6-2015

Of Links and Legal Merits: Good Faith in the Statutory Derivative Action in Singapore

Pearlie M. C. KOH
Singapore Management University, pearliekoh@smu.edu.sg

DOI: https://doi.org/10.1080/14729342.2015.1047652

Published in Oxford University Commonwealth Law Journal, 2014, 14 (2), 225-249.
https://doi.org/10.1080/14729342.2015.1047652

OF LINKS AND LEGAL MERITS—GOOD FAITH IN THE STATUTORY DERIVATIVE ACTION IN SINGAPORE

PEARLIE KOH*

ABSTRACT

An applicant for leave to bring a statutory derivative action in Singapore is required to satisfy the court as to, inter alia, his good faith. Although the statutory language places the burden of doing so on the applicant, Singapore courts have tended to assume the presence of good faith if the claim is a legitimate one. This approach, which denigrates the requirement of good faith, was recently disapproved by the Singapore Court of Appeal. This notwithstanding, subsequent cases have reverted to the earlier position, casting doubt on the utility of the requirement. This paper considers good faith, and argues that it was included to address a distinct concern that cannot be met by a consideration of the viability of the claim and the company's interests in pursuing the same, a concern that arose out of the peculiar function of the statutory derivative action in opening up shareholder access to corporate litigation.

A Introduction

The statutory procedure for bringing a derivative action in Singapore, which was introduced in 1993, is found in ss 216A and 216B of the Companies Act.[1] Pursuant thereto, a 'complainant' may apply to the court for leave to bring an action in the name of and on behalf of the company, or to intervene in an action to which the company is a party.[2] The complainant is required to satisfy the court as to three matters before the court will grant leave.[3] First, the complainant must have given 14 days' notice to the directors of the company of his intention to apply to the court if the directors of the company do not bring, diligently

* LLM (Melb), Associate Professor, School of Law, Singapore Management University. Email: pearliekoh@smu.edu.sg. I would like to thank the anonymous referees for their constructive comments. All errors remain mine.

[1] Companies Act (Cap 50) ('CA'), s 216A is modelled after the statutory derivative action in the Canadian Business Corporations Act. A statutory procedure for the bringing of derivative actions may also be found in New Zealand (Companies Act 1993 (NZ), ss 165–68), Australia (Corporations Act 2001 (Cth), part 2F.1A) and the UK (Companies Act 2006 (UK), ss 260–64). For further comparative reading, see Dan Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia – A Comparative and Functional Approach* (CUP 2012).

[2] CA, s 216A(1).

[3] CA, s 216A(3).

prosecute, or defend, or discontinue the action;[4] secondly, the complainant is acting in good faith;[5] and thirdly, that it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.[6] These preconditions serve as a screening mechanism to sift out cases that are without merit.

Although it had a slow start, recent years have seen a relative increase, albeit still modest, in the number of applications under section 216A of the CA.[7] Most recently, the Singapore Court of Appeal had the occasion to consider the second and third preconditions in *Ang Thiam Swee v Low Hian Chor*.[8] In particular, the judgment, delivered on the Court's behalf by Rajah JA, provided a close and careful analysis of the requirement for good faith, and in so doing, overturned a longstanding assumption hitherto adopted by the courts in connection with the burden of proof. The judgment is without doubt an important one in the area of shareholder litigation in Singapore as it provides the most comprehensive judicial consideration of the element of good faith to date. Nevertheless, it has been asserted that the concerns articulated by Rajah JA may be 'mediated through the interests of the company requirement', casting doubt on the relevance and utility of the good faith requirement.[9] Indeed, the post-*Ang Thiam Swee* decision of the Singapore High Court in *Chan Tong Fan v Chiam Heng Luan Realty Pte Ltd*[10] appears to lend at least tacit support for this view.

In this paper, I ponder the relevance of good faith.[11] I begin by considering the extant judicial approach to the requirement which lent support to this negative view of good faith. I then proceed to consider the requirement against the analytical backdrop usefully provided by the Court of Appeal's decision in *Ang Thiam*

[4] CA, s 216A(3)(a).
[5] CA, s 216A(3)(b).
[6] CA, s 216A(3)(c).
[7] From a survey (as at 12 August 2014) of the judgments reported on Lawnet (www.lawnet.com.sg), there were 7 applications between 1993 and 2003 (inclusive) and 13 applications between 2004 and 2014.
[8] [2013] SGCA 11 (Singapore Court of Appeal (SGCA)).
[9] Dan Puchniak and Cheng Tan, 'Company Law' (2012) 13 Singapore Academy of Law Annual Review of Singapore Cases 143, [9.25].
[10] [2013] SGHC 192 (Singapore High Court (SGHC)). This case is considered in more detail below. See also the critique in ibid 179, [9.30].
[11] This paper focuses on an issue that is not infrequently raised in jurisdictions that provide for the private enforcement of directors' duties by shareholders through the medium of the statutory derivative action. The wider question whether private enforcement or public enforcement ought to be accorded dominance is beyond the scope of this paper. The reader is referred to other works in the area, including, Reinier Kraakman, Hyun Park and Steven Shavell, 'When are Shareholder Suits in Shareholder Interests?' (1993–94) 82 Georgetown Law Journal 1733; Renee Jones and Michelle Welsh, 'Toward a Public Enforcement Model for Directors' Duty of Oversight' (2012) 45 Vanderbilt Journal of Transnational Law 343; Martin Gelter, 'Why Do Shareholder Derivative Suits Remain Rare in Continental Europe' (2011–12) 37 Brooklyn Journal of International Law 843; Professor Ian Ramsay also delivered a keynote address that touched on the issue at the Comparative Enforcement of Corporate and Securities Laws in Asia Conference, 17–18 July 2014, Singapore.

Swee. The requirement of good faith must have been included as a pre-requisite to serve a distinct function from the interests of the company requirement. The key, it is submitted, is in identifying and appreciating this distinct purpose, which should then assist in any attempt at defining a framework for the operationalisation of the criterion. As much of the negativity directed at the good faith requirement appears to hinge on the difficulties associated with its proof, a workable conceptual framework should go some distance to pacify detractors. Rajah JA has, in *Ang Thiam Swee*, provided such a framework, which this paper will examine. It is useful to note that, despite its inherent vagueness, good faith is nevertheless made a pre-requisite for the grant of leave to bring derivative proceedings in a number of other jurisdictions, including Australia, Canada and South Africa. The statutory derivative claim in the UK is structured somewhat differently,[12] but even there, good faith is one of a number of factors the court is obliged to take account of in considering whether to give permission for the action.[13] In this regard, it seems unlikely that the English court will grant permission to a claimant who lacked good faith.[14]

In stark contrast to these jurisdictions, the statutory derivative procedure of New Zealand does not make any reference to good faith at all.[15] Instead, a 'broad discretion' is vested in the court whether or not to grant leave.[16] Whilst the statutory provision does provide a number of specific matters to which the court must have regard,[17] it has been stated that the court's discretion is 'undiminished by the particular considerations referred'[18] therein. Indeed, in a number of cases, the New Zealand courts have considered it relevant to have regard to the applicant's *motives*.[19] As we shall soon see, a consideration of the motives of the applicant is an important step towards establishing his good faith.

[12] Companies Act 2006 (UK), Pt 11.

[13] See Companies Act 2006 (UK), s 263(3).

[14] See *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch) (England and Wales Chancery Division (Ch)) [122]. See also Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) [6.75]–[6.76].

[15] Companies Act 1993 (NZ), s 165(3) mandates that the court must be satisfied either that the company does not intend to bring proceedings, or that it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole. Section 165(2) lists a number of factors that the court must have regard to. See generally Lang Thai and Matt Berkahn, 'Statutory Derivative Actions in Australia and New Zealand: What Can We Learn from Each Other' (2012) 25 New Zealand Universities Law Review 371.

[16] *Vrij v Boyle* [1995] 3 NZLR 763 (New Zealand High Court (NZHC)) 767. See also *Needham v EBT Worldwide Ltd* [2006] NZHC 509 (NZHC) [19].

[17] These are matters which the courts in Singapore, Canada and Australia would generally take account of when considering whether it would be in the company's interests for the subject litigation to proceed, including the likelihood of the proceedings succeeding, the costs of the proceedings and the interests of the company in commencing the proceedings.

[18] *Vrij v Boyle* (n 16) (Fisher J).

[19] See eg *Torrice v Hayhow* CIV-2003-485-1995 (NZHC) [31]; *Cameron v Coleman* CIV-2010-485-2151 (NZHC) [24]; *Needham* (n 16) [62], [65]. See also *Nobilo v Nobilo* [2014] NZHC 401 (NZHC) [24], where counsel for the respondent raised this argument.

B On 'Good Faith'

1 Emaciating Good Faith — The Burden of Proof

Before the court may grant leave to the applicant to bring a derivative action in the name and on behalf of the company, the court must be satisfied, inter alia, that 'the complainant is acting in good faith'.[20] The statutory language is clear—the applicant's good faith must be proved. Given that it is the applicant who is seeking leave, the general rule, *semper necessitas probandi incumbit ei qui agit*, should apply. Indeed, as Rajah JA noted, this represents the Australian[21] and Canadian[22] positions.[23] However, in *Agus Irawan v Toh Teck Chye*,[24] Choo Han Teck JC (as he then was) had expressed the view that, if there was a reasonable and legitimate claim against the respondent, the burden should be on the latter to show that the applicant did not act in good faith. In Choo JC's view, the court should be 'entitled (…) to assume that every party who comes to court with a reasonable and legitimate claim is acting in good faith—unless proven otherwise'.[25] His Honour's view was considered 'generally beyond reproach' by a differently constituted Court of Appeal in *Pang Yong Hock v PKS Contracts Services Pte Ltd*.[26] This evidential approach has generally been adopted by the Singapore High Court. Thus, in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd*,[27] the Court, upon finding that the applicant had raised claims which 'contained some semblance of merit',[28] placed the burden of showing that the application was made in bad faith upon the defendant wrongdoer.

It should be readily appreciated that the threshold for the presumption to arise in favour of the applicant is rather low. All that is necessary is for the applicant to have shown that there was an 'arguable case or cause of action',[29] or a '*prima facie*

[20] CA, s 216A has in fact a wider scope of application in that it allows leave to be granted to the complainant 'to intervene in an action to which the company is a party': s 216A(2).

[21] *Swansson v R A Pratt Properties Pty Ltd* [2002] NSWSC 583 (New South Wales Supreme Court (NSWSC)) [52]; *South Johnstone Mill Ltd v Dennis and Scales* [2007] FCA 1448 (Federal Court of Australia (FCA)) [68]; *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52 (New South Wales Court of Appeal (NSWCA)) [67]; *Vinciguerra v MG Corrosion Consultants Pty Ltd* [2010] FCA 763 (FCA) [54].

[22] See, inter alia, *Lost Lake Properties Ltd v Sunshine Ridge Properties Ltd* [2009] BCSC 938, 179 ACWS (3d) 1101 (British Columbia Supreme Court (BCSC)); *Discovery Enterprises Inc v Ebco Industries Ltd* (1997) 40 BCLR (3d) 43 [72], [118] (BCSC); affirmed (1998) 50 BCLR (3d) 195 (British Columbia Court of Appeal (BCCA)).

[23] See *Ang Thiam Swee* (n 8) [19]–[20].

[24] [2002] SGHC 49 (SGHC) 471.

[25] ibid [9].

[26] [2004] SGCA 18 (SGCA) [19]. The court had opined that good faith may be best demonstrated by showing a 'legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all': ibid [20].

[27] [2011] SGHC 88 (SGHC) 980. See also *Poondy Radhakrishnan v Sivapiragasam s/o Veerasingam* [2009] SGHC 228 (SGHC).

[28] ibid [73].

[29] *Fong Wai Lyn Carolyn* [2011] SGHC 88 (SGHC) [23].

case',[30] or, expressed negatively, that the action is 'not frivolous or vexatious'. It cannot be denied that the *Agus Irawan* approach does make much practical sense. Good faith is not a concept that is readily susceptible of *positive* proof. What is good faith but the lack of bad faith? As one commentator has observed:

> [Good faith is] an excluder. It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically excluded.[31]

However, the effect of the beguilingly simple approach advocated in *Agus Irawan* is to emaciate the requirement of good faith. There is little reason for the courts to subject the applicant's motives and purpose to careful consideration and analysis, as the existence of an arguable case trumps all. Indeed, in *Fong Wai Lyn Carolyn*,[32] the possibilities that first, the applicant herself could have been in breach of her directors' duties, and secondly that the applicant was possessed of a collateral purpose in making the application, were considered irrelevant and/or insufficient to support any finding of bad faith in the light of the fact that the applicant had 'raised several legitimate claims that [the company] could pursue against [the defendant]'.[33] This approach, as Rajah JA observed in *Ang Thiam Swee*, has given rise to a 'fixation on the legal merits of the proposed statutory derivative action', a consequence of which is that 'local jurisprudence has been sparse on the substantive relevance of the applicant's motives to the assessment of his good faith'.[34]

The *Agus Irawan* approach also precipitated the observed practice in the Singapore courts to accord primacy to the interests of the company requirement.[35] The 'crucial link' between the two requirements imposed by s 216A(3) has been judicially noted on a number of previous occasions and also in *Ang Thiam Swee*.[36] In *Pang Yong Hock*,[37] for example, the Singapore Court of Appeal had noted that as a consequence of the 'interplay of the requirements in s 216A(3)(b) and (c)', '[t]he 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'.[38] It should be noted that the fact that a potential action is 'arguable' or 'legitimate' does not necessarily mean that bringing that action will be 'in the interests of the company'. A distinction clearly exists between these two concepts. The

[30] ibid.
[31] Robert Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Virginia Law Review 195, 201.
[32] [2011] SGHC 88 (SGHC) 980.
[33] ibid [82].
[34] *Ang Thiam Swee* (n 8) [30].
[35] Puchniak and Tan (n 9) 143, [9.25].
[36] *Ang Thiam Swee* (n 8) [13].
[37] *Pang Yong Hock* (n 26).
[38] ibid [20].

prerequisite demands more. It demands that due consideration be given to the further question whether, in spite of the viability of the action, it nevertheless ought not to be pursued. The inquiry into the 'interests of the company' should therefore involve weighing of the costs (financial and intangible) of litigation against the potential gains that might ultimately result. As the Court of Appeal in *Pang Yong Hock*[39] explained:

> A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.[40]

Nevertheless, the interests of the company prerequisite is necessarily predicated on the legitimacy of the action, for it cannot be in the company's interests, even on a prima facie case, to bring an action which is without some objective basis.[41] As Rajah JA noted, '[t]o satisfy the requirement in s 216A(3)(c) (…) the applicant must cross the threshold of convincing the court that the company's claim would be legitimate and arguable'.[42] The *Agus Irawan* approach therefore lent support to the view that the interests of the company requirement occupied a pre-eminent position. Once this requirement is established, the argument goes, the good faith requirement should concomitantly also be satisfied. The applicant's good faith is therefore of little consequence.[43]

2 A Necessary Realignment

But is this the correct approach? It is certainly not supported from a textual perspective of s 216A of the CA. Indeed, if anything, the section quite clearly exacts a more stringent standard of proof for good faith than 'for the interests of the company' requirement. Unlike the pre-condition in s 216A(3)(c), which merely requires the court to be satisfied, not that bringing the proposed derivative

[39] ibid.

[40] ibid [21]. See also *Robash Pty Ltd v Gladstone Pacific Nickel Pty Ltd* [2011] NSWSC 1235 (NSWSC) [57], where the following factors were considered relevant to the question whether an application was in the interests of the company: (1) the prospects of success of the proceedings; (2) the likely costs and likely recovery if the proceedings are successful and the likely consequences if the proceedings are not successful; (3) the nature of any indemnity the applicant has offered to the company if the proceedings are brought and the likelihood of the company recovering under the indemnity; (4) the resources the company will need to devote to the proceedings and the resources it has available; and (5) the effect that the proceedings may have on other parts of the company's business. See also *L & B Electric Ltd v Oickle* [2005] NSSC 110 (Nova Scotia Supreme Court (NSSC)) [48].

[41] *Ang Thiam Swee* (n 8) [58].

[42] ibid [53].

[43] This is also the view of some academic commentators: see Dennis Peterson and Matthew Cumming, *Shareholder Remedies in Canada* (2nd edn (loose-leaf ed) LexisNexis 2009) [16.39]; Arad Reisberg, *Derivative Actions and Corporate Governance* (OUP 2007) 115–20.

action *is* in the interests of the company, but that it *appears to be prima facie* in the company's interests, s 216A(3)(b) requires the court to *be satisfied* that the applicant *is* acting in good faith. The applicant is, on a textual interpretation, clearly required to positively[44] satisfy the court as to his good faith.[45] By exacting a higher standard with respect to its proof, Parliament appears to have underscored the significance of good faith for leave to be granted under s 216A. In light of the clear language of the statute, therefore, the *Agus Irawan* approach needed qualification.[46] *Ang Thiam Swee* has now confirmed that there can be no presumption of good faith in favour of the applicant. The onus to establish good faith lies squarely on the applicant.[47]

The effect of this realignment is stark as can be seen from the diametrically opposed conclusions reached in *Ang Thiam Swee* in the High Court and in the Court of Appeal. The applicant, Low, and Ang were minority shareholders in the company, each holding a 10% stake, and also sat on the company's board of directors. Both had been persuaded to be part of the company by Gan, who was then the only other director and majority shareholder in the company. In the twenty-odd years or so since the company's incorporation, it appeared that Gan had effectively run the company as a sole proprietorship. In 2009, following Gan's conviction for making fraudulent tax claims and consequent statutory disqualification from his directorship of the company, the board (now comprising Low and Ang) caused the company's accounts to be professionally investigated. The investigations revealed that Gan had misappropriated over $5 million of the company's funds. Low alleged that the same investigations also revealed that Ang, as co-signatory with Gan of the company's bank account, had also misappropriated company funds in breach of his directors' duties. He then sought leave under s 216A to bring a derivative action in the company's name against Ang for the return of the misappropriated sums. Low succeeded in the High Court.[48] The learned judge found that Low had satisfied the pre-requisites prescribed by s 216A(3) and granted leave to Low to proceed with the claims against Ang.[49] The judge's sole ground for so concluding was that '[i]t appeared *prima facie* that there was a significant amount of monies that had been misappropriated from the [company], and that Ang had committed multiple serious breaches of his duties as a director'.[50]

[44] See *Tremblett v SCB Fisheries Ltd* (1993) 116 Nfld & PEIR 139 (Newfoundland Supreme Court (NSC)) [87]. See also *Discovery Enterprise* (n 22) [118].

[45] The standard of proof is the civil standard of a balance of probabilities: *Tam Tak Chuen v Eden Aesthetics Pte Ltd (Khairul bin Abdul Rahman and another, non-parties)* [2010] SGHC 24 (SGHC) [12].

[46] *Ang Thiam Swee* (n 8) [23].

[47] ibid.

[48] *Low Hian Chor v Steel Forming & Rolling Specialists Pte Ltd* [2012] SGHC 10 (SGHC).

[49] These were claims for payments made to Ang without basis, allowances paid to Ang's brother, monies paid into a personal bank account held jointly by Ang and Gan's son, and secret commissions paid to a customer's employee: ibid [8].

[50] ibid [7].

On Ang's appeal to the Court of Appeal, the appellate court disagreed with the High Court that the requirements of s 216A had been satisfied. In relation to the requirement of good faith, the court took a close look at the evidence to evince the applicant's motives and purpose, and concluded that the applicant had failed to discharge his burden on two grounds. First, the evidence indicated that the application had been 'animated by such a compound of private motives as to amount to a collateral purpose',[51] and secondly, Low could not have had an honest belief in the merits of the application as it was obvious that he doubted the veracity of the very evidence that he was himself adducing to evidence Ang's alleged misconduct. The court stated:

> We think that the Application has indeed been animated by such a compound of private motives as to amount to a collateral personal purpose. Any justice done for the Company would be, at best, incidental to the advancement of Low's own aims. (…) Given the absence of any clear coincidence between the Company's interests and Low's apparent collateral personal purpose of securing sole control of the Company, it would be a patent abuse of process to allow him to use the Company as a vehicle for his own private objects. (…) [T]he *raison d'être* of s 216A of the Companies Act is to protect minority interests and do justice to the company. The present application appears to be a cynical attempt to load the scales against another minority shareholder on the pretence of doing justice to the company, and, as such, fails at the very first hurdle of *bona fides*.[52]

The Court of Appeal has therefore made it clear that the requirement of good faith stands on its own and a separate consideration of the applicant's good faith is necessary. Unfortunately, despite the Court of Appeal's categorical view, it would appear that the Singapore High Court has found it difficult to shake off the old habit engendered by *Agus Irawan*. Two cases illustrate this.

Chan Tong Fan v Chiam Heng Luan Realty Pte Ltd[53] involved an application by minority shareholders for leave to commence derivative actions on behalf of the company against the directors for breach of directors' duties. The learned judge dealt first with the interests of the company requirement, stating:

> The complainant has the two-fold burden of proving that (i) there is a reasonable basis for his complaint and a legitimate or arguable action against the proposed defendants; and (ii) it is in the interests of the company for the proposed action to be pursued.[54]

After subjecting the proposed claims to close examination, the judge concluded that, out of the six proposed actions, only one was of sufficient objective merit. And this fact alone was sufficient to satisfy the interests of the company requirement.[55] The judge then proceeded to consider the good faith requirement.

[51] *Ang Thiam Swee* (n 8) [46].
[52] ibid.
[53] [2013] SGHC 192 (SGHC).
[54] ibid [33].
[55] ibid [73].

After observing that the burden of proof for good faith lay on the plaintiffs,[56] the judge stated as follows:

> I accepted that the plaintiffs genuinely felt aggrieved. Unfortunately, it was clear from the form their complaints took that, in many cases, the plaintiffs had allowed their unhappiness with [the defendants] and with the way that [the company] was being run to overcome their objectivity. In my view, the plaintiffs had taken an unduly suspicious view of the actions of the Directors and of their motivations. (…) *To that extent I considered that the plaintiffs had not proven their good faith.* It was only as regards the treatment of the income from the Shanghai Properties that the plaintiffs had been able to show that the company had a legitimate cause of action.[57]

Despite this negative finding as to good faith, the learned judge nevertheless granted leave in respect of that one arguable case.[58] The only logical inference that one can draw from this, with respect, somewhat odd conclusion is that the requirement of good faith was, because of the legitimacy of that action and thence the satisfaction of s 216A(3)(c), somehow satisfied. Clearly, the interests of the company trumped good (or perhaps more accurately, bad) faith.

The second[59] post-*Ang Thiam Swee* case that is relevant for our purposes is *Lee Sen Eder v Wee Kim Chwee*[60] where the main issue was whether the failure to give notice as required by s 216A(3)(a) could be excused by the court. The applicant had argued that it was not expedient to give notice as he had reasonable concerns that the defendants would destroy or tamper with the evidence. The High Court concluded that these concerns were insufficient to excuse the failure to comply with the notice requirement and dismissed the application. Given this conclusion, it was strictly unnecessary, as the learned judge himself noted, to consider the other prerequisites of s 216A. However, his Honour nevertheless decided to take that further step but only with respect to the interests of the company requirement. That the judge considered the good faith requirement as secondary was put beyond conjecture as his Honour thought it fit to refer to only the notice and the interests of the company requirements as respectively, 'Requirement 1' and 'Requirement 2'. The requirement of good faith was not accorded similar treatment. Indeed, there was also no consideration of the applicant's good faith at all.

[56] ibid [74].

[57] ibid [77] (emphasis added).

[58] ibid [58]. In fact, the learned judge appears to have decided on granting leave before considering good faith.

[59] A contemporaneous decision of the High Court which may be considered neutral is *Teo Seng Hoe v IDV Concepts Pte Ltd* [2013] SGHC 269 (SGHC), where the court concluded as follows (at [56]):

> There was a breakdown in the business relationship between Teo [the applicant] and Chew [one of the defendants]. However, and importantly, there is no evidence to show that Teo was so motivated by vendetta, perceived or real, that his judgment would be clouded by purely personal considerations. Instead, I have found that there were legitimate and arguable claims against [the defendants] which Teo believed existed and which Chew was, for obvious reasons, not inclined to pursue. In my judgment, Teo has shown that he brought the present proceedings in good faith.

[60] [2013] SGHC 287 (SGHC).

With respect, this (non-)development in the treatment of good faith, in spite of the clear direction given in *Ang Thiam Swee*, is unfortunate. The cases presented opportunities for the framework laid down in *Ang Thiam Swee* to be applied to different factual situations. They were therefore opportunities missed. Even more lamentable perhaps is the necessary supposition that the courts continue to view good faith as a secondary matter, seemingly without an independent role to play. This view is clearly at odds with the clear text of the section and does little to give effect to the role of good faith, to which we should now turn.

3 The Significance of Good Faith

Whilst the concept of good faith is difficult to define comprehensively, and its meaning elusive,[61] it is not a concept that is alien to corporate law.[62] Given the ubiquitous need for, and hence the consequential presence of, human intermediaries and agents in corporate operations, the concept is necessary to ensure that any intermediary to whom a power is conferred does not abuse the power but exercises it for proper purposes. Thus, directors are subject to a duty to exercise the corporate powers conferred on them in good faith and for proper purposes,[63] and, to a more limited extent, shareholders when exercising their voting powers are constrained not to do so for ulterior purposes.[64] As Dixon J pointed out in *Mills v Mills*,[65] this constraint is essentially only one application of a general doctrine that 'a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void'.[66]

The inclusion of good faith as a requirement in s 216A is clearly intended to achieve cognate objectives. The objective behind the statutory procedure in s 216A is to enable justice to be done to the company,[67] and not to serve the applicant's personal or private purposes. During the second and third readings of the

[61] Margaret Chew, *Minority Shareholders' Rights and Remedies* (2nd edn, LexisNexis 2007) 301. See also Maleka Cassim, 'The Statutory Derivative Action under the Companies Act of 2008: The Role of Good Faith' (2013) 130 The South African Law Journal 496, 508.

[62] It has been described as a concept that 'everyone understands': Sean Griffith, 'Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence' (2005) 55 Duke Law Journal 1, 4. The UK Law Commission considered it a concept that is 'generally readily recognisable': see Law Commission (n 14) [6.76].

[63] See *Ho Kang Peng v Scintronix Corp Ltd* [2014] SGCA 22 (SGCA) [35]–[37]. See also *Re Smith and Fawcett Ltd* [1942] Ch 304 (England and Wales Court of Appeal (CA)); *Mills v Mills* (1937–38) 60 CLR 150 (High Court of Australia (HCA)) 185.

[64] *Ngurli Ltd v McCann* (1953) 90 CLR 425 (HCA) 438. See *Re S Q Wong Holdings (Pte) Ltd* (SGHC). See also *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 (Ch); *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 (CA); *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 (CA).

[65] *Mills* (n 63) 185.

[66] *Aleyn v Belchier* (1758) 1 Eden 132, 138; 28 ER 634, 637 (Lord Northington). For an example of the principle applied outside of the corporate context, see *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48 (CA).

[67] *Pang Yong Hock* (n 26) [19] to which Rajah JA referred: *Ang Thiam Swee* (n 8) [31].

Amendment Bill[68] which introduced the section, the then Minister for Finance had stated:

> To ensure that the remedies that would be open to shareholders [pursuant to s 216A] are *not abused* and give rise to unjustified court action, s 216A contains strict conditions that must be satisfied before any action can be brought (…)[69]

And in the words of Lai Kew Chai J:

> Management decisions should generally be left to the board of directors. Members generally cannot sue in the name of his company. A minority shareholder could attempt to abuse the new procedure, which would be as undesirable as the tyranny of the majority directors who unreasonably refuse to act.[70]

The concern therefore is over the potential misuse of the procedure for purposes unrelated to those intended by its inclusion into the statute books. Similar concerns undergird the preconditions for leave in Australia[71] and in Canada.[72] Indeed, these same concerns also constrained the availability of the derivative action at common law. In *Barrett v Duckett*,[73] Peter Gibson LJ had said:

> The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely, if the action is brought for an ulterior purpose (…) the court will not allow the derivative action to proceed.[74]

The common law, therefore, as was adroitly expressed in a leading English company law text, had 'always been more impressed by the risk of derivative claims being motivated by personal objectives than by the risk that confining derivative claims would lead to less litigation than the company's interests

[68] Companies (Amendment) Bill (Bill 33 of 1992). See *Ang Thiam Swee* (n 8) [21]–[22].

[69] Singapore Parliamentary Debates, Official Report (14 September 1992) vol 60, col 231 (emphasis added). See *Ang Thiam Swee* (n 8) [21].

[70] *Teo Gek Luang v Ng Ai Tiong* [1998] 2 SLR(R) 426 (SGHC) [14].

[71] See the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 which explained, with respect to the good faith criterion, as follows:

> [6.36] In assessing whether an applicant is acting in good faith, the Court could be expected to have regard to whether:
> there was any complicity by the applicant in the matters complained of; andthe application is being made in pursuit of an interest other than that of the company.
> [6.39] The good faith requirement is designed to prevent proceedings being used to further the purposes of the applicant, rather than the company as a whole.
> See *Fiduciary Limited v Morningstar Research Pty Limited* (2005) 53 ACSR 732 (NSWSC) [20] where Austin J referred to this explanation.

[72] See Robert Dickerson, John Howard and Leon Getz, *Proposals for a New Corporations Law for Canada* (1971) vol 1 [482], which stated that '[b]y requiring good faith on the part of the complainant this provision precludes private vendettas'.

[73] [1995] BCC 362 (CA) 368.

[74] See further *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] SGHC 157 (SGHC) [69].

required'.[75] This concern, however, is not without ground. Much of the law which governs representatives is dictated by concerns that human infirmity[76] may lead one to act in self-interest.

But there is a more directly relevant reason. Whereas corporate decision making is generally subject to the majority rule, derivative actions bypass this rule. The rule in *Foss v Harbottle*[77] is (in)famous for the obstacles it placed before every well-intentioned shareholder. Where a decision as to the alleged wrongdoing has been taken by the majority, whether represented by the general meeting or the board, there is no room for a minority shareholder to litigate in respect thereof. As Jenkins LJ explained in an oft-cited passage, 'if a mere majority of the members of the company (…) is in favour of what has been done, then *cadit quæstio*. No wrong had been done to the company or association and there is nothing in respect of which anyone can sue'.[78] The faithful adherence to the majority rule that the rule in *Foss v Harbottle* demands has been repeatedly justified. Choo Han Teck J's statement in *Ting Sing Ning v Ting Chek Swee* is representative:[79]

> The rule is a useful one because it avoids the multiplicity of actions by individual members by giving the right of action to the company itself; and thus, and in many instances, prevents a minority from oppressing the majority by inflicting vexatious and unwarranted legal action.[80]

Indeed, as Lord Wilberforce observed in *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[81] those who take interest in companies limited by shares have to accept majority rule. And this is appropriately so because it provides a democratic decision-making mechanism that is commercially workable.[82] Nevertheless, the need to accept and allow the exceptional case for permitting the derivative action at common law was borne out of the recognition that an absolute adherence to the majority rule may result in unfairness and corporate wrongs going without remedy.[83] And although the statutory procedure was introduced to ameliorate

[75] Paul Davies and Sarah Worthington, *Gower & Davies Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) [17–5].

[76] *Ex Parte Bennett* (1805) 32 ER 893, 897 (Eldon LC).

[77] (1843) 2 Hare 461, 67 ER 189.

[78] *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066–67.

[79] [2006] SGHC 192, [2007] 1 SLR(R) (SGHC) 369; appeal was allowed [2007] SGCA 49, [2008] 1 SLR(R) (SGCA) 197 but Choo J's comments on the rationale for the rule remains valid.

[80] ibid [1].

[81] [1978] 2 MLJ 227 (Privy Council (PC)) 229.

[82] Chew (n 61) 7. See also BAK Rider, 'Amiable Lunatics and the Rule in *Foss v Harbottle*' (1978) 37 Cambridge Law Journal 270.

[83] Wigram VC alluded to this in *Foss v Harbottle* (1843) 2 Hare 461, 492; 67 ER 189, 203 itself when he said:

> If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the … claims of justice would be found superior to any

the admittedly rigid position in connection with the common law derivative action, it merely changed the rules for shareholder access to control of corporate litigation. The fundamental nature of the statutory action remained essentially the same. The fact that statutory inroads have been made into access rules cannot deny the logic that sustains the rule in *Foss v Harbottle*. It remains indubitable that the majority rule underpins much of corporate operations, and continues to do so notwithstanding the introduction of s 216A. The grant of leave under s 216A involves vesting the 'extraordinary power' in a shareholder or other proper applicant to subject the company,[84] and to commit its resources, to 'a position of legal conflict' even if a majority of the company,[85] acting through the board of directors or some other corporate process dictated by the company's constitutional documents, is not supportive of the action.[86] Scrutinizing the applicant's motivations becomes all the more necessary as integrity of purpose takes on especial significance because of the very nature of the derivative action. The court must be convinced that the applicant is seeking to bring the action for the purpose of advancing the company's interests. If the court finds that the real purpose for the application is to advance some personal agenda, good faith would not be present, and leave ought not to be granted, even if there is objective merit to the case. As Puddester J noted in *Tremblett v SCB Fisheries Ltd*,[87] '[g]ood faith clearly is, and must be, an essential and separate element, in light of the broad power which would devolve [upon the applicant] on the granting of the application'.[88] The good faith requirement can, to this extent, be said to accord due respect to the majority rule.

There is another facet to the purpose of the good faith requirement, and this is related to the question whether the particular applicant ought to be granted leave. In focusing the inquiry on the subjective aspects of the applicant's state of mind, the good faith requirement checks the suitability of the applicant as a corporate representative. Rajah JA alluded to this when he observed that an applicant who lacked good faith may not be 'the proper party to represent the company's interests'.[89] At common law, this concern was manifested in the law's

difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

[84] *Tremblett* (n 44) [61] (Puddester J).

[85] ibid.

[86] Muir J pointed out in *Cannon Street Pty Ltd v Karedis* [2004] QSC 104 (Queensland Supreme Court (QSC)) [176] that the applicant, in applying to the court for leave to bring proceedings 'in a sense, is assuming a role of the company's directors', who, as is trite, act under sanction by the majority. It should be noted that the board is also subject to a duty to exercise corporate powers for proper purposes which is duty is not satisfied by reference to the interests of the company: see generally *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC). See also *Scintronix Corp Ltd (formerly known as TTL Holdings Ltd) v Ho Kang Peng* [2013] SGHC 34 (SGHC) [45].

[87] *Tremblett* (n 44).

[88] ibid 158.

[89] *Ang Thiam Swee* (n 8) [13] (emphasis original).

consideration of the applicant's 'clean hands'[90] or lack thereof which would deny him the right to act on behalf of the company. As Lawton LJ had stated in *Nurcombe v Nurcombe*:[91]

> [T]he court is entitled to look at the conduct of a plaintiff in a minority shareholder's action in order to satisfy itself that he is a proper person to bring the action on behalf of the company and that the company itself will benefit. A particular plaintiff may not be a proper person because his conduct is tainted in some way which under the rules of equity may bar relief.[92]

The case involved a wife who had commenced a derivative action against her former husband in the name of the company in which they both held shares for breach of duty in diverting a substantial contract to another company he effectively owned. However, in matrimonial proceedings for financial provision that took place prior to the derivative action, the wife had been awarded a lump sum which took account of the profits her erstwhile husband had made out of the diversion. The Court of Appeal affirmed the lower court's decision to dismiss the action, and Lawton LJ stated:

> In this action she is in effect saying: although I have shared with the first defendant his ill-gotten gains, I want the court to order that he should pay over to [the company] his share of them plus my share so that I can have a chance of getting some more because of my status as a shareholder. In my judgment, the court should not countenance such conduct.[93]

The question then is: can this 'sifting' role of the good faith requirement nevertheless be fulfilled by the interests of the company requirement?

Rajah JA clearly thought not. In fact, in Rajah JA's view, it is the good faith that should be of primary concern. He stated:

> [B]ad faith may be established where these questionable motives constitute a personal purpose which indicates that the company's interests will not be served, *ie that s 216A (3)(c) will not be satisfied*.[94]

This is penetrating insight—if the applicant was acting without good faith, even if there was objective legal merit to the proposed action, it would not be prima facie in the company's interests for that applicant to be given control of the action. It is ventured with respect that this insight underscores the need for the separate requirement of good faith, and the need for it to be independently proved. An application for leave signals only the start of proceedings for the company. If the applicant is to be given control of these proceedings, it is appropriate that his

[90] For a consideration of whether the doctrine of 'clean hands' ought to apply in derivative actions, see Jennifer Payne, '"Clean Hands" in Derivative Actions' (2002) 61 Cambridge Law Journal 76.
[91] [1985] 1 WLR 370 (CA).
[92] ibid 377.
[93] ibid.
[94] *Ang Thiam Swee* (n 8) [13] (emphasis added).

good faith, measured by reference to his suitability as a corporate representative and the propriety of his intentions, be assessed so as to provide assurance that the proposed proceedings will be prosecuted in the company's interests.[95]

There is indeed a subtle difference in perspective between the interests of the company requirement and the requirement of good faith. Whilst good faith focuses the attention of the court on the person of the applicant, and the inquiry is therefore necessarily substantially subjective, the 'interests of the company' requirement directs attention to the 'company's separate and independent welfare'.[96] This has been said to import the 'familiar concept of the interest of the company as a whole'.[97] The 'interests of the company' requirement therefore respects the proper plaintiff rule by recognizing that the true plaintiff in the proceedings is the company, and it is its rights that are being vindicated. The fact that this requirement is satisfied is however no assurance that the purpose for which the action was brought was proper. It has been observed that one is hard put to find 'a single case in which the court has found that a proposed derivative action was in the interests of the company but failed to grant leave based on a lack of good faith',[98] arguably suggesting that good faith is a necessary corollary to any proposed action that is found to be in the company's interests. But this is not always the case, as the Ontario decision in *Katana v Avsenik* illustrates.[99] As s 216A is based on the Ontario provisions, the requirements for leave are essentially identical.

The case involved a dispute between the Katana and Avsenik families who have been involved for many years in the business of producing shoes through, *inter alia*, the company MAK Shoes Inc ('MAK') in which each side held a 50% stake. Sometime ago, it was decided that the assets of MAK be sold to a company known as Natural Comfort Ltd ('Natural') in which the families were also directly or indirectly interested. The purchase price was satisfied by the delivery of a promissory note secured under a general security agreement. As a consequence of Natural's subsequent poor economic performance, the families decided that it should be wound up. They were however unable to agree as to how to deal with its assets, and the dispute resulted in proceedings being commenced in which each side sought different orders. These proceedings were then settled through a settlement agreement entered into between various members of the respective, and a consent order which resolved that litigation was made.

[95] See Explanatory Memorandum to the Corporate Law Economic Reform Programme Bill 1998 [6.37], referred to by Austin J in *Fiduciary Ltd v Morningstar Research Pty Ltd* [2005] NSWSC 442 (NSWSC) [20].

[96] *Maher v Honeysett & Maher Electrical Contractors* [2005] NSWSC 859 (NSWSC) [44]. It should be noted that the Australian requirement as to interests of the company is couched slightly differently from section 216A. The Corporations Act, s 237(3) requires the court to be satisfied that the proposed action is in the *best* interests of the company. The standard of proof required is therefore higher.

[97] ibid.

[98] Puchniak and Tan (n 9) [9.25].

[99] (2007) 161 ACWS (3d) 562 (Ontario Superior Court of Justice (Ontario SCJ)).

Unfortunately, further disputes arose between the parties, and the present application to commence derivative proceedings was made by a representative member of the Katana family in the name of and on behalf of MAK alleging that, as it remained a secured creditor of Natural, the latter ought to pay MAK pursuant to the promissory note. The application was necessary as the Asvenik family refused to approve the action. In support of the application, it was argued, inter alia, that the settlement agreement did not bind MAK as it was not a party thereto. On the evidence, the Court concluded that there was some possibility that this argument might succeed. Accordingly, given the low standard of proof applicable to the requirement as to interests of the company,[100] the Court considered itself to have been satisfied as to the same. Given this finding, Wilton-Siegel J considered the question whether the applicants were acting in good faith to be 'pivotal'.[101] In this connection, the Court found that the applicants had acted in bad faith in bringing the application. His Honour stated as follows:

> This conclusion proceeds from the finding above that the intention of the parties to the [settlement agreement], and related documentation, was that (…) MAK [was] to forbear from asserting [its] outstanding claims against Natural. By executing the [settlement agreement], therefore, the parties thereto committed themselves to acting in good faith to implement the objects of the [settlement agreement]. This duty to act in good faith includes an obligation not to take any actions that would frustrate the objects of the [settlement agreement]. I have concluded that by pursuing this action on behalf of (…) MAK, the applicants are doing exactly that — frustrating the object of the [settlement agreement] (…) — and are therefore acting in bad faith.[102]

The applicants' purpose therefore was not to do justice to the company, but to frustrate an agreement which they themselves had committed to.

The case also amply demonstrates why the suggestion to accord primacy to the interests of the company requirement ought to be resisted. As pointed out earlier, s 216A does not require the applicant to show a prima facie case that bringing the action is in the company's interests, but only that there appears to be such a prima facie case. This is a low standard indeed, and is, presumably, recognition that a

[100] Ontario Business Corporations Act, s 246(2) requires that the court is satisfied that, *inter alia*, '(c) it appears to be in the interests of the corporation (…) that the action be brought (…)'. In *Marc-Jay Investments Inc v Levy* (1974) 5 OR (2d) 235 (Ontario High Court of Justice (Ontario HCJ)), a case which was referred to by our courts in a number of cases (see *Teo Gek* (n 70) [14]; *Sinwa SS (HK) Co Ltd* (n 74) [24]; *Poh Kim Chwee v Lim Swee Long* [1998] SGHC 186 (SGHC) [18]), O'Leary J had stated (at [9]–[10]):

> It is obvious that a Judge hearing an application for leave to commence an action, cannot try the action. I believe it is my function to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful (…) I am not to deny leave to bring an action simply because on a weighing of the evidence I should decide it is unlikely that the action will be successful.

[101] (2007) 161 ACWS (3d) 562 (Ontario SCJ) [89].
[102] ibid [91].

minority shareholder is usually not in a position to obtain sufficient evidence at the leave stage so as to be able to found a prima facie case. As Prakash J observed in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd*:[103]

> It is often the case that a party making the application for leave is not privy and does not have access to significant documents held by the company or its controlling directors. It is not surprising to find that complaints in such proceedings have been partly based upon information received, belief and inference.[104]

In *Ang Thiam Swee*, the Court of Appeal suggested that the requirement in s 216A (3)(c) is concerned mainly with the *objective legal merits* of the case. Hence, if the applicant has shown that the proposed action was not frivolous or vexatious,[105] and therefore of legal merit, the 'interests of the company' requirement would be satisfied:

> It is plain that at this interlocutory stage, the standard of proof required is low, and only the most obviously unmeritorious claims will be culled. (…) In determining whether the requirement in s 216A(3)(c) has been satisfied, apart from a detached assessment of the merits in prosecuting the proposed statutory derivative action, the court may also go further to examine whether it would be in the practical and commercial interests of the company for the action to be brought.[106]

Given this low standard, the good faith requirement is, as Wilton-Siegel J noted, indeed pivotal. Its role is to ensure that the careful balance, between providing an effective avenue for the protection of the minority and preventing abuse of this very avenue, which the imposition of these 'strict' prerequisites is intended to maintain, is not tilted too far in favour of the minority shareholder given the relative ease of satisfying the interests of the company requirement.

If this pivotal nature of the good faith requirement is accepted, the question that necessarily follows is: how should good faith be positively proven?

C Proof of Good Faith

The difficulties of positively establishing good faith have already been alluded to. As Rajah JA observed, the assessment of good faith is often 'obtruded by the qualification that this issue is a matter for the court to determine on the particular facts of each case'.[107] Given the myriad possible factual circumstances that may present themselves in s 216A applications, no two cases are likely to be identical. Any attempt to craft a single test or definition is not only difficult, but also possibly

[103] [2011] SGHC 88 (SGHC) 980.
[104] ibid [28].
[105] *Ang Thiam Swee* (n 8) [55].
[106] ibid [55]–[56] (emphasis added).
[107] ibid [12].

unwise.[108] This notwithstanding, Rajah JA made it clear that a 'conceptual framework' is necessary in order to guide the court in its exercise of discretion. There appears to be two distinct aspects to Rajah JA's schema. First, the applicant's *purpose* for making the s 216A application must have 'an obvious nexus with the company's benefit or interests'.[109] An applicant acts in good faith only if he is bringing the application for the proper purpose of advancing the company's interests. Second, the court must be satisfied that the applicant honestly intends to serve the company's interests. This latter more subjective inquiry is targeted at establishing whether the applicant is a 'proper party to represent the company's interests'.[110] Rajah JA's framework is therefore one that is closely tied to the *raison d'être* for the good faith requirement. These two aspects are likely to overlap, not just because similar factors and considerations are relevant to both aspects, but more significantly, because of their inter-reliance. Thus, a conclusion that the purpose of the action is to advance the company's interests is likely to lead to at least an inference that the applicant intends to act in the company's interests.

1 The Applicant's Purpose

An applicant would not be acting in good faith if he was not pursuing the derivative action to vindicate the company's rights and advance its interests. Rajah JA had observed that 'the court ought to assess the *motivations* of the applicant in order to determine whether he is acting in good faith'.[111] In this regard, the applicant's purpose may be discerned by examining his motivations. His personal feelings, which can also constitute motives, are somewhat less helpful in ascertaining his purpose.[112] Thus, the fact that the applicant was moved or spurred by personal animus, and even malice,[113] against the defendant(s) cannot, by itself, inexorably lead to an inference that his purpose was improper. This was recognised by the Court of Appeal in *Pang Yong Hock* which had observed that '[h]ostility between the factions involved is (…) generally insufficient evidence of lack of good faith'.[114] As Palmer J noted in *Swansson v RA Pratt Properties Pty Ltd*,[115] 'it is not the law that only a plaintiff who feels good will towards a defendant is entitled to sue'.[116]

Instead, it is the objective facts that must be scrutinized. This includes the applicant's allegations and the circumstances out of which they arose,[117] as well as the

[108] *Swansson* (n 21) [35] (Palmer J).
[109] *Ang Thiam Swee* (n 8) [13].
[110] ibid (italics omitted).
[111] ibid.
[112] ibid.
[113] *Swansson* (n 21) [41].
[114] *Pang Yong Hock* (n 26) [20].
[115] *Swansson* (n 21).
[116] ibid [41].
[117] *Vinciguerra* (n 21) [56].

ultimate effect of the proposed litigation. It is from these factors that the court will draw the necessary inferences as to the applicant's purpose. Whilst it is true that 'good faith' connotes a particular state of mind which must be found to exist in the applicant, it has been judicially pointed out that a sworn assertion that relevant state of mind 'which by necessity will almost always be unqualified opinion founded on hearsay (…) and will be dependent upon the advice of lawyers (…) must be of little weight or utility; and the objective facts and circumstances will speak louder than the applicant's words.'[118]

Further, an applicant who acts out of self-interest is not necessarily spurred by improper purposes. The question is the *nature* of the applicant's self-interest. Where the applicant's self-interest is aligned with the company's interests,[119] such as where he is seeking to maximise the value of or restore value to his shares in the company, the applicant's purpose is proper. As Tysoe J observed in *Primex Investments Ltd v Northwest Sports Enterprises Ltd*:

> Anything that benefits a company will indirectly benefit its shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self interest in wanting the company to prosecute an action which it is in the interests to prosecute.[120]

Indeed, the fact that the applicant has a stake of this nature in the proposed litigation is often taken as a positive indication of good faith,[121] and counts as a 'relatively easy'[122] case of good faith. As Palmer J explained:

> 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.[123]

These statements recognise that the reality is that an applicant is, in most cases, unlikely to be able to demonstrate absolute purity of purpose, untainted by ancillary considerations. This should not, in many cases, lead to a conclusion of bad faith. This notwithstanding, there is clearly some point at which the applicant's self-interest, or his collateral motivations, crosses over to the side that indicates impropriety of purpose. The difficulty is in identifying that point. Rajah JA had noted that there is at present no test that has been articulated to assist in identifying this critical juncture. His Honour however suggested that a workable test might be whether the applicant's collateral motives were such as to render the application

[118] *Maher* (n 96) [33] (Brereton J). See also *Vinciguerra* (n 21) [56].
[119] *Primex Investments Ltd v Northwest Sports Enterprises Ltd* (1995) 13 BCLR (3d) 300 (BCSC) [42]. For a similar, but more generous proposition, see *Discovery Enterprises* (n 22) [122].
[120] (1995) 13 BCLR (3d) 300 (BCCA) [42].
[121] *Chahwan* (n 21) [74].
[122] *Swansson* (n 21) [38].
[123] ibid.

an abuse of the court's process.[124] The general principle of abuse of court process was stated by Evershed MR in *Re Majory, A Debtor, Ex parte The Debtor v F A Dumont Ld* in the following manner:

> [C]ourt proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.[125]

As noted in *Pang Yong Hock*,[126] s 216A was designed to provide a procedure for the 'protection of genuinely aggrieved minority interests and for doing justice to a company'.[127] Thus, if the applicant demonstrates that his collateral purpose is 'sufficiently consistent with the purpose of "doing justice to a company" (…) so that he is not abusing the statute, and by extension, also the company, as a vehicle for his own aims and interests',[128] there would be no abuse of process. When would the applicant's collateral motives or purpose be so 'sufficiently consistent'?

In the English decision of *Iesini v Westrip Holdings Ltd*,[129] Lewison J, in considering whether the claimants were acting in good faith, applied the definition of 'collateral advantage' given by Bridge LJ in *Goldsmith v Sperrings Ltd.*[130] Bridge LJ had stated:

> For the purpose of [the general rule on abuse of process], what is meant by a 'collateral advantage'? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. (…) In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, *if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process*. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it.[131]

[124] *Ang Thiam Swee* (n 8) [30].
[125] [1955] Ch 600 (CA) 623–24.
[126] *Pang Yong Hock* (n 26).
[127] ibid [19]. See also *Ang Thiam Swee* (n 8) [31].
[128] *Ang Thiam Swee* (n 8) [31].
[129] [2009] EWHC 2526 (Ch).
[130] [1977] 1 WLR 478 (CA). This was a libel case in which the defendant distributors of a fortnightly paper applied for an order that the actions against them should be stayed or dismissed as an abuse of the process of the court as the plaintiff's purpose in pursuing actions against the distributors was allegedly not to protect his reputation but the collateral purpose of destroying the paper by cutting off its retail outlets.
[131] ibid 503 (emphasis added).

In *Iesini*, the claimant was a minority shareholder in the company Westrip, and was seeking permission to bring a derivative claim on behalf of Westrip against its directors for breach of duty. The claimant alleged that the directors' conduct had led to Westrip losing its valuable assets, and that the claim was necessary to reverse this alleged asset-stripping. The question of the claimant's good faith arose as his bringing of the derivative action was supported by an indemnity as to costs and damages provided by Greenland, an Australian company. Greenland had earlier entered into a joint venture agreement with Westrip, which it now regretted and wished to get out of. The claimant had agreed, in return for the indemnity, to use his best endeavours to procure Westrip to enter into an agreement to terminate that joint venture. The defendant directors argued that the action was not being brought for the benefit of Westrip but for the benefit of Greenland. The evidence, however, indicated that the company stood to recover substantial compensation if the claim succeeded. Lewison J held that the fact that a derivative claim was brought partly for collateral reasons, or where the claimant would derive other benefits therefrom, would not disqualify the claimant from bringing the claim if the claim was ultimately for the benefit of the company. His Honour stated:

> [I]t seems clear to me that [the claimant] was entitled to form the view that unless the derivative claim was brought, Westrip would be left with no assets at all. Thus, in my judgment, the dominant purpose of the action was to benefit Westrip. It cannot, in my judgment, be said that but for the collateral purpose, the claim would not have been brought at all. The claim is, in my judgment, brought in good faith.[132]

Nevertheless, the abuse of process yardstick may, on occasion, be too narrow to cover all potential situations of bad faith. If a wrong has been committed against the company, the shareholder applicant is likely to be, in most cases, 'genuinely aggrieved'. And if the company stood to benefit should the prosecution of the action be successful, it could be said that justice would, by the derivative action, be done to the company. In such cases, there is technically no abuse of process as the section is being utilised for the purposes for which it was enacted.[133] And yet, if a further step were to be taken to examine the ultimate consequences that are likely to follow the successful derivative suit, an inference may be made that the applicant was in truth seeking to gain some benefit which he should not, 'in good conscience',[134] receive. As Palmer J explained in *Swansson*:

> Such a benefit would include, for example, a double recovery by the applicant for a wrong suffered or recompense for a wrongful act inflicted upon the company in which the applicant was a direct and knowing participant with the proposed defendant in the

[132] [2009] EWHC 2526 (Ch).
[133] See *Swansson* (n 21) [43].
[134] ibid.

derivative action. In such a case, the law would not permit the applicant to derive a benefit from his or her own wrongdoing.[135]

In a factual context reminiscent of *Nurcombe v Nurcombe*,[136] the applicant in *Swansson* had sought leave of court to bring proceedings in the name of the company against her former husband for making certain payments in breach of his directors' duties for his own benefit and for the benefit of companies in which the couple were both interested. As part of the divorce proceedings, a deed of settlement was entered into which allegedly took account of these payments. The applicant denied this. On the evidence, Palmer J was unable to make a positive finding as to whether she did or did not receive any such benefit and whether she was or was not seeking double recovery. Noting, however, that the applicant bore the onus of proving her good faith on a balance of probabilities, his Honour concluded as follows:

> The circumstances to which I have referred, taken together, cause me to hesitate in accepting at face value the untested assertions of [the applicant]. The onus is upon her to demonstrate to the court's satisfaction that she is acting in good faith in making the application. In my opinion, she has not discharged that onus. I am not able to feel a comfortable degree of satisfaction that sufficient facts have emerged to justify a finding in [her] favour.[137]

The case of *Chahwan v Euphoric Pty Ltd* provides another example.[138] The applicant was the sole director and holder of all the issued shares in the company Bycoon which owned certain land. The land was mortgaged to Euphoric as a condition for its supply of fuel to Bycoon on credit terms. The applicant claimed that the mortgage was granted by Bycoon's then sole director (who was the applicant's sister) in breach of her directors' duties, and that as Euphoric had knowledge of these contraventions, it held the interest in the land as constructive trustee for Bycoon. The applicant sought leave to bring an action in the name of the company against Euphoric for declarations to this effect. The impetus for the application however was to facilitate the applicant's claim against Bycoon that the latter held all its interest in the land upon trust for him, as he had provided the funds for the acquisition of the land. On the issue of good faith, it was argued that as the applicant was doing no more than seeking to exercise the lawful rights of the company, there was no abuse of process and his conduct could not be said to lack good faith.[139] Tobias JA however noted, '[T]he expression "acting in good faith" (…) extends beyond conduct that would constitute an abuse of process'.[140] In the final analysis, asserting Bycoon's rights via the derivative action was merely a step towards the applicant's real

[135] ibid.
[136] See (n 91).
[137] ibid [52].
[138] *Chahwan* (n 21) [81].
[139] ibid [53].
[140] ibid [81].

purpose of ultimately taking the entire benefit of the claim personally.[141] Tobias JA stated as follows:

> [I]t must be kept well in mind that the onus lies upon the applicant to satisfy the court that, in applying to it for leave to bring the relevant proceedings, he or she is acting in good faith. If such an applicant is in reality seeking to further his or her own personal interests other than as a current or former shareholder of the company, rather than the interests of the company as a whole, then in my view that onus will not have been discharged (…) It thus matters not that the conduct in question would not support a finding of abuse of process.[142]

The issue, it appears, is ultimately one of degree and of balance. What appears to be crucial is whether the court can be convinced that, even absent the collateral purpose or benefit, the applicant would still have forged ahead in an attempt to vindicate the company's rights.

2 Honest Intent

The second aspect of Rajah JA's schema requires a consideration of the subjective intent of the applicant. As alluded to before, this is important in the overall assessment of whether the applicant is the 'proper party to represent the company's interests'.[143] The applicant's motives are also relevant here. An applicant who is 'so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations' is not likely to serve the company's interests.[144] In this case, it would be judicious to deny leave to that particular applicant on the ground that he would not be a proper person to represent the company.

An important factor that supports the existence of an intention to serve the company's interests is the applicant's belief in the viability of the cause of action. Clearly the applicant can only intend to serve the company's interests if he believed that a good cause of action with a reasonable prospect of success exists. In this regard, Rajah JA appeared to have embraced a purely subjective assessment of the applicant's belief:

> While the applicant's good faith and the merits of his application need not be unconnected (…), they are not necessarily connected. Contrary to Prakash J's view in *Carolyn Fong*,[145] an applicant might—albeit quixotically—seek to bring a statutory

[141] ibid [67], [76], [77], [83]–[84].
[142] ibid [83].
[143] *Ang Thiam Swee* (n 8) [13].
[144] *Pang Yong Hock* (n 67) [20]; *Ang Thiam Swee* (n 8) [29].
[145] Prakash J had summarised the principles established in the local cases as including the proposition that 'bad faith is usually inferred from the lack of an arguable cause of action or a prima facie case': *Fong Wai* (n 29) [72].

> derivative action in good faith even where there is no arguable or legitimate case to be advanced (…)[146]

However, a purely subjective view of the applicant's belief as a deciding factor of his good faith is in fact not the typical approach adopted in either Australia or Canada.[147] In *Swansson*, for example, Palmer J had explicitly observed that '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 would hold that belief'.[148] Similarly, the Canadian cases have tended to also require that the requirement of good faith be anchored by an objective consideration of the legal merits of the proposed action. The observations of the Alberta Court of Appeal in *Valgardson v Valgardson* are representative:

> The question of good faith requires the court to ensure that the proposed action is not frivolous or vexatious. There is both a subjective and objective component to the requirement of good faith. The subjective aspect requires that the applicant believes the proposed derivative action has merit. This guards against actions spurned by self-interest or private vendetta. But even where the applicant believes that the proposed action has merit, the court must consider whether objectively viewed the action is not frivolous and vexatious.[149]

D Conclusion

The statutory action is conceptualised as a tool for serving and advancing corporate interests.[150] Imposing a requirement for the applicant to establish his good faith compels an examination as to whether this is indeed the case. A conclusion that the action is prima facie in the company's interests does little to ensure this. As Gilmour J suggested in *Vinciguerra v MG Corrosion*,[151] the shareholder might have acted with a collateral purpose even if the company itself stood to obtain some benefit from a successful conclusion to the derivative action. Propriety of purpose underpins the very inquiry into the good faith of the applicant. It seems obvious therefore that there is good reason for the independence of the

[146] *Ang Thiam Swee* (n 8).

[147] Indeed, one is reminded of the wry observation made by Bowen LJ a long time ago that a person's *bona fides* cannot be the sole test, for otherwise 'you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational': *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 (CA) 671.

[148] *Swansson* (n 21) [36]. See also *Chahwan* (n 21).

[149] [2012] ABCA 124, (2012) 98 BLR (4th) 223 (Alberta Court of Appeal) [20] (references omitted).

[150] The personal interests of the applicant shareholder are often simultaneously served. Indeed, this is far from unusual given that any gain to the company often results in a corresponding advantage to the shareholder. As pointed out above, the Canadian courts have treated such alignment of interests as being indicative of the applicant's good faith.

[151] [2010] FCA 763 (FCA) [66].

good faith requirement. It has been pointed out that a shareholder, who applies to court to bring proceedings in the name of a company, is 'in a sense (…) assuming a role of the company's directors'.[152] Seen in this light, it cannot be inappropriate for the applicant to be subject to those strictures rooted in *bona fides* that have long been applicable to the acts and determinations of directors.

[152] *Cannon Street* (n 86) [176] (Muir J).