact that the parties were involved in other proceedings was insufficient to show lack of good faith on an applicant's part; and that irrelevant factors that were never raised by her, were taken into consideration by the JC.

Held (allowing appeal; granting order in terms)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Generally, the majority is allowed to have its way and the minority at most, its say, except where it can be shown that the majority is not acting in the best interest of the company by its inaction when action is required. By virtue of s. 347(1) of the Act, leave of court must first be obtained before an action may be commenced in the name of the company so as to ensure that the interests of the company are not being disregarded to the detriment of the minority who has the interests of the company in mind and at heart. Such right is available to the "complainant" which includes a member or director of the company. (paras 27 & 28)

(2) There are two limbs to s. 348(4) of the Act, *ie*, that the complainant is acting in good faith ("limb 1") and that it appears *prima facie* to be in the best interest of the company that the application for leave be granted ("limb 2"). The good faith requirement has the twin elements of (i) whether *the applicant honestly believed* that a good cause of action

exists and that it has a reasonable prospect of success; and (ii) *whether the applicant is seeking to bring the derivative suit for such a collateral purpose* as would amount to an abuse of process. (paras 30 & 35)

(3) The court is required to assess the applicant/plaintiff's subjective satisfaction to see if the honest belief of the applicant/plaintiff as a member of the company, is reasonable. If the applicant/plaintiff is also a director, as in the instant case, the court would have to consider if a director similarly circumstanced would honestly believe that she is acting in good faith. That objective evaluation of reasonableness does not convert the subjective satisfaction of the member or director into an objective satisfaction of the court. Whether an applicant honestly and reasonably believes that a good cause of action exists, is to be subjectively assessed by the court. In this regard, the wrong test seemed to have been applied by the JC in assessing the element of "good faith". (paras 38, 39, 41, 73)

(4) The delay by TMC in bringing this action had to be considered in light of the fact that ordinarily, being a family dispute and more so when a daughter's wish is pitted against that of the mother, she would only resort to litigation as a last straw. In the circumstances of the case, the delay was reasonable and was neither detrimental to TMC's application nor could it be decisive in depriving her of her right to seek leave of court to commence a derivative action in the name of the company. Given that the redemption was paid on 27 June 2011, limitation would have set in after 12 years for an action for specific performance in land had TMC not sought leave of court now, to commence an action in the name of the company against TYYR. That kind of a delay should not be held against TMC bearing in mind further, the fact that the issue of delay was never raised by NPL in her affidavit in opposition, but was only raised for the first time in her solicitor's skeletal submission dated 17 September 2019. (paras 49, 50, 51 & 52)

(5) Unless the case was one where the venomous vendetta between the parties had led to vile vilification, clouding all reasonable and rational decisions and producing a perverted pursuit for personal gains, the hostility between the parties did not equate to a lack of good faith nor raised any presumption of a collateral purpose on the part of the applicant. The litigation proceedings between TMC and NPL, especially the mental health proceedings, would not be relevant to the proposed derivative action because NPL would not be named as a party to the said action which, if successful, would be to the company's benefit and indirectly, to NPL's benefit as a shareholder of the company in equal manner as TMC since both held equal shares in

the company. TMC could not be said to be pursuing some oblique or collateral purpose merely because there was a history of pending litigation between her and NPL. (paras 70-72 & 74)

(6) The JC's findings of fact that TMC had shown a good *prima facie* cause of action by the company against TYYR and that NPL had failed to rebut the documentary evidence showing payment of the redemption sum by the company were ample objective grounds to sustain a subjective good faith required to bring this derivative action. It mattered not if the same parties were already litigating at various fronts and that this move by one may be seen by the other as trying to score points in the overall tally of the battle and the bigger scheme of things. When faced with the allegation of a collateral and oblique purpose in seeking leave, the applicant must point to the cold facts that could not be contradicted that if leave was granted, *prima facie* the action would be in the best interest of the company. (paras 86-90)

(7) As a director of the company, TMC had a 'legitimate interest in the welfare and good management of the company itself' and she had every reason to conduct and manage the affairs of the company in accordance with the Act and to avoid any contravention of it that could be remedied with a legal action, as in this instance, through a derivative action. The pain and penalty of a contravention was a valid justification for TMC to seek leave to commence such derivative action in the name of the company against a bare trustee in TYYR. Such a plea for leave could not be postponed on account of other pending lawsuits between the parties or under the pretext that no prosecution would be proceeded with unless a police report was lodged. TMC's interest in preserving and protecting the asset of the company was a most natural and responsible thing to do and was also an action that could only benefit NPL as well, she being the other 50% shareholder in the company (paras 101-104)

(8) So long as TMC's action was aimed at enhancing the value of the company for the benefit of all shareholders, she would have demonstrated to the court's satisfaction that she had fulfilled the requirements of 'good faith' and 'acting in the best interest of the company'. The law does not require an applicant to feel goodwill towards the defendant who is objecting to the leave application. Whilst personal interest may be the prime motivation, yet if it also serves a broader purpose of promoting the welfare of the other shareholders as well, as in the instant case, the court should recognise the genuine grievance of the applicant in a case where the company would be the proper plaintiff and grant leave accordingly. The element of good faith would have been established so long as TMC honestly believed that a good cause of action existed and had a reasonable prospect of success. (paras 105, 106, 108, 112 & 113)

(9) A derivative action was merely a proceeding to seek leave to commence an action against TYYR and not against NPL at all and seeking reliefs for the benefit of the company rather than TMC's own benefit. Viewed from that perspective, TMC's present conduct could not be judged by her action in the other proceedings involving her and NPL for if she had acted unreasonably there, she would be mulct with costs and even costs on a solicitor-client basis if her conduct had been egregious. (paras 115 & 116)

(10) Whatever may be the final outcome of the mental health proceedings, the court making or affirming the final decision as the case may be, would be in a position to make ancillary orders and give directions with respect to the proceedings already commenced where limitation would set in if a fresh proceeding had to be recommenced in a case of mental disability of a director and shareholder in the person of NPL. Once leave was granted, TMC would be driving the litigation and the party suing would be the company. The party sued would be TYYR and NPL would not be in the picture at all. It could not therefore be seen how the outcome of the mental health proceedings should affect the test that the High Court must be satisfied before granting the leave for the derivative action. (paras 122-124)

(11) It was plain that the derivative action could not be validly objected to. As was held in *Perak Intergrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor*, winding up as an alternative remedy does not bar a shareholder from bringing a derivative action. Hence, viewed dispassionately, the existence of the winding up petition ought not to be a disincentive against the granting of leave for a derivative action and more so given the finding that it could not be said that TMC had failed to act in good faith and in the best interest of the company and the JC's finding that *prima facie*, the company had a good cause of action against TYYR. (paras 128-134, 137, 139 & 140, 141 & 142)

(12) The JC had failed to place sufficient weight to the fact of the impending limitation period for the said action which would set in around June 2023. The full payment of the redemption sum having been made on 27 June 2011 and TYYR having to date failed to execute the memorandum of transfer, the company may be prejudiced by further delay in bringing an action for specific performance, as its right to sue would have been extinguished to its detriment and loss once the action was statute-barred. (paras 145-147)

(13) The principle of "presumption of innocence" which is central to the right of TMC to the criminal charge against her, must always be upheld. It was even more imperative when the charge had resulted in an acquittal in the Sessions Court and was subsequently replaced by a discharge not amounting to an acquittal by the High Court and Court of Appeal. The fact that no fresh charge had been preferred would mean that the previous charge should have no bearing on the JC in his consideration against granting the leave application. (paras 148, 149 & 153)

(14) The relative prejudice suffered would be greater to TMC if she was not allowed to bring the proceedings in the name of the company against TYYR, as, should the company succeed, the benefit and fruit of its success would go to NPL in the event it was finally held that all the shares in the company were owned by NPL and that TMC was merely her nominee. There was no good reason to deny TMC the leave application prayed for nor was there any good reason to deny the company the right to prove and to claim that it had a basis for asserting that the property should be duly registered in its name. (paras 156-162)

Case(s) referred to:

Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors [2017] 1 CLJ 633 CA ***(refd)***
Ang Thiam Swee v. Low Hian Chor [2013] SGCA 11 ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Ferguson v. Wallbridge [1935] 3 DLR 66 ***(dist)***
Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case [2012] 7 CLJ 407 HC ***(refd)***
Kontron Asia Pacific Design Sdn Bhd & Anor v. Quah Sin Chye & Ors And Another Appeal [2018] 8 CLJ 490 HC ***(refd)***
Maher v. Honeysett & Maher Electrical Contractors [2005] NSWSC 859 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors [2018] 1 LNS 596 HC ***(refd)***
Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors And Other Applications [2018] 1 LNS 1426 HC ***(refd)***
Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor [2015] 10 CLJ 599 HC ***(refd)***
Pang Yong Hock and Another v. PKS Contracts Services Pte Ltd [2004] SGCA 18 ***(refd)***
Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor [2018] 5 CLJ 513 FC ***(foll)***
Re Firedart Ltd; Official Receiver v. Fairfall [1994] 2 BCLC 340 ***(refd)***
Richardson Greenshields of Canada Limited v. Kalmacoff et al (1995) 22 OR (3d) 577 ***(refd)***
Swansson v. Pratt [2002] NSWSC 583 ***(refd)***
Swansson v. R A Pratt Properties Pty Ltd And Another (2002) 42 ACSR 313 ***(refd)***
Tengku Ezuan Ismara Tengku Nun Ahmad & Anor v. Lim Seng Choon David [2017] 1 LNS 1840 HC ***(refd)***
Teo Gek Luang v. Ng Ai Tiong & Ors [1999] 1 SLR 20 ***(refd)***
Wescourt Design Sdn Bhd v. Westcourt Furnishing (M) Sdn Bhd [2015] 1 LNS 656 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Companies Act 2016, ss. 213, 245(1), (2), (9), 347(1), 348(2), (4)
Limitation Act 1953, s. 9(1)
Mental Health Act 2001, s. 52

Companies Act (Chapter 50) [Sing], s. 216A(3)
Corporations Act 2001 [Aust], s. 237(2)

For the appellant - Goh Meng Yew & Goh Jen Nie; M/s Iza Ng Yeoh & Kit
For the respondent - Michael Chow Keat Thye & Wong Zhi Khung; M/s Michael Chow

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-24NCC-340-06-2019 (overruled).]

Reported by Gavin Xavier

JUDGMENT

Lee Swee Seng JCA:

[1] The mother and daughter have against each other some pending suits before the courts since February 2013. The mother of all suits between them must surely be the one where the daughter is praying for a committee to be appointed to manage her mother's affairs on ground of her supposed mental disability or incapacity under the Mental Health Act 2001. This mental health action would have a domino effect on the other pending contentious suits if the outcome is in favour of the daughter.

[2] They are both at different rounds of their legal battles that have now reached the Court of Appeal and this present one is now at the leave application stage before the Federal Court.

[3] This is an action launched on 25 June 2019 by the daughter against the company United Eastern Resources Sdn Bhd ("the company") and the mother, seeking leave of the High Court to bring an action in the name of the company against another company named TYY Resources Sdn Bhd ("TYYR"), the vendor, that had received full purchase price of a property from the company but had refused to transfer the property to the company.

[4] It is an action under ss. 345, 347 and 348 of the Companies Act 2016 ('the Act"). The company is thus a nominal first defendant and the mother is the main second defendant.

[5] Apparently there are some tenants occupying the property which is a shop lot but that the vendor had failed to account for the rental collected and to pay over to the company.

[6] The plaintiff daughter had applied for leave to commence a derivative action for and on behalf of the first defendant against TYYR for the following orders:

(i) the transfer of a property held under Geran No. 10452, Lot No. 77, Section 6, Town and District of Kuala Lumpur having postal address at No. 21, Jalan Melati, 50100, Kuala Lumpur ("the property"); and

(ii) for an account of all rentals collected by TYYR on behalf of UER on the basis that the rentals are held by TYYR on a constructive trust for UER.

[7] There is a deadlock in the company as it has only two directors in the mother and the daughter who are also the two registered members of the company, both holding an equal number of shares of one share each.

[8] Even after receiving a formal notice from the daughter prior to this leave application, the mother had refused to take any legal action against the vendor company TYYR, which we understand to be a family company of some sort, the exact shareholding and directorship of which had not been disclosed to the court in the affidavits filed.

[9] The daughter cannot fathom why the mother could live with a purchase of a substantial asset of the company and yet refused to have it registered in the company's name. The limitation period of 12 years for a specific performance action is just round the corner and the action would be statute-barred soon.

[10] Any directors who had failed in the discharge of their statutory duties of care and skill to ensure that the company becomes the registered owner of a landed asset and has possession of it would be exposed to a negligent suit by the company, who by then may be controlled by different shareholders, depending on who the mother would transfer or bequeath her shares to. There is also exposure to criminal liability under the Act for which the directors may be prosecuted.

[11] On top of that the company is a separate legal entity from its shareholders and directors and any dereliction of duties as a director of the company to ensure that the assets of the company are protected and preserved would expose the directors to suits by the shareholders, including future shareholders of the company.

[12] The mother is already about 89 years old and she might in her will have bequeathed her 50% in the company to anyone of her children. Her shares would be transmitted to whoever is the rightful beneficiary of her estate.

[13] The daughter said that the mother had not disclosed any reason why she is not authorising the company to take legal action to ensure the property is registered in the company's name before limitation sets in. She merely said she would not suffer any action being taken against the vendor company.

[14] The daughter's stand is that no one in the proper frame of mind would refuse to have the property registered in the company's name when it is not disputed that the company had paid the full redemption sum of RM1,815,801.31 for TYYR to redeem the property from its bank BIMB on or about 20 June 2011 followed by TYYR's instruction to its bank to deliver the title and related documents to the company. The mother, being the other half registered owner of the shares in the company would also stand to gain from the registration of the property in the name of the company.

[15] She said she has acted in the best interest of the company by seeking leave of the court to commence the specific performance suit in the name of the company against the vendor company and that there is no collateral purpose intended by her action.

[16] She is aware that her mother's avowed stand is that her 50% share in the company is not hers but that she was a mere nominee for her mother. Until that is resolved and even if that be resolved against her, there is still no prejudice to the company and her mother because she would have the whole company to herself with the landed asset sitting snugly secured and nicely nestled in the company's name, with streams of rental income flowing into the coffers of the company.

[17] The learned High Court Judge disagreed. The learned judge was not impressed with her action to, as it were, right a wrong under the matriarchal leadership of the mother in the company.

[18] The learned judge considered the daughter's action in applying for stay of her other suits by and against the mother where the daughter has appealed to the Court of Appeal. The daughter would be acting in bad faith to commence this fresh action when in the other actions where she is appealing, she has asked for a stay of proceedings.

[19] The learned judge also considered the fact that there is a pending winding-up petition filed against the company and so if the company is wound up, the liquidator appointed would be in a position to bring an action to have the property transferred to the company's name.

[20] The learned judge was apparently influenced by the fact that should it be held that the mother is mentally incapacitated from managing her own affairs including giving instructions to solicitors for the pending suits, then such a decision would invariably affect this particular leave order that the daughter is seeking in that the leave granted would have to be set aside

resulting in unnecessary dissipation of time and energy on the part of all including the court. At any rate, having waited that long to bring this leave application, there does not seem to be any urgency in the matter which cannot be pursued by the liquidator and that things would be clearer after the relevant High Court has heard the mental health application brought by the daughter against the mother.

[21] It would appear from the perspective of the mother, with which the learned High Court Judge agreed, that this current leave application is yet another spanner being thrown into the works by the daughter to get the upper hand in her strategy to win not just the battle but the war declared in the continuing saga of the family legal disputes.

[22] The mother is in effect saying that the court should not be awed by what the daughter has painted; a picture of her crusading for what is right and even righteous, when for more than a decade she had quietly sat by, in silence. To the mother, nothing has changed other than that she is now asking for the daughter's shares back for she was a nominee to begin with. All hell seems to have broken loose. She sees her daughter springing into action in this case, for the battle has to be won not just at the personal level but at the psychological level as well, with every step carefully crafted to score some points.

[23] The learned High Court Judge had dismissed the daughter's leave application in encl. 1 and against that decision she had appealed to this court.

[24] The daughter, Tai May Chean ("TMC") is the plaintiff/appellant and the mother Ng Pik Lian ("NPL") is the second defendant/second respondent; the company being the nominal first defendant/first respondent. The daughter shall be referred to as TMC or the plaintiff and the mother as NPL or the defendant.

[25] Whilst there is much heat in the disputations, we must yet seek to bring the light of the law to help discern the thoughts and action of the two protagonists, to dispassionately separate the cold facts of the corporation from the calculated family contestations that seek to engulf in a conflagration everything in its wake.

What Is The Test Of "Good Faith" For A Leave Application To Commence A Derivative Action

[26] The law appreciates that there would be occasions when a company is under the control of the majority who, for reasons best known to them, are not prepared to bring an action on behalf of the company to pursue what is in its interest, whether it be for recovering a debt or to enforce its rights, whether contractual or otherwise. It may also be a case where a company is not keen to defend an action brought against it but which is perceived by the minority as being not in the best interest of the company. It also covers a case where the company may intervene in a proceeding.

[27] Generally the majority is allowed to have its way and the minority at most, its say except where the majority can be shown not to be acting in the best interest of the company by its inaction when action is required. To ensure that the interest of the company is not being disregarded to the detriment of the minority who has the interest of the company in mind and at heart, the law requires leave to be obtained first from the court before an action may be commenced in the name of the company. See s. 347(1) of the Act.

[28] This right is available to a "complainant" which includes a member or director of a company. See s. 345 of the Act. Section 348(2) of the Act requires a 30-day notice to be given to the directors prior to leave being sought from the court.

[29] The fact that the requisite notice had been given by the plaintiff TMC on 17 April 2019 is undisputed. Section 348(4) of the Act provides that:

> In deciding whether or not leave shall be granted, the court must take into account whether:
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> (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." (emphasis added)

[30] There are thus two limbs to s. 348(4) ie, the complainant is acting in good faith ("limb 1") and it appears *prima facie* to be in the best interest of the company that the application for leave to be granted ("limb 2").

Limb 1. The Good Faith Requirement

[31] The learned Judicial Commissioner ("JC") of the High Court had held that:

> ... **in determining 'good faith'**, this court needs to first consider whether, **objectively assessed**, there exists a good cause of action by UER against TYYR in respect of the Property and one that has reasonable prospect of success" and came to a conclusion that "... the requirement of 'good faith' on the part of the Plaintiff has not been established. (emphasis added)

[32] Learned counsel for the plaintiff had sought to challenge the learned JC's finding of a lack of good faith on the part of the plaintiff on the following grounds:

(i) the learned JC clearly applied the wrong test (ie, the objective test) for limb 1;

(ii) the learned JC failed to appreciate that hostility between the parties/or factions in corporate litigation disputes is bound to be present and therefore the mere fact that the parties are involved in other legal proceedings is insufficient to show lack of good faith on an applicant's part; and

(iii) the learned JC took into consideration irrelevant factors which were not raised by NPL herself.

[33] Our own Court of Appeal in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636 explained the test of good faith as follows:

> [15] The second crucial requirement for the determination of the court in granting leave is **the need for the respondent to show that he was acting in good faith in making this application** (s. 181B(4)(a)). The onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold. **One is an honest belief on the part of the respondent**, and two, that this application is **not brought up for a collateral purpose** ... (emphasis added)

[34] We agreed with learned counsel for the appellant that the Court of Appeal had followed the *dicta* in the Australian case of *Swansson v. Pratt* [2002] NSWSC 583 as follows:

> [36] "Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s. 237(2)(b) is satisfied., **The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success**. Clearly, whether the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief., **The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process**. (emphasis added)

[35] The "good faith" requirement has the twin elements of:

(i) whether the applicant honestly believed that a good cause of action exists and that it has a reasonable prospect of success; and

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

[36] As may be rightly observed the Australian statutory provision on derivative action is similar to the Malaysian provision to the extent that an applicant must fulfil the requirement of "good faith" in seeking leave. Section 237(2) of the Australian Corporations Act 2001 ("the Australian Act") states:

> (2) The court must grant the application if it is satisfied that:
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> (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
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> (b) the applicant is acting in good faith; and
>
> (c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings – there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) is appropriate to grant leave even though subparagraph (i) is not satisfied.

[37] Our s. 348(4) of the Act is also similar to s. 216A(3) of the Singapore Companies Act (Chapter 50) ("The Singapore Companies Act") which reads:

(3) No action or arbitration may be brought and no intervention in an action or arbitration may be made under subsection (2) unless the court is satisfied that:

(a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action or arbitration;

(b) the complainant is acting in good faith; and

(c) it appears to be *prima facie* in the interests of the company that the action or arbitration be brought, prosecuted, defended or discontinued.

[38] We appreciate that just because the applicant/plaintiff says that she honestly believes that she has acted in good faith does not mean that the court must accept her word for it. The court is required to assess her subjective satisfaction to see if as a member of the company her honest believe has been reasonable. If she is also a director, as in this case, the court would have to consider if a director similarly circumstanced would honestly believe that she is acting in good faith.

[39] That objective evaluation of reasonableness does not convert the subjective satisfaction of the member or director into an objective satisfaction of the court. Whether an applicant honestly and reasonably believes that a good cause of action exists is to be subjectively assessed by the court. See the Singapore Court of Appeal case of *Ang Thiam Swee v. Low Hian Chor* [2013] SGCA 11.

[40] The Supreme Court in New South Wales in *Maher v. Honeysett & Maher Electrical Contractors* [2005] NSWSC 859 said at para. [64] that the test is subjective in nature and held that "a state of mind" must be found in the applicant that he believes that a good cause of action exists and has reasonable prospects of success.

[41] With the greatest of respect to the learned JC, the wrong test seemed to have been applied in assessing the element of "good faith".

[42] However, beyond nomenclature, we would proceed to consider whether by applying the right test of subjective satisfaction of the part of TMC, has she satisfied the test of "good faith" and "*prima facie* to be in the best interest of the company".

What Is The Test Of Acting "*Prima Facie* In The Best Interest Of The Company" For A Leave Application To Commence A Derivative Action

[43] This is limb 2 of the requirement under s. 348(4) of the Act ie, it appears *prima facie* to be in the best interest of the company that the application for leave to be granted.

[44] The position of the law properly stated is that when the court considers the question of whether an action would *prima facie* be in the best interest of the company, the court must consider whether objectively speaking, the company would gain substantially in money or money's worth and whether there are genuine commercial considerations for not wanting to pursue the intended claim.

[45] Thus in *Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors* [2017] 1 CLJ 633, the Court of Appeal held, in respect of limb 2 as follows:

> [36] **in an application for leave, should not go into the merits of the case at the leave stage. Its role is to see if the application for leave is frivolous** ... Secondly, in the matter of an application for leave under s. 181A of the Act, it would be the duty of the court to weigh all the circumstances and decide whether the claim ought to be pursued.
>
> [37] At the leave stage, the issue is only whether it is in the best interest of the eighth respondent to pursue the claim. The apposite question therefore, should be whether, having considered the facts of the case, the eighth respondent **would gain substantially in money or money's worth and that there were genuine commercial considerations for not wanting to pursue claims** ... (emphasis added)

[46] It has also been variously stated as that the intended action is a legitimate and arguable case.

[47] In interpreting a similar provision in the Canadian legislation, Robins JA, delivering judgment on behalf of the Ontario Court of Appeal in *Richardson Greenshields of Canada Limited v. Kalmacoff et al* (1995) 22 OR (3d) 577 at 585 explained this requirement of limb 2 as follows:

> The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. Before granting leave, the court should be satisfied that **there is a reasonable basis for the complaint** and that **the action sought to be instituted is a legitimate or arguable one**. The preconditions

A of s. 339 [of the Trust and Loan Companies Act (SC 1991, c 45)] cannot be considered in isolation. Whether they have been satisfied must be determined in the light of the potential validity of the proposed action.

(emphasis added)

B **Whether The Plaintiff Had Satisfied Requirements Of "Good Faith" And "Best Interest Of The Company" For Leave To Commence A Derivative Action**

[48] The learned JC considered the fact of delay in TMC bringing this action. Apparently, she had in her capacity as a director of the company UER C threatened TYYR with legal action as far back as 27 August 2014.

[49] We are of the view that the delay has to be appreciated in the light of the fact that ordinarily, being a family dispute and more so when a daughter's wish is pitted against that of the mother, she would only resort to the litigation as a last straw. The delay is reasonable in the circumstances of this D case where familiar and family relationships must see forbearance coming to the fore and only where all long-suffering has suffered long and overtures rebuffed that a last resort to a derivative action is reluctantly commenced. See the case of *Teo Gek Luang v. Ng Ai Tiong & Ors* [1999] 1 SLR at para. 20.

E **[50]** The delay here is not detrimental to the plaintiff's application for leave and neither can it be decisive in depriving her of her right to seek the leave of this court in commencing a derivative action in the name of the company. The dilemma of the daughter becomes more defining as the dire consequences of her inaction draw nearer the deadline where limitation is F concerned.

[51] If TMC does not seek leave of the court now to commence the action in the name of UER against TYYR, limitation would have set in after 12 years for an action for specific performance in land. As the redemption was paid way back on 27 June 2011 to TYYR's bank BIMB, limitation G would be just round the corner. We do not think that kind of a delay should be held against TMC.

[52] We further note that the issue of delay was not raised by the mother NPL in her affidavit in opposition but only for the first time in NPL's solicitors' skeletal submission dated 17 September 2019. If the mother had H raised this issue of delay, then TMC would have the opportunity to reply. See *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281.

[53] There appears to be an apparent contradiction where delay is I concerned between NPL's own deposition in her affidavit in opposition that TMC's action was supposedly premature in view that her shareholding in UER is being challenged and that there is a live winding-up petition of UER pending.

[54] The learned JC did not view favourably the plaintiff's *bona fides* when he considered the plaintiff's mental health proceedings brought on 18 October 2018 against the mother in Kuala Lumpur High Court Originating Summons No: WA-24 NCvC-2129-10-2018 (the "mental health proceedings").

[55] TMC had applied to stay Kuala Lumpur High Court Originating Summons No: 24 NCC-49-02-2013 ("OS 49") and Kuala Lumpur High Court Suit No: WA-22NCC-124-04-2017 ("Suit 124"). OS 49 was brought by the mother against the daughter whereas Suit 124 was brought by the daughter on 11 April 2017 against the mother and seven others; the common issue in both the originating summons being the capacity of the daughter's share in the company, whether as the owner of the shares or only a mere nominee for the mother.

[56] In Suit 124 which has now been consolidated with OS 49 the parties have agreed to have the various pre-signed share transfer forms and the letters of resignation purportedly signed by the plaintiff to be tried. The authenticity of these documents is relevant to decide the issue of whether the plaintiff is holding her shares in the company for herself or in trust for the mother.

[57] OS 49 is also an oppression action under s. 181 of the Companies Act 1965. The daughter had also filed a counterclaim within the OS 24 and for a rough flavour of dispute we can have a foretaste of it in the judgment of JC Wong Chee Lin in *Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors And Other Applications* [2018] 1 LNS 1426; [2018] MLJU 1331:

> [60] The Plaintiff filed an oppression action against TMC by way of Suit 49. The 2 main claims made by the Plaintiff was, firstly, that TMC had misappropriated RM4.9 million from the second Defendant without her knowledge and that TMC was holding her share in the first Defendant company as trustee for the Plaintiff's benefit. On the first allegation, the Plaintiff has said that she does not know the basis on which TMC had taken the second Defendant's monies but TMC in her affidavit in reply has admitted to taking for herself and her companies the said sum of money and explained her basis for taking the money. On the second issue, the only eyewitness to TMC signing the pre-signed documents was her father who was the Plaintiff's husband who has passed away in May of this year. The Plaintiff was not an eyewitness and she has no personal knowledge to enable her to say that TMC had signed the blank forms. Most likely, the determination of this issue will be subject to the opinions of handwriting experts who were scheduled to file affidavits and be subject to cross-examination at the hearing. Strictly speaking, however the issue of forgery arises out of the counterclaim in Suit 49 and is not part of the oppression suit in Suit 49.

[58] TMC had also applied for stay of the mother's winding-up petition against the company in Kuala Lumpur High Court Companies Winding Up Petition No: WA-28NCC-466-07-2017 (the "company's winding up petition") pending the disposal of the Mental Health Proceedings; the winding up being on the just and equitable ground.

[59] The learned JC was of the view that it was disingenuous for TMC to commence the mental health proceedings and on one hand stay all legal proceedings brought by the mother NPL on the ground that NPL does not have the mental capacity to manage herself and her affairs and to instruct solicitors but on the other hand to commence this suit against NPL and to assert that she was the wrongdoer in control of UER which has caused it to be incapacitated from bringing an action against TYYR.

[60] The learned JC observed that TMC should hold this proceeding pending the results of the mental health proceedings. At any rate all the plaintiff's stay applications were dismissed by the High Court with the result that there was no stay of the various contentious suits and the decisions are currently pending appeals to the Court of Appeal.

[61] At first blush it appears that since all proceedings by the mother against the daughter are sought to be stayed and with that too all proceedings by the daughter against the mother, it would be natural that this present leave proceeding should not be allowed to proceed. However, there are peculiar considerations here such as limitation setting in and exposure of the daughter to suits for breach of fiduciary duty and statutory duty under the Act and even a criminal prosecution for an offence under the Act as well as what can only result in a likely overall benefit to the company.

[62] All these, as we hope to demonstrate, would justify treating this leave application as a stand-alone application that can be separately addressed, unaffected by the raging storm and howling wind of the contentions suits pending that seem to be gathering momentum with each step taken by the two protagonists.

[63] As highlighted to us by learned counsel for the daughter, the mother herself had not brought up at all the mental health proceedings in her affidavit in opposition affirmed on 1 August 2019. We agree with learned counsel for the plaintiff that the parties are bound by their depositions in their affidavits. See *Tengku Ezuan Ismara Tengku Nun Ahmad & Anor v. Lim Seng Choon David* [2017] 1 LNS 1840; [2017] MLJU 1927.

[64] It was brought up for the first time in the affidavit filed by the mother's solicitor Wong Zhi Khung which was filed on 13 September 2019 which was after the deadline set by the High Court for the filing of the second defendant's affidavit and after the plaintiff's solicitors had filed their submissions. It was also impressed upon us by the plaintiff's counsel that no leave was sought nor obtained from the High Court for the filing and service of the said defendant's solicitor's affidavit.

[65] We also note that it was learned counsel's submission on behalf of the mother that before the daughter may challenge the capacity of the mother to affirm her affidavits in OS 49 and Suit 124 and to instruct her solicitors to act for her, the daughter must first have obtained an order under the Mental Health Act 2001 after an inquiry under s. 52 thereof. The daughter had applied to strike out the mother's action in OS 49 and to strike out her affidavit in Suit 124.

[66] The learned JC Wong Chee Lin observed as follows in *Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors And Other Applications* [2018] 1 LNS 1426; [2018] MLJU 1331:

> [30] Learned Counsel for the Plaintiff submits that the court should not make the order sought by the applicants as they cannot seek to challenge the mental capacity of the Plaintiff without making an inquiry under section 52 of the Mental Health Act 2001. It is not in dispute that the applications herein are not brought pursuant to the Mental Health Act 2001.
>
> [31] In support, the Plaintiff relies on the Court of Appeal decision in the case of *MTD Prime Sdn Bhd v. See Hwee Keong & Ors And Another Appeal* [2016] 4 MLJ 695 wherein the defendants contended that the plaintiff had no *locus standi* to bring the action as he lacked the mental capacity to do so. The Court of Appeal held that:
>
> > ... As a general rule, under O. 76 r. 2(1) of the Rules of Court 2012 ("the ROC 2012") a person under disability does not have the capacity to bring proceedings in court. Order 76 r. 2(1) of the ROC 2012 provides:
> >
> > > A person under disability may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative.
> >
> > Order 76 r. 1 of the ROC 2012 in essence provides that a person under disability is a person who is a minor or a patient. A 'patient' means a 'mentally disturbed person' within the meaning of the Mental Health Act 2001.
> >
> > However, what is of greater significance for the purpose of this appeal is the definition of a 'mentally disordered person' as set out in s. 51 of the Mental Health Act 2001. The said s. 51 provides that a 'mentally disordered person' means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs. The law in the form of s. 52 of the Mental Health Act 2001 requires that an inquiry be held before any person is declared to be a mentally disordered person.

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> In the instant case, the plaintiff cannot be said to be a mentally disordered person as he has not been so found by due course of law to be mentally disordered and incapable of managing himself and his affairs. This by itself is sufficient to defeat the argument raised by the defendants (See *Wan Chon v. Chua Ka Bu* [2990] 2 MLJ 460).

B

...

> [34] Based on the authorities cited by Learned Counsel for the Plaintiff, I agree that I should not dismiss the Plaintiff's actions on the ground of mental incapacity as she has not been found to be mentally disordered pursuant to due course of law ie under the Mental Health Act 2001. Assuming, however, that I am wrong and that I am at liberty to determine the mental capacity of the Plaintiff without an inquiry under section 52 of the Mental Health Act 2001, I would find that TMC has adduced sufficient evidence to shift the evidential burden of proof to the Plaintiff.

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[67] The learned JC Wong Chee Lin finally concluded as follows:

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> [79] In all the premises, I am of the view that it would be just for me to only decide whether I will admit or exclude the affidavits of the Plaintiff and her husband after hearing the other evidence in Suit 49 and not at this juncture. Accordingly, I dismiss all the applications to strike out Suit 49 (the application by TMC and the second and 4th Defendants in Suit 49 and the application by TMC in Suit 124) with no order as to costs.

E

[68] That was what constrained the daughter to file the mental health proceedings for the appointment of a committee to manage the affairs of the mother and it would be natural then to apply for a stay of OS 49, Suit 124 and a subsequent winding up petition so as to properly put the horse before the cart.

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[69] We also note that it was the mother who had earlier applied for a stay of OS 49 when she was unhappy with the decision of the High Court in Civil Suit No. 22NCC-497-07-2-2013 ("Suit 497") to set aside a consent judgment entered into in OS 49 with the result that OS 49 was restored for hearing. The mother's application for stay of OS 49 pending her appeal against the setting aside of the consent judgment was dismissed by the learned JC Khadijah Idris in *Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors* [2018] 1 LNS 596; [2018] MLJU 568. The mother had not appealed against that decision dismissing her stay of OS 49.

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[70] We find merit in the plaintiff's argument that these proceedings especially the mental health proceedings, would not be relevant to the proposed derivative action because NPL would not be named as a party to the said action. More importantly, if the derivative action were to succeed, UER would benefit from the said action which would indirectly benefit NPL as a shareholder of UER in equal manner as TMC since both hold equal shares in UER. At this stage all that the plaintiff needs to show is that *prima facie* the proposed derivative action would be in the best interest of the company.

I

[71] With respect we do not think that just because there is a history of pending litigation between the plaintiff daughter and the defendant mother, there must then be some oblique or collateral purpose that the plaintiff is here pursuing.

[72] Hostility between the parties does not equate to a lack of good faith and neither does it raise any presumption of a collateral purpose on the part of the applicant unless it is a case where the venomous vendetta of the parties has led to vile vilification, clouding all reasonable and rational decision and producing a perverted pursuit for personal gains. See the case of *Pang Yong Hock and Another v. PKS Contracts Services Pte Ltd* [2004] SGCA 18 at paras. 20 and 22.

[73] Whilst we share the concern of the learned JC in that the court "cannot but be alive to the possibility that the plaintiff's [TMC] present action is part of her strategy in furthering her own personal interests in the legal proceedings against the parties therein rather than the interest of the first defendant [UER]", the court must nevertheless assess her subjective satisfaction of having acted in "good faith" and "in the best interest of the company" by evaluating dispassionately the benefits that she seeks to obtain for the company through the proposed litigation.

[74] If there is to be shown a collateral purpose, it has to be borne out from the reasons given by the defendant mother in opposing the leave application for a derivative action against TYYR.

[75] Having chosen the structure of a limited company to house her interests in the property, the mother cannot ignore the parameters within which a director cum member of the company, in this case her daughter with whom she has fallen out, is constrained to act to preserve and promote the best interest of the company.

[76] It is not disputed that the company had paid TYYR's bank to redeem the property of TYYR and the relevant transfer form had been sent by the solicitors of TYYR for its client's execution but TYYR had not executed as the transferor. The rental continued to be collected by TYYR without any accounting to the company UER.

[77] If indeed this leave action is a strategic move by the plaintiff in the overall big picture of the multiplicity of suits between the mother and daughter, then it has to be shown how this strategy could not be furthering the best interest of the company. The plaintiff may even be acting selfishly as a member of the company, but then it is the kind of altruistic selfishness that would preserve for the company what it is supposed to have obtained, with the property duly registered in its name.

[78] Even if it is finally decided that the shares that she holds in the company is only as a nominee for her mother, that would still not bring any detriment to the company but only the fruits of proper governance where the

company, having paid the purchase price for the property, has every right, consistent with the law and proper accounting, to have the property reflected as a registered asset of the company with the land title reflecting that. It is trite law that under the Torrens system of title by registration, the title is everything.

[79] The learned JC was arguably affected by TMC's conduct in seeking to stay OS 49, Suit 124 and the company's winding up proceedings, when to proceed would not be to her advantage but on the other hand, to push for her leave application to be heard, to further ostensibly, the company's interests as a whole.

[80] Whilst TMC may be no angel, we cannot say that she has slipped over to the dark side by wanting to ensure that the company conducts its affairs in accordance with the law and that its member and director in her, be allowed to pursue the derivative action, not directed against NPL but against TYYR which is supposed to have done everything to ensure that the property is registered in the name of the company and the rental accounted for.

[81] Not to do so would be a dereliction of her duty as a director of the company that the law enjoins to have her act at all times properly, with all due diligence of reasonable skill and care and in the best interest of the company.

[82] It is no comfort to say that no one would sue her for any breach of fiduciary duties as the other member is the mother who is not willing to take any legal action against the vendor TYYR. As is only too obvious, any new members of the company, in going through the records of the company may want to take action against the directors who were responsible for not ensuring that the substantial purchase and asset of the company is preserved.

[83] The mother is already in her late eighties and her shares in the company may be bequeathed to her other children who may not see eye-to-eye with their sibling TMC. If at the end of the day TMC's shares is declared by the court to have been held in trust for the mother NPL, TMC might find herself not only ousted from the company but also facing a suit from the company for not ensuring something as simple as ensuring that the company's property is duly registered in the company's name.

[84] We are not given more information about TYYR in terms of shareholding and directorship save that it is a family company but the reality is why should TMC suffer the risk of being sued for breach of fiduciary and statutory duties under the Act because of a possible new dynamics in the family dispute as and when the mother NPL is no more.

[85] We must resist every temptation to read more into the undisputed facts that stare at us in the face. We may not fathom the underlying currents in the simmering discontent that had led to the conflagration in the multiple

suits filed by the daughter and the mother at different fronts for indeed who can understand the motives and motivations of family relationships that have gone awfully awry.

[86] Be that as it may, the learned JC had earlier found that the daughter TMC had shown a good *prima facie* cause of action by the company UER against TYYR and that the mother NPL was unable to rebut the documentary evidence showing payment of the redemption sum by UER. There was also the finding of the learned JC that the transfer documents had been forwarded to UER evidencing the purchase of the property and that there was nothing to suggest that UER had paid TYYR for any other reason. The learned JC's clarity of findings of facts are set out below:

> [38] I find that the Plaintiff has shown that there is a good *prima facie* cause of action by UER against TYYR in respect of UER's purchase of the Property from TYYR. The 2nd Defendant has not been able to rebut the documentary evidence showing that the redemption sum of RM1,815,801.31 was in fact paid by UER to BIMB. There is also the fact that the Transfer From 14A and the Assignment of the Property were forwarded to UER evidencing the purchase of the Property.
>
> [39] Apart from the 2nd Defendant's letter of 19.9.2014 stating that she had 'no recollection that UER has ever insisted that any property of TYY be transferred to UER or that any rental income by TYY should be paid to UER' and stating further that she 'had not, do not and will not support, any legal action to be taken by UER against TYY', there is nothing before this court suggesting that the payment of the said sum of RM1,815,801.31 was for any purpose otherwise than for the purchase of the Property. In fact, the 2nd Defendant in the same letter had stated that she had 'no issue with any rentals relating to the above property being held by TYY and I have not and will not support any action to insist that the above property be transferred from TYY to UER'.

[87] We agree with learned counsel for the daughter that the above provided ample objective grounds to sustain a subjective good faith that is required to bring this derivative action.

[88] We are of the view that, more often than not, a leave application of this nature is constrained by the parties sometimes obstinately refusing to agree with the other in the context of trouble brewing and even boiling over in disputes that have disrupted if not destroyed the already fragile relationship of mutual trust and confidence. Such being the case, we need to tease out the material facts not in dispute and see if there are any valid reasons proffered for prohibiting what is *prima facie* an action that can only be for the best interest of the company. It does not matter if the same parties are already litigating at various fronts and that this move by one may be seen by the other as trying to score points in the overall tally of the battle and the bigger scheme of things.

[89] Parties may even be hostile towards each other arising out of a total collapse of the element of mutual trust and confidence. It is only too true that love can so easily turn to hate and that trust once broken, is difficult to be restored.

[90] Decided cases have illustrated that when faced with the allegation of a collateral and oblique purpose in seeking leave, the plaintiff applicant must point to the cold facts that cannot be contradicted that if leave is granted, *prima facie* the action would be in the best interest of the company.

[91] Our attention was drawn on to the case of *Ong Keng Huat v. Fortune Frontier (M) Sdn Bhd & Anor* [2015] 10 CLJ 599; [2015] 11 MLJ 604 where Mohd Nazlan JC (as he then was) held at para. 46:

> The court ruled that the onus was on the applicant to establish good faith on his part and the court must assess the motivations of an applicant in order to determine whether he is acting in good faith. *Good faith was stated to be less dependant on the motives which trigger the application, but more on the purpose of the proposed derivative action, which must have a clear nexus with the company's benefits or interests*. The motivations of the applicant would only amount to a lack of good faith if they revealed that the applicant's judgment was influenced by purely personal considerations. The applicant must demonstrate that he is genuinely aggrieved and that *his collateral purpose is sufficiently consistent with the objective of doing justice to the company*.
>
> (emphasis added)

[92] See also the cases of *Pang Yong Hock and Another v. PKS Contracts Services Pte Ltd* [2004] SGCA 18 at paras. 20 and 21 and Ang Thiam Swee at para. 13.

[93] The cases suggest that the focus and concern of the court should be less on the motive that triggers the action but the mission that the action is sought to achieve. For after all, as Solomon would remind us, the purposes of a person's heart are deep waters and it would take one who has insight to draw them out.

[94] It is a case of the ends must justify the means and here the means is the unpleasantness of the court's hand in moving the subject company into action when it has chosen the default position of inaction. The ends is that the company's landed asset in the property purchased would be preserved and the right to collect rental. There is also a need for the company's accounts and annual report to accurately and correctly reflect the purchase by the company and a substantial asset at that.

[95] The company UER's accounts have to be audited and the auditor would naturally be asking for the proof of the property purchased and unless this is reflected in the title being registered in the company's name, there may be a need to qualify the accounts.

[96] Section 245(1) and (2) of the Companies Act 2016 imposes a duty on directors of a company to keep proper accounting records to explain the transactions of a company as follows:

> 245(1). A company, the directors and managers of a company shall:
>
> (a) cause to be kept the accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets and any documents required to be attached thereto to be prepared; and
>
> (b) cause the accounting and other records to be kept in a manner as to enable the accounting and other records to be conveniently and properly audited.
>
> (2) A company, the directors and managers of a company shall cause appropriate entries to be made in the accounting and other records within sixty days of the completion of the transactions to which the entries relate.

[97] In *Re Firedart Ltd; Official Receiver v. Fairfall* [1994] 2 BCLC 340, the court found a director to be in breach of his statutory duty under s. 221 of the UK Companies Act 1985 which is similar to s. 245 of the Malaysian Companies Act 2016 in that he had failed to maintain documents in the company's financial records to explain the company's expenditure and liabilities as recorded in the company's books. See the case of *Westcourt Design Sdn Bhd v. Westcourt Furnishing (M) Sdn Bhd* [2015] 1 LNS 656; [2015] 11 MLJ 735 and *Kontron Asia Pacific Design Sdn Bhd & Anor v. Quah Sin Chye & Ors And Another Appeal* [2018] 8 CLJ 490.

[98] In *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* [2012] 7 CLJ 407, the High Court held that the company's management and directors could not exonerate themselves from liability for the irregularities and breach of their duties to keep proper accounts by relying on the fact that the company's accounts had been audited.

[99] Section 245(9) of the Act provides for criminal sanction in the event of non-compliance as follows:

> The company and **every officer who contravenes this section commit an offence** and shall, on conviction, be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both. (emphasis added)

[100] The above specific statutory duties of a director, of which the daughter is one, is within the overarching duty housed in s. 213 of the Act as follows:

> **213. Duties and responsibilities of directors**
>
> (1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in **good faith in the best interest of the company**.

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(2) A director of a company shall exercise reasonable care, skill and diligence with:

(a) the **knowledge, skill and experience which may reasonably be expected of a director** having the same responsibilities; and

B

(b) any additional knowledge, skill and experience which the director in fact has.

(3) A director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding **five years or to a fine not exceeding three million ringgit or to both**. (emphasis added)

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[101] As a director of the company the daughter has every reason to conduct and manage the affairs of the company in accordance with the Act and to avoid any contravention of it that can be remedied with a legal action in court like in this case through a derivative action. The pain and penalty of a contravention is a valid justification for the plaintiff daughter to come to court pleading for leave to be granted to her to commence a derivative action in the name of the company against a bare trustee in TYYR to transfer to the company the property purchased.

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[102] Such a plea cannot be postponed on account of other pending law suits between the parties or under the pretext that no prosecution would be proceeded with unless a police report is lodged. The daughter already had tasted the pain of it when the mother lodged a police report against her that led to her being prosecuted in the Sessions Court. The daughter has every reason to avoid the same fate being visited against her in a battle where the siblings are already taking sides and aligning themselves with the party that they think would eventually emerge victorious.

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[103] Besides the exposure to prosecution and liability, the daughter's interest in preserving and protecting the asset of the company is a most natural and responsible thing to do and it is also an action that could only benefit the mother as well, she being the other 50% shareholder in the company. The company is after all an investment holding company and all investments in properties or another assets have to be properly accounted for.

G

[104] The daughter, as a director of the company, has a "legitimate interest in the welfare and good management of the company itself" to borrow an expression used in the Australian case of *Swansson v. R A Pratt Properties Pty Ltd And Another* (2002) 42 ACSR 313; [2002] NSWSC 583 as follows:

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> 38 Where the application is made by a *current shareholder of a company who has more than a token shareholding and the derivative action seeks recovery of property so that the value of the applicant's shares would be increased, good faith will be relatively easy for the applicant to demonstrate to the court's satisfaction*. So also, where the applicant is a current director or officer: it will generally be easy to show that such an applicant has a *legitimate interest in the welfare*

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> *and good management of the company itself*, warranting action to recover property or to ensure that the majority of the shareholders or of the board do not act unlawfully to the detriment of the company as a whole.
>
> (emphasis added)

[105] The motivation for bringing a derivative action may not be completely altruistic and may even have a selfish side to it, but then the law does not require an applicant to be an angel. So long as the applicant's action is aimed at enhancing the value of the company for the benefit of all shareholders, and here there are only two in the mother and the daughter, the daughter would have demonstrated to the court's satisfaction that she has fulfilled the requirements of "good faith" and "acting in the best interest of the company."

[106] The law does not require an applicant to feel goodwill towards the defendant who is objecting to the leave application. Here it appears that there is no love lost. The action may even have been activated by some animosity but the court would separate the feelings from the facts and to see if the overall outcome is for the benefit of all shareholders and the company as a whole.

[107] The following observation in the *Swansson*'s case (*supra*) resonates with us:

> 41 To take another example: a *derivative action sought to be instituted by a current shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant*: it is not the law that only a plaintiff who feels goodwill towards a defendant is entitled to sue ... On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith. (emphasis added)

[108] Whilst personal interest may be the prime motivation in enhancing and preserving the value and worth of one's shares in the company, yet if it also serves a broader purpose of promoting the welfare of the other shareholder as well, like in the instant case, then the court should recognise the genuine grievance of the applicant in a case where the company would be the proper plaintiff and grant leave accordingly.

[109] In a leave application of this nature it falls upon to court to separate as it were the wheat from the chaff, the bite from the bark. The balancing of competing and conflicting interest in the context of the complete whole circle of the corporate structure is captured in the dicta from the New South Wales Supreme Court case of *Maher v. Honeysett & Maher Electrical Contractors* [2005] NSWSC 859 as follows:

A 45 Moreover, *the existence in an applicant of a personal interest in the outcome of a proposed derivative action, or even of a personal animus against the company, or other members of it, cannot be significant, let alone decisive; they are usual concomitants of the types of disputes which lead to derivative actions*, and few if any such actions would be brought but for personal interest on the part of the relevant applicant and in the absence of *animus* against the
B company or other shareholders. Corporations Act, Pt 2F.1A was *intended to facilitate the bringing of derivative actions where appropriate, and not to impose restrictions which did not previously exist*. According to the Explanatory Memorandum, the criteria are aimed at 'preventing potentially vexatious or unmeritorious actions that would be detrimental to the company on whose behalf the action was taken' and 'seek to strike a balance between
C the need to provide a real avenue for applicants to seek redress on behalf of the company where it fails to do so and the need to prevent actions proceeding which have little likelihood of success'. Explanatory Memorandum, paragraphs 6.1, 6.2. *That balance would not be served by excluding applicants who have a genuine grievance in respect of which the company*
D *is the proper plaintiff, just because they have a personal interest or animus in doing so*. (emphasis added)

[110] Far too often, familiar and family relationships may become so fractured, leaving the parties frustrated, fuming and furious. The court's task would be to separate the abiding principles from the *animus* of the
E personalities in promoting what is in the "best interest of the company."

[111] The daughter may not be completely without reproach in the cacophony of combative court claims and counterclaims but for the purpose of this leave application we need only to confine ourselves to the question as to whether she has acted reasonably in good faith and in the best interest
F of the company.

[112] We would agree with the plaintiff that for so long as she honestly believes that a good cause of action exists and that it has a reasonable prospect of success, the element of "good faith" would have been established.

G **[113]** We also see that the intended derivative action is fairly legitimate and arguable and can only benefit both the shareholders where "the best interest of the company" is concerned.

Whether The Applicant's Conduct In The Mental Health Proceedings And Other Pending Proceedings Negated Her Conduct Of Good Faith And
H **Acting *Prima Facie* In The Best Interest Of The Company In The Leave Application Or That It Would Be Inappropriate To Grant The Leave Sought**

The Mental Health Proceedings By The Daughter Against The Mother

I **[114]** Learned counsel for the plaintiff daughter submitted that the learned JC was unduly influenced by the daughter's pending Mental Health Proceedings against the mother as well as other pending proceedings in the

High Court in concluding that she failed to satisfy the requirement of good faith and has acted in the best interest of the company in the present leave application supported by contemporaneous documents and admissions made by TYYR that TYYR is holding the said property and rentals collected therefrom for the benefit of the company UER since 2011.

[115] It must not be forgotten that the daughter TMC owes a fiduciary as well as a statutory duty to the company UER as its director to protect its interests. A derivative action is merely a proceeding to seek leave to commence an action against TYYR and not against the mother NPL at all and seeking reliefs for the benefit of UER rather than her own benefit.

[116] Viewed from that perspective, her present conduct cannot be judged by her action in the other proceedings involving her and the mother for if she had acted unreasonably there, she would be mulct with costs and even costs on a solicitor-client basis if her conduct has been egregious. Nothing comes close to that has been found so far.

[117] The learned JC held, and as contended by the plaintiff in her various stay applications, that if leave is granted and TMC proceeds to commence an action against TYYR and it is subsequently determined that NPL is mentally disordered, this action would be null and void and the consequence of such determination is that NPL is mentally incapable of appointing and instructing her solicitors in this action. This, the learned JC held will result in a complete waste of time and money for the company.

[118] The learned JC is at liberty to take the mother's affidavit filed as being properly filed and to proceed from the premise that she is in full control of her faculties when she affirmed her affidavit to oppose the leave application for it was explained to her by an advocate and solicitor and signed in the presence of a Commissioner for Oaths.

[119] As and when an order is made in the mental health proceedings against the mother, the court granting it would state the date it is effective from so as not to affect proceedings validly taken by or against the mother. Even if the order made would affect the validity of the affidavits that she had signed, all that it means is that there were no proper affidavits before the court then and more so when the mother had gone down on record as stating that she had made the affidavits freely, voluntarily and understood the contents thereof.

[120] Looking at the facts of this case and taking her at her word that she was fully conscious and cognisant of the reasons for objection to the leave application and taking her objections as being properly raised, the learned JC had found as a matter of fact that the company has a good cause of action against TYYR. The fact that the Mental Health Proceedings may well end up with the mother being declared mentally incapable of managing her affairs

would not assist the mother any bit than it would assist the daughter for it is only postponing the problem that has to be addressed now as limitation may set in soon.

[121] Alternatively if the mother had no mental capacity to affirm her affidavit to oppose the derivative leave application, then what was affirmed would not be her affidavit and there would have been no material before the court with respect to opposing the application brought by the daughter other than the solicitor's affidavit filed in support of the mother's application but referring only to the pending proceedings before the various courts involving the mother and the daughter.

[122] Whatever may be the final outcome of the mental health proceedings we are more than confident that the court making or affirming the final decision as the case may be would be in a position to make ancillary orders and give directions with respect to proceedings already commenced where limitation would set in if a fresh proceeding has to be recommenced in a case of mental disability not of the company here but that of a director and shareholder in the person of the mother.

[123] Once leave had been granted, the daughter would be driving the litigation and the party suing would be the company and the party sued would be TYYR and the mother would not be in the picture.

[124] We cannot see how the outcome of the Mental Health Proceedings should affect the test that the High Court must be satisfied before granting the leave for the derivative action.

[125] We cannot worry too much of the future where the final result of the mental health proceedings is concerned for it may well be litigated to the apex court. This is a case where we are content to let tomorrow take care of itself for each day has enough problems of its own.

The Winding-up Petition Brought By The Mother Against The Company

[126] The learned JC referred to a pending winding-up petition filed by the mother NPL against the company based on complete breakdown of relationship. With NPL and TMC holding equal shares and with UER being deadlocked, the mother as petitioner had sought to persuade the winding up court to wind up the company on just and equitable grounds.

[127] The learned JC further held that there was supposedly nothing to suggest that NPL was motivated by ulterior motive in filing the UER winding-up petition and that while it cannot be said that the UER winding-up proceedings is guaranteed to succeed, it cannot be said that NPL does not have reasonable grounds to wind up UER based on the alleged deadlock situation and breakdown in trust and confidence between parties.

[128] With the greatest of respect, we fail to see how the possible winding up of the company could have a bearing on the current derivative action. As the learned JC had held that the daughter has been able to show a *prima facie* good cause of action against TYYR, any liquidator appointed upon the winding up of the company may choose to continue with the suit as there is the asset of the company in the property to be recovered and the uncollected rentals to claim which would be in the interest of all the contributories of the company. We fail to see how it could be said to be an exercise in vain for the moment, awaiting the decision of the liquidator upon a winding-up order being made.

[129] Should the liquidator decide not to continue with the derivative action, that itself would be a decision that an aggrieved contributory may challenge in court.

[130] In the event that the winding-up petition is dismissed there would be "lost time" and the danger of limitation having set in the intended derivative action against TYYR against the backdrop of the learned JC own finding that the company UER has a good cause of action against TYYR.

[131] We agree with learned counsel for the daughter that the winding-up petition being before a different court there was no need to enter into anything speculative with respect to whether a winding-up order would eventually be made as the intended derivative action could hardly be affected by a winding-up order against the company. Indeed, the relative prejudice would be greater for the company should limitation set in by the time the winding-up petition is finally disposed of one way or the other.

[132] The winding up petition was filed by the mother NPL after the daughter had filed Suit 124 which according to NPL herself is supposed to determine TMC's position in the company UER. The mother had earlier filed her first salvo in OS 49 involving the company UER to ask for among other things declarations that TMC is a mere nominee of her shares in the company UER.

[133] Learned counsel for the daughter TMC also took umbrage against the learned JC's stand that it would be in the interest of company UER for the UER winding-up petition to be determined first rather than granting leave and that a liquidator appointed in the event UER is wound up would be better placed to commence the action against TYYR.

[134] With respect we do not see how the above approach can be more advantageous to the company against the impending limitation setting in to make the proposed action by the liquidator statute-barred as and when he is appointed and more so against the backdrop of a finding by the learned JC that the company has a *prima facie* good cause of action against TYYR.

[135] Whilst we should proceed from the premise that the liquidator appointed would act professionally, we are nevertheless conscious of how business reality is such that a petitioner to a winding up petition would appoint a liquidator of his choice and not the Director General of Insolvency ("DGI") as in this case by the mother petitioner. There is much leeway in the exercise of a liquidator's discretion whether or not to commence an action against TYYR to recover what is ostensibly the property of the company and the influence of the petitioner over the liquidator's exercise of his independent discretion and decision cannot be dismissed as being altogether fanciful.

[136] We are of course confident that the liquidator to be appointed in the event that the company is wound up would act professionally but then again, seeing how the various proceedings had been fought, it would take quite a while before parties exhaust all avenues of appeal and the winding up could then be said to be final and by then limitation would have set in irreversibly.

[137] We cannot help getting the feeling that it would only be postponing what is an important decision that the plaintiff daughter wanted the court to decide, and shorn of the fireworks from the *dramatis personae* in this action, it is plain that the derivative action cannot be validly objected to.

[138] The learned JC had referred to the case of *Ferguson v. Wallbridge* [1935] 3 DLR 66 as support for the above approach. However, the court in *Ferguson*'s case, was referring to a situation where a company was already in liquidation. In that case, the court held that there would be no need to file an action if the company concerned is in liquidation as the majority shareholders would no longer be in control on liquidation and instead all powers are vested with the liquidators:

> ... But *cessante ratione legis, cessat lex ipsa*. So soon as the company goes into liquidation the necessity for any such expedient in procedure disappears. Passing over the superficial difficulty that a company in compulsory liquidation cannot be proceeded against without the leave of the court, the real complainants, the minority shareholders, are now no longer at the mercy of the majority, wrongly retaining the property of the company at the strength of their votes.

[139] We agree with learned counsel for the plaintiff, the daughter TMC, that a more relevant case would be or Federal Court case of *Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* [2018] 5 CLJ 513; [2018] 4 MLJ 1. Here, the Federal Court held that winding up as an alternative remedy does not bar a shareholder from bringing a derivative action:

> [100] We are of the view that **the *dicta* in *Barrett v. Duckett* and others ought to be confined to, and understood against the background of, the unusual circumstances of the case**. In respect of a company which is a

going concern, we consider the correct position of the law to be as stated in H Tijo, P Koh, PW Lee, *Corporate Law* (Singapore: Academy Publishing, 2015) at p 440:

> The decision in *Barrett v. Duckett* [1995] 1 BCLC 243, therefore, may be better understood as a case where the court, in the light of the very real possibility that the company would be placed in liquidation, had decided that a derivative action by a shareholder was simply, as Gibson LJ himself put it, 'inappropriate' (Barrett at 255). The position *vis-a-vis* the availability of alternative proceedings or processes should be as put forth by Judge Reid QC, sitting as a judge of the High Court, in *Mumbray v. Lapper* [2005] EWHC 1152; [2005] BCC 990 at [5]):
>
> > The true position is that, while the availability of an alternative remedy is a factor, and may well be an extremely important factor, it is not an absolute bar and the fact that it is possible to point to some other alternative method of achieving the desired result does not mean that it is inevitably inappropriate for permission for a representative action to be continued.
>
> [101] The broad proposition that a derivative action is disallowed if winding up is available as an alternative remedy in respect of a company which is a going concern lacks support in authority and basis in principle. **The option of winding up does not itself operate as an automatic bar to a shareholder bringing a derivative action on behalf of a going concern company**. Additionally, we note that winding up a company which is a going concern has generally been regarded as a drastic measure (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 2 MLJ 227 at p 233). **The appropriate route for a shareholder in any case would depend on the nature of the relief sought, and whether the necessary elements for the remedy could be satisfied on the facts and circumstances of the case**. (emphasis added)

[140] Therefore, viewed dispassionately, the existence of the UER Winding- up petition ought not to be a disincentive against the granting of leave for a derivative action and more so when the learned JC had found that *prima facie* the company has a good cause of action against TYYR and as we have found so far, it cannot be said that the plaintiff daughter has failed to act in good faith and for the best interest of the company in seeking leave to commence the derivative action against TYYR.

[141] Very pertinently, even if UER is ordered to be wound up, the liquidator would still be able to proceed with the action against TYYR and be legally bound to account for and recover all assets including the property belonging to UER. We fail to see how the UER winding-up petition would adversely affect the action against TYYR.

[142] The learned JC had explored the position that the parties may apply to court to direct the liquidator to proceed with the claim or to permit the party to sue in UER's name in the event the liquidator refuses to pursue the claim. However since the alternative remedy of winding up is not a bar to this action and since the winding-up petition has not been heard yet, there is no need to postulate various possibilities when as we have found so far, there is no bar to the leave being granted at this stage when the learned JC had held that the company has a good cause of action against TYYR and more so when limitation looms round the corner.

[143] It would be to postpone a decision to a later date when there is no real advantage to be had for the company but every danger of the future action being statute-barred, not to mention the possible exposure of the directors left behind to possible action for breach of fiduciary and statutory duties and even criminal prosecution.

[144] We have used the expression "directors left behind" circumspectly as we cannot, and no one for that matter, be sure which of the two directors would outlive the other; the mother being 86 years old or the daughter approaching 68 years old.

[145] We find merits in the daughter's contention that the learned JC had not placed sufficient weight to the fact of the impending limitation period for the said action which would set in around June 2023 as the full redemption sum of RM1,815,801.31 was paid by the company to TYYR's bank BIMB on 27 June 2011 and that BIMB had undertaken to release to the company the title to the said property and the related documents. To this day TYYR had failed to sign the memorandum of transfer prepared by their own solicitors Messrs Balasingam & Co for their execution.

[146] Section 9(1) of the Limitation Act 1953 provides as follows:

> Limitation of actions to recover land.
>
> (1) No action shall be brought by any person to **recover any land after the expiration of twelve years from the date on which the right of action accrued to him**, or if it first accrued to some person through whom he claims, to that person. (emphasis added)

[147] Further delay in bringing an action for specific performance in the transfer of the property from TYYR to the company may prejudice the company and once the action is statute-barred, the company's right to sue would have been extinguished to the detriment and loss to the company. The plaintiff is also exposed to a negligent suit by the company in the new dynamics involving the new shareholder by transmission of the mother's 50% share in the company in her last will and testament, assuming she has one.

The Criminal Breach Of Trust Proceeding Against The Daughter

[148] The learned JC held that given the charge for criminal breach of trust against the daughter TMC as a director of the company and considering the animosity between the parties, it would not be in the company's best interest for TMC to drive the legal action against TYYR. The learned JC was of the view that a liquidator appointed in the event that UER is wound up would be better placed to commence such an action.

[149] With respect, we must always uphold the principle of the "presumption of innocence" which is central to the right of the daughter to the criminal charge. See the Federal Court's case of *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1.

[150] This is even more imperative when the criminal charge resulted in an acquittal at the Sessions Court and subsequently replaced by a discharge not amounting to an acquittal by the High Court and Court of Appeal. The fact that no fresh charge had been preferred by the prosecution would mean that such a previous charge should have no bearing on the learned JC in his consideration against granting the leave application.

[151] The criminal charge had been preferred because of a police report lodged by the mother and her tenacity in wanting the charge reinstated can be seen in her instructing her solicitors Messrs AmerBON to write to the Public Prosecutor to immediately re-charge the daughter TMC subsequent to the decision of the High Court in granting a discharge not amounting to an acquittal to the daughter. See exh. NPL-3 of NPL's affidavit in reply.

[152] The learned JC Wong Chee Lin in her judgment in *Ng Pik Lian v. United Eastern Resources Sdn Bhd & Ors And Another Appeal* [2018] 1 LNS 1426; [2018] MLJU 1331 had given us a peek into what happened at the criminal proceedings as follows:

> [14] The Plaintiff had lodged a police report against TMC for breach of trust in respect of one of the family companies and TMC has been charged in court. In the criminal proceedings, the Plaintiff was tendering evidence and was asked a series of preliminary questions and her responses to the same were recorded as follows in the transcript of the proceedings recorded by the Sessions Court:
>
> > Saya tinggal dengan suami saya sekarang. Saya ada 11 orang anak. Saya ada 4 orang anak lelaki dan 4 orang anak perempuan. Saya datang ke Mahkamah kerana anak saya bawa saya datang. Nama anak Tai Hen Heng. Anak saya bawa datang ke Mahkamah kerana untuk jadi saksi, untuk bercakap. Anak saya bawa saya datang tapi tak beritahu tujuan saya datang.
> >
> > Saya ada anak perempuan bernama Tai May Chean. Anak saya ada di sini hari ini. Saya tak berapa nampak. Saya tahu dia akan hadir hari ini tapi saya tak nampak. Saya tahu dalam kandang itu anak saya.

A [15] It is to be noted that the plaintiff has 6 children, 4 men and 2 women. None of the plaintiff's children carry the name "Tai Hen Heng". The plaintiff had also said that her age was in the sixties when in fact she was 85 years old.

[16] The Plaintiff's evidence was stopped by the Learned Sessions Court
B Judge and the Judge invited the Prosecuting Officer to reconsider pursuing the case in view of the Plaintiff's medical state and/or state of mind.

[17] Subsequently, the solicitors representing the Plaintiff issued the above-said letter from the Plaintiff's doctor requesting for the Plaintiff's
C attendance in the proceedings to be exempted on medical grounds.

[153] If at all the mother is not happy with the criminal proceedings that had been terminated with a discharge not amounting to an acquittal against the daughter, then she is free to pursue a civil action against the daughter and if need be, to apply for leave to commence a derivative action against the
D daughter in the name of the company.

The OS 49 And Suit 124 Brought By The Mother And Daughter Respectively With Respect To The Daughter's Directorship And Shareholding In The Company

[154] The learned JC held that the daughter's status as director and shareholder is being challenged in OS 49 and Suit 124 and in event that TMC
E is found not to be the legal and beneficial owner of her shares in company, this will supposedly have an impact on her *locus standi* to make this application.

[155] However the learned JC had earlier made his finding that the daughter
F TMC had the requisite *locus standi* to invoke ss. 347 and 348 of the Act and to have the merits of the leave application considered.

[156] The relative prejudice suffered would be greater to the daughter if she is not allowed to bring the proceeding in the name of the company against TYYR for, if the company should succeed, the benefit and fruit of the success
G would all go to the mother if she is finally held to own all the shares in the company and the daughter is just her nominee.

[157] However if the daughter is the owner of the shares and not her mother's nominee, then should the company succeed, the benefit would be for both the daughter and the mother as they are both the only shareholders
H of the company.

Decision

[158] We find no good reason to deny the daughter the leave application prayed for against the backdrop of the facts as succinctly summarised by
I learned counsel for the daughter and set out below:

(i) that the company had purchased the said property;

(ii) that the company had paid on 27 June 2011 the redemption sum of RM1,851,801.31 for the said property to BIMB;

(iii) that TYYR solicitors, Messrs Balasingam & Co themselves had forwarded the transfer documents to UER for execution by way of a letter dated 18 January 2013;

(iv) that the transfer documents were then forwarded to TYYR for execution *vide* letter dated 6 February 2013 but TYYR refused to do so despite the company being the beneficial owner of the said property.

[159] TYYR would stand in the position of a bare trustee of the property and the uncontroverted evidence presented so far clearly show that *prima facie* the said property is that of the company and that it should be allowed to pursue its good cause of action against TYYR.

[160] The mother NPL would also owe a fiduciary and statutory duty to the company to safeguard the asset of the company and this cannot be affected nor assailed by the outcome of the dispute between the mother and the daughter on the true nature of her shareholding in the company.

[161] We cannot appreciate how there could be a "genuine commercial consideration" by the mother in refusing to pursue the claim against TYYR when *prima facie* the mother would be in breach of her fiduciary duties as a director of company.

[162] We see no good reason to deny the company the right to prove and to claim what it has a basis for asserting that the property should be duly registered in its name.

[163] Therefore, we had allowed the appeal and granted an order in terms of the originating summons as we were of the view that there is good faith on the part of the appellant/plaintiff and *prima facie* it is in the best interest of the company. In any event the mother respondent, being a 50% shareholder in the company, would also stand to gain from the action if successful.

[164] The order of the High Court dated 24 October 2019 dismissing the plaintiff's leave application for a derivative action was set aside. We also ordered costs of RM20,000 to the appellant to be paid by the respondent mother subject to allocator.