

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[ORIGINATING SUMMONS NO.: WA- 24NCC-154-03/2021]**

BETWEEN

LOH TECK WAH

(Identity Card No.: 731106145267)

... APPLICANT

AND

1. LIM PANG KIAM

(Identity Card No.: 631208015529)

2. YAP CHEE KHENG

(Identity Card No.: 730526145285)

3. PNL TRADING SDN BHD

(Company No.: 651286-P)

... RESPONDENTS

GROUND OF JUDGMENT

Introduction

[1] This is an application filed by the Applicant for leave to be granted to commence derivative action on behalf and in the name of PNL Trading Sdn. Bhd., the 3rd Respondent herein pursuant to s. 347 and s. 348 of the Companies Act 2016 (“**the Act**”).

[2] At the conclusion of the proceedings, this Court dismissed the Originating Summons. The following are the Grounds of Decision of this Court.

Background Facts

- [3] It was pleaded that the Applicant, the 1st and the 2nd Respondents were the partners of the partnership known as PNL Group. The 3rd Respondent is one of the corporate vehicles of this partnership. The Applicant is seeking leave from this Court to commence proceeding in the name of the 3rd Respondent to recover the sums due and owing by Tian An Trading Sdn Bhd (“**Tian An**”), another corporate vehicle of this partnership.
- [4] There were series of discussions between the directors on the reorganization of the PNL Group which includes the proposal for a split in the shareholding structure of each of the PNL Group of companies. However, these discussions did not yield any agreement between the directors.
- [5] On 10.2.2020, the 1st Respondent issued a notice of dissolution of the partnership in the form of an email to the Applicant.
- [6] The Applicant then, claimed for:
- (a) a sum of RM3,495,000.00 for the advances made by the 3rd Respondent to Tian An;
 - (b) a sum of RM509,909.17 being an accrued deemed interest owing by Tian An to the 3rd Respondent; and
 - (c) a sum of RM264,758.22 being interest of 7% per annum incurred on the advances made by the 3rd Respondent to Tian An between 1.3.2020 to 30.3.2021
- [7] On 22.1.2021, the Applicant issued a notice pursuant to s. 347 of the Act to the 1st and the 2nd Respondents, to request them for the recovery of the sum owing by Tian An to the 3rd Respondent.
- [8] On 3.2.2021, a notice of board meeting of the 3rd Respondent was sent out to convene a board meeting on 5.2.2021. The Applicant however did not attend the said meeting. The meeting

minutes of 5.2.2021 purport to explain that there was no amount owing by Tian An to the 3rd Respondent.

- [9] Series of emails were sent out by the Applicant in seeking clarification and evidence of repayment from Tian An to the 3rd Respondent but no response from the Respondents hence the filing of the present Originating Summons on 31.3.2021.

Parties' contention

- [10] In support of his application, the Applicant submitted that the Respondents had failed to demonstrate as to whether the 3rd Respondent was in fact repaid the full sum advanced to Tian An with interest. Therefore, on the basis that the Applicant is both the director and shareholder of the 3rd Respondent, there is no collateral purpose in initiating the proceeding herein except for the purpose and intention of causing the 3rd Respondent to recover the sums due and owing by Tian An. The Applicant had filed this application undoubtedly in good faith with the very intention to ensure the majority of shareholders of the 3rd Respondent, being the 1st and the 2nd Respondents who are also directors of the 3rd Respondent, do not act to the detriment of the 3rd Respondent.

- [11] Further, the Applicant argued that the purported transfer of the amount owing by Tian An to PNL Business Services Sdn. Bhd. (“**PNLBS**”) without his approval is an *ultra vires* act and has not absolved Tian An from making repayment to the 3rd Respondent. The transaction of transferring the debt from the 3rd Respondent to PNLBS was not in the best interest of the 3rd Respondent at all, as the 3rd Respondent's rights and opportunities to recovery of monies were stripped away by the 1st and the 2nd Respondents' decision.

[12] In resisting the application, the Respondents contended that:

- (a) in relation to the debts, prior to 2020, Tian An was in need of working capital for the purpose of expanding the business. Therefore, the related companies had advanced some monies to Tian An;
- (b) the borrowing and lending of money was done in accordance with the arms-length principle. For all the monies which were borrowed by Tian An, Tian An has repaid the principle sum together with the interest incurred thereto;
- (c) all of the debts from Tian An had been duly paid off. This was confirmed by the Auditor after conducting the Special Audit;
- (d) the Applicant tried to mislead the Court by referring to different statement made by the Auditor;
- (e) the transfer of debts to PNLBS were done in the best interest of the shareholders of the 3rd Respondent. In all circumstances the decision to transfer the debts is a business decision which does not require the Applicant's approval; and
- (f) the Originating Summons herein is nothing but an attempt to harass Tian An and made with bad faith.

[13] This Court will now examine the arguments proffered by both parties.

Analysis

[14] The objective of a derivative action is to ensure that the wrongdoers in a company are stopped in their tracks from further

damaging the company and to protect the minority. The recent Federal Court case of *The Bank of Nova Scotia Bhd & Anor v. Lion Dri Sdn Bhd & Ors* [2020] MLJU 1987 reminded this point succinctly where the apex bench ruled that:

“[100] The aforesaid 3 reasons are really the underlying basis requiring shareholders to bring derivative actions where a wrong was done to the company as the cause of action is vested in the company and the company alone can sue. Hence, where the wrongdoers are in control of the company, the procedural device of a derivative action provided under section 347 of the CA 2016 affords protection to the minority...”.

(emphasis added)

Application for leave under s. 348 of the Act

[15] A complainant may, with leave of the court initiate, intervene in or defend a proceeding on behalf of a company. This is expressly provided under s. 347 of the Act. However, the prerequisite requirement is the granting of leave by the court under s. 348 of the Act.

[16] S. 347 states as follows:

“347. Derivative proceedings

(1) A complainant may, with leave of the Court initiate, intervene in or defend a proceeding on behalf of a company.

(2) Proceedings brought under this section shall be brought in the company’s name.

(3) *The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.”.*

[17] S. 348 states as follows:

“348. Leave of Court

(1) *An application for leave of the Court under section 347 shall be made to the court without the need for an appearance to be entered.*

(2) *The complainant shall give thirty days’ notice in writing to the directors of his intention to apply for the leave of Court under section 347.*

(3) *Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.*

(4) *In deciding whether or not leave shall be granted, the Court shall take into account whether –*

(a) *the complainant is acting in good faith; and*

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

(5) *Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court.”*

Locus standi of the Applicant

[18] Being a director of the 3rd Respondent, the Applicant falls within the definition of a “complainant” as found under s. 345(c) of the Act. Accordingly, the Applicant has the requisite *locus standi* to invoke s. 347 and to apply for leave under s. 348.

[19] While it is clear that an application under s. 347(1) is for leave to “initiate, intervene in or defend a proceeding on behalf of the company”, however s. 348(2) does not impose any formal requirement for the statutory notice. As such, the letter to the Company dated 22.1.2021 was sufficient notice given by the Applicant to demonstrate his intention as complainant “to apply for the leave of Court under s. 347.” (See *Abdul Rahim Suleiman & Anor v. Faridah MD Lazim & Ors* [2017] 1 CLJ 633).

[20] The mandatory 30 days notice under s. 348(2) was also fulfilled by the Applicant as the action was filed well beyond 30 days from the date of his letter to the Company.

[21] In *Dato’ Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2019] 10 MLJ 693 Darryl Goon J (now JCA) held that s. 347 is also wide enough to encompass leave to commence proceedings against third parties.

Considerations when granting leave

[22] Under s. 348(4) of the Act, the Court is required to take into account the following:

- a) whether the Applicant is acting in good faith; and
- b) whether it appears *prima facie* to be in the best interest of the company that leave be granted.

[23] In determining the meaning of good faith, this Court is guided by the Court of Appeal in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2010] 1 LNS 560, Abdull Hamid Embong JCA (then FCJ), although in the context of an application under s. 181B(4)(a) CA 1965, His Lordship explained 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 is 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)

[24] His Lordship went on to explain :

“[16] This second requirement will depend on the factual circumstance which comes before the court. This was stated by Palmer J in Swansson with these words:

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 this 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)

[25] Darryl Goon J in *Dato’ Seri Timor Shah Rafiq (supra)* in usual clarity explained how good faith is to be interpreted for the purposes of a s. 348 leave application. His Lordship held as follows:

“Good faith” simpliciter is meaningless if it were not attached to some context. As it is a factor to be taken into account in relation to an application for leave under section 348, “good faith” must therefore relate to the reason section 347 is invoked.

Thus, “good faith” under section 348(4)(a) must be read in relation to the purpose of the application for leave whether it be to initiate, intervene in or defend a proceeding in the name and on behalf of a company. If so, and in context, it becomes quite clear that an applicant seeking leave must do so in “good faith” for those purposes.

The predecessors to sections 347 and 348 were sections 181A and 181B of CA 1965. These provisions are materially the same save for one major difference i.e. under section 181A(3), the common law was not abrogated whereas now, as indicated above, under section 347(3) of CA 2016, the common law is expressly abrogated.”

[26] Applying the principles in *Dato’ Seri Timor Shah Rafiq and Celcom (Malaysia) Bhd*, the Applicant must demonstrate to this Court that there is a good cause of action with a reasonable prospect of success. However, if there is a collateral purpose for

wanting to initiate proceedings, the requirement of good faith under s. 348(2) fails and leave must be refused.

Threshold for leave

[27] There is a burden imposed on an applicant in a leave application under s. 348 of the Act. In *Celcom (Malaysia) Bhd*, the Court of Appeal held that the leave application is not to be dealt with lightly and be considered with a low threshold similar to leave applications for judicial review. Citing the case of *Swansson v. RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC 58 328 the Court held that:

“[24] It is clearly the intent of the act that leave to bring a derivative action must not be given lightly. An application under s. 237(2) is not interlocutory in character; the relief sought is final and the applicant bears the onus of establishing the requirements of the subsection to the Court’s satisfaction.”

(emphasis added)

[28] The standard in making out a case for leave is on a balance of probabilities (see *Celcom (M) Berhad*). There is therefore, a duty for the court to consider strictly the adherence with the statutory requirements.

[29] It is based on the above parameters that that this Court must examine if the Applicant has initiated the application in good faith.

Whether the Applicant has met the good faith requirement

[30] The Applicant has requested for an action to be commenced by the 3rd Respondent against Tian An to recover the purported sum

owed by Tian An to the 3rd Respondent. The Applicant also circulated a directors' resolution for the purpose of seeking for support to commence the derivative action.

[31] Consistent with the Applicant's notice to the Respondents dated 22.1.2021, the proposed derivative action to be taken based on the following reason:

- a) as per the Applicant's records, there is an amount of RM3,495,000.00 which is due and owing from Tian An to the 3rd Respondent; and
- b) there is a deemed interest of RM630,290.67 which had accrued as a result of the amount due from Tian An to the 3rd Respondent.

[32] In this respect, it is crucial to examine whether the said proposed action by the Applicant passes the good faith test as expounded in the cases discussed where the Applicant needs to show :

- a) a valid cause of action against Tian An has been established with a likelihood of success; and
- b) no collateral purpose.

A. Whether a valid cause of action with a likelihood of success had been established

[33] This Court considered both arguments put forward by the Applicant as well as the Respondents. In response to the allegation that Tian An owes a sum of money to the 3rd Respondent, the Respondents explained as follows:

[34] Prior to year 2020, Tian An was in need of working capital for the purpose of expanding the business. Therefore, the related companies had advanced some monies to Tian An.

[35] The borrowing and lending of money was done in accordance with the arms-length principle. It was also done in accordance with the terms stipulated under the transfer pricing report. In other words, for all the monies which were borrowed by Tian An, Tian An has repaid the principle sum together with the interest incurred thereto. In support of this explanation, the Respondents produced the following summary to demonstrate that no monies were due from Tian An to the 3rd Respondent. The said summary were all contained in the Affidavit In Reply (1) affirmed by the 2nd Respondent found in Enclosure 3. The table is reproduced as follows:

Transaction details between Tian An and the 3rd Respondent

NO	DATE	DESCRIPTION	SUM
1	31.03.2020	Total Sum Due and Owing from Tian An	3,495,000.00
2	08.05.2020	Payment to Subang Industry Park Sdn Bhd (“SIP”) on behalf of the 3 rd Respondent	(350,000.00)
3	12.05.2020	Money advanced by SIP on behalf of the 3 rd Respondent to Tian An	200,000.00
4	12.05.2020	Money advanced by SIP on behalf of the 3 rd Respondent to Tian An	50,000.00
5	01.07.2020	PNLBS took over the debts from the 3 rd Respondent Outstanding deemed interest owing by Tian An to the 3 rd Respondent	(3,395,000.00) 577,436.26
6	08.12.2020	Repayment of Deemed Interest by Tian An to the 3 rd Respondent	(50,000.00)

7	08.12.2020	Repayment of Deemed Interest by Tian An to the 3 rd Respondent	(527,436.26)
Balance			NIL

[36] It was further shown to this Court how much was paid by Tian An to PNLBS. The details of which were:

Transaction details between Tian An and PNLBS

NO	DATE	DESCRIPTION	SUM
1	01.07.2020	Total Sum Due and Owing from Tian An	3,395,000.00
2	17.12.2020	Repayment from Tian An to PNLBS	(1,400,000.00)
3	18.12.2020	Repayment from Tian An to PNLBS	(575,000.00)
4	18.12.2020	Repayment from Tian An to PNLBS	(220,000.00)
5	29.12.2020	Repayment from Tian An to PNLBS	(1,200,000.00)
6	29.12.2020	Deemed interest charged by PNLBS	(50,000.00)
7	31.12.2020	Repayment of Deemed interest	(56,583.35)
Balance			NIL

[37] What this demonstrates is the fact that as at 31.12.2020, Tian An does not owe any monies to the 3rd Respondent. The above summary was confirmed by the special audit carried out by the

auditors of the 3rd Respondent. The summary of the Audit confirmation in its letter dated 3.2.2021 is reproduced as follows:

The breakdown of Amount owing by Tian An Trading Sdn. Bhd. [1st April 2020 – 31st December 2020] as follow :

<i>No</i>	<i>Item Amount</i>	<i>RM</i>
1.	367-000 Tian An Trading Sdn. Bhd.	Nil
2.	302-T0002 Tian An Trading Sdn. Bhd.	Nil

[38] Given the evidence produced, it is clear to the mind of this Court that the Applicant has failed to establish a valid cause of action against Tian An. What has been shown is not purely records produced by the 3rd Respondent but also was verified by auditors during the Special Audit carried out. There was nothing outstanding from Tian An based on the records.

Commercial decision

[39] The Respondents contended that the decision to transfer the debt to PNLBS was a commercial decision which was not meant to benefit the Respondents at the expense of the Applicant. It was in fact a decision that would impact the members of the 3rd Respondent collectively.

[40] The transfer of debts from the 3rd Respondent to PNLBS was explained succinctly by the Respondents in the Respondents' Affidavit in Reply (1).

[41] In summary the explanations are as follows:

- a) on 2.7.2021, a letter was issued by the 3rd Respondent to Tian An. Among others, Tian An was informed that all of

the future debts should be paid to PNLBS instead of the 3rd Respondent;

- b) it was the 1st Respondent’s opinion that the transfer of debts was done in the best interest of both the 3rd Respondent and PNLBS. This is because the transfer of debts would save interest accrued in PNLBS (which has banking facilities), where else the 3rd Respondent does not have any credit facilities;
- c) the shareholders rights are not affected, because PNLBS and the 3rd Respondent have the same shareholders :

3rd Respondent		PNLBS	
Share holder	Percentage (%)	Shareholder	Percentage (%)
2nd Respondent	32	2nd Respondent	32
1st Respondent	32	1st Respondent	32
Applicant	32	Applicant	32
Lee San Koon (May)	4	May	4

[42] From the above, this Court is satisfied that the decision was done in the best interest of PNLBS and the 3rd Respondent .

[43] It must be recalled that the 3rd Respondent, Tian An and PNLBS all belong in the same group. If at all it was a strategic business decision, then it remains as one. A derivative action is not sought to correct a business judgment or a commercial misjudgement. Even if it was one, it is not the duty of this Court to take into considerations such factors in a leave for derivative action application.

[44] It is trite that courts will not interfere with the internal management of a company. In *Burland v. Earle* [1902] AC 83 at

page 93, Lord Davey, when delivering the advice of the Privy Council expressed the proposition in the following words:

“It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.”

[45] In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, the Federal Court stated:

*“Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid- nineteenth century, they administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 ER 833.”*

(emphasis added)

[46] It is in this respect that this Court finds that the commercial decision was one that a court should not meddle with.

Proper recourse for recovery

[47] The key issue that must not drift away from this Court’s scrutiny is the proposed action against Tian An. Given that Tian An made payments for the sums advanced albeit to PNLBS and not to the 3rd Respondent, it remains a fact that by the arrangement, Tian An no longer owes anything to the 3rd Respondent. Tian An cannot be asked to pay twice the sum they borrowed. On this point alone, Tian An has a valid defence. If the altruistic

intention of the Applicant is to be followed up namely to recover the 3rd Respondent's funds, the recourse is for the 3rd Respondent to recover from PNLBS, not Tian An.

Misplaced arguments

[48] Although the Applicant was informed of the outcome of the special audit, he nevertheless refused to accept the explanation of the Respondents. Instead, the following issues were raised by the Applicant:

- a) the request for documents and/or explanation to be furnished by the Respondents were not complied with;
- b) failure to show or provide satisfactory documents or evidence to the Applicant to show support the fact that there is no outstanding debts which are owed by Tian An to the 3rd Respondent; and
- c) his rights to inspect documents were deprived.

[49] With respect, this Court does not find the basis or argument advanced by the Applicant to be of value in this current application. It is not disputed that the right of a Director to have access to documents in particular to books and accounts of the company is sacrosanct (See *Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741). There is no need to revisit such a fundament and settled position in law. The remedy for the above complaint by the Applicant is to file for discovery of the said documents.

[50] Lest it be forgotten that a derivative action is provided by the law in order to allow a shareholder to take on the mantle of a company to sue in the name of the company the wrongdoers be they fellow shareholders, directors or third parties who are

causing harm to the company. Among others, it affords protection to minority shareholders from wrongdoers running the company (see *The Bank of Nova Scotia Bhd & Anor v. Lion Dri Sdn Bhd (supra)*).

Collateral purpose

[51] From the facts presented in this case, it cannot be denied that there were correspondences between the Applicant and the 3rd Respondent even before the Applicant issued the statutory notice dated 22.1.2021. However, it was pointed out that there was a failure on the part of the Applicant to respond to a letter sent by the Respondents' solicitors dated 18.2.2021. The Respondents in the said letter informed the Applicant that an auditor had conducted a special audit and confirmed that there was no debt due.

[52] In all the circumstances, the Applicant was given a chance to enquire further during the board meeting on 5.2.2021. However, the Applicant did not attend the said board meeting. There was no cogent reason provided by the Applicant as to why he could not attend to the board meeting on 5.2.2021. His only excuse from a reading of his submission before this Court was that the notice given on a short notice.

[53] It was in evidence that even after the current Originating Summons was filed, all the evidence in relation to the repayments of debts was furnished to the Applicant.

[54] From the constellation of the above facts, there is only one inference which could be drawn, that is, the Applicant has intentionally refused to accept all the explanation which is intended to be given and/or furnished to him. The reasonable

conclusion to be made is that the application is made for a collateral purpose.

[55] In considering whether there is collateral purpose, there is no requirement for such an elaborate finding to be made. In *Dato' Seri Timor Shah Daryll Goon J* ruled that:

“[142] However, disagreements would give rise to concern if there exist significant disputes between the parties which do not concern the interests of the company but those of the disputants themselves. In such a situation, the court should be alert to the possibility that there might exist a collateral purpose for the application for leave.

[143]Such a collateral purpose need not have to be elaborate. It is in this regard that the context in which good faith should exist must be borne in mind.”.

(emphasis added)

[56] Hostility or bad blood among parties is a relevant factor. The Singapore Court of Appeal in the case *Pang Yong Hock and another v. PKS Contracts Services Pte Ltd* [2004] 3 SLR 1 held:

*“.. .[20] The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing a s. 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. **Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the***

applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations that may be sufficient for the court to find a lack of good faith on his part. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse. for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s. 216A(3)(b) and (c). (emphasis added)

- [57] From the facts put forward by the Respondents, which was largely undisputed by the Applicant, it was discovered by the 1st and 2nd Respondents that the Applicant was running a competing business with Tian An by the corporate vehicle under the name of WAWA Trading Sdn Bhd (“**Wawa Trading**”).
- [58] Wawa Trading was established on 22.3.2019. Based on the CTOS search conducted by the 1st and 2nd Respondents, Wawa Trading is owned by the parents of the Applicant, who is at the age of 79 and 83 respectively. On the other hand, the Applicant owns 1% share.
- [59] Further, it was also discovered by the 1st and 2nd Respondents that the Applicant had once acted as the director of Wawa Trading. All these matters were not brought to the 1st and/or 2nd Respondents' attention when the Applicant served as a director of Tian An.
- [60] It was also shown to this Court that the Applicant joined Versatile Creative Berhad as a director, a company running a competing business with Tian An.

[61] Premised on the aforesaid, there is sufficient reason for this Court to conclude that the current Originating Summons was filed with a collateral purpose. This Court does not disagree with the submissions of the Respondents that it was filed to destroy Tian An for the benefit of the Applicant and his personal vendetta.

[62] In *Nurcombe v. Nurcombe* [1985] 1 ALL E.R. 65 95, the court held that a leave for derivative action will be denied in the event the applicant does not come in clean hands.

Finding of whether the Applicant was acting in good faith

[63] All the factors discussed above leads to a single conclusion that the Applicant was clearly not acting in good faith. This is borne out by the fact that no reasonable cause of action with a likelihood of success has been established and that there was a collateral purpose in filing this application.

B. Whether application is in the best interest of the 3rd Respondent

[64] From the facts discussed above, it cannot be gainsaid that the Applicant had failed to demonstrate to this Court that the application was made in the best interest of the 3rd Respondent. On the contrary, it can be seen that such an action would yield no benefit to the 3rd Respondent. It would result in a futile attempt to seek recovery from Tian An as the cause of action has clearly not been made out. The 3rd Respondent instead would incur costs and expenses which would at the end of the day be unrecoverable.

Conclusion

[65] Premised on the foregoing reasons, this Court is of the considered view that the Applicant has failed to fulfil the statutory requirements for the issuance of leave to initiate a derivative action in the name of the 3rd Respondent.

[66] The application is therefore dismissed with costs.

(AHMAD FAIRUZ ZAINOL ABIDIN)

Judge

High Court of Malaya

Kuala Lumpur

Dated: 13 JANUARY 2022

COUNSEL:

For the applicant - Wong Tze Yeong; M/s Syed Ibrahim & Co, Kuala Lumpur

For the respondents - Yap Boon Hau & Ong Kai Rou; M/s Mah-Kamariyah & Philip Koh, Petaling Jaya, Selangor

Case(s) referred to:

The Bank of Nova Scotia Bhd & Anor v. Lion Dri Sdn Bhd & Ors [2020] MLJU 1987

Abdul Rahim Suleiman & Anor v. Faridah MD Lazim & Ors [2017] 1 CLJ 633

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693

Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808; [2010] 1 LNS 560

Swansson v. RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 58 328

Burland v. Earle [1902] AC 83

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113

Dato' Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741

Pang Yong Hock and another v. PKS Contracts Services Pte Ltd [2004] 3 SLR 1

Nurcombe v. Nurcombe [1985] 1 ALL E.R. 65 95

Legislation referred to:

Companies Act 2016, ss. 345(c), 347, 348(2), (4)

Companies Act 1965, s. 181B(4)(a)