EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC(COM) 2015/0090

IN THE MATTER OF MERIT FORTUNE HOLDINGS LIMITED
AND IN THE MATTER OF BVI BUSINESS COMPANIES ACT, 2004, SECTION 184C

BETWEEN:

GLORY ADVANCE INTERNATIONAL LIMITED

Applicant

and

MERIT FORTUNE HOLDINGS LIMITED

First Respondent

CHU KONG

Second Respondent

Appearances:

Robert Levy QC, and Matthew Neal of Walkers, for the Applicant
Richard Evans and Murray Laing of Conyers Dill & Pearman
for the Second Respondent

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2015: September 1
2016: July 8
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JUDGMENT

Application under BVI Companies Act for leave to bring derivative proceedings in Hong Kong in name of and on behalf of BVI company (first respondent) – Subsidiary of company (special purpose vehicle established to own dry bulk vessel that was sold) had been put into liquidation in Hong Kong by its sole director – Subsidiary deadlocked at shareholder level – Company deadlocked at director and ultimate beneficial owner levels – Applicant alleged Hong Kong procedure (Section 228A of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance) used improperly and unlawfully by sole director

as requirements for its use not met – Proposed derivative proceedings aimed at setting aside/staying liquidation.

Application one of numerous court proceedings in BVI and Hong Kong arising from total and irretrievable breakdown of longstanding and wide-ranging business relationship between two Hong Kong businessmen, second respondent being one of them – Litigation involves them and their 'camps', and serious and trenchant disputes.

Court considering application must know, in some manner, specifics of proposed proceedings so it can assess statutory considerations properly, and so applicant not given "blank cheque" – Act sets out broad mandatory considerations for court – Even if met, court has discretion to decline leave based on other appropriate considerations – Key consideration on application was subsection 182C(2)(c), "whether the proceedings are likely to succeed", meaning "whether it is more probable than not that the proceedings will succeed" based on a "full and proper evaluation" of evidence then before the court and arguments advanced by both parties (Basab Inc. v Accufit Investment Inc. and Double Key International Limited BVICHCMAP 2014/0020, Judgment, 9 November 2015, applied).

Success in context meant not just establishing that proposed claimant/applicant likely to be found correct in allegations of improper use of Hong Kong Ordinance provision but also likely to obtain meaningful and effective relief (that is, ending subsidiary's liquidation) – These are matters of Hong Kong law.

Extensive evidence filed by both parties – Court questioned why much of it needed – Court not being asked to, nor could it, determine most of facts, issues and disputes raised – Only needed evidence relevant to determine mandatory statutory considerations (including "acting in good faith" consideration) for giving or not giving leave and relevant to discretion to deny leave even if considerations satisfied.

Second respondent objected that applicant's Hong Kong law evidence tendered without court's permission (CPR 32.6(1)) and he would be prejudiced by retrospective permission because had not submitted expert evidence as no admissible evidence to reply to – Court considered he 'rolled the dice' – Should have anticipated retrospective permission – Could have submitted expert evidence on contingent basis, or on basis that could be only admissible Hong Kong law evidence – Asserted prejudice of his own doing.

Further objection that expert evidence inadmissible as expert was lawyer with applicant's Hong Kong law firm – Not compliant with requirements (CPR 32) that expert witness provide impartial, independent, objective and unbiased help to court – May be circumstances in international commercial litigation where exigencies of time and/or cost and/or available expertise may make it practical, if not ideal, to consider receiving and

giving appropriate weight to expert evidence on foreign law from lawyer in law firm representing party, particularly if not on central issue – Here no assurance that evidence impartial, independent, objective and unbiased help to court; Hong Kong law issue central and critical to application; CPR 32.14 requirements not met in substance even if not in form; and no exigencies of time and/or cost and/or available expertise that made it practical and expedient to admit expert evidence from lawyer in firm representing applicant – Expert evidence also deficient because insufficient for expert merely to state conclusion – Must present analytical process by which conclusion reached – Was no reasoned explanation of opinion – Evidence not admitted – No alternative means to deal with Hong Kong law here – Cannot assume it is the same as BVI law – Hong Kong process in issue not known under BVI law – Would make no sense, and be strange and inappropriate, when court needs to assess whether claim will succeed in Hong Kong under Hong Kong law – Post-hearing request to submit additional expert evidence as not appreciated that would be objection – While some sympathy for applicant's situation, expert affidavit did not deal at all with remedy Hong Kong court might grant – Might allow winding up to proceed on insolvency or just and equitable grounds (no business activities as vessel sold; protracted disputes) – No expert evidence on other issues of Hong Kong law raised by other proposed grounds for derivative proceedings.

Cost/benefit consideration (subsection 184C(2)(d)) did not lead to conclusion on balance of probabilities that proposed litigation would be good investment – No indication of intended defendant(s)/respondent(s); no budget for proposed litigation; no indication whether resources to pay costs, if awarded; no evidence about Hong Kong cost regime (in particular, anticipated percentage recovery).

Not shown that any alternative remedy to challenge liquidation of subsidiary (subsection 184C(2)(d)).

Subsection 184C(2)(b) requires court, in assessing interests of company, to take account of views of company's directors on commercial matters – Means reasoned views – That way court has benefit of directors' thinking, experience and perspective on commercial matters in coming to decision on whether proposed proceedings in interest of company – Consistent with general deference of courts to business judgment of directors.

Not shown that proposed derivative proceedings in interests of company (subsection 184C(2)(b)) – Cannot be in company's interests unless reasonable prospect of ending liquidation, assuming that would be in company's interests – Likely success not shown – Also intractable disputes between ultimate beneficial owners and their camps, and end of venture for which subsidiary formed, leads to conclusion that subsidiary should be wound up.

Subsection 184C(2)(a) requires court to consider whether member acting in good faith – If bringing proposed claim in interests of company, if real prospect of success, and if true object is to seek redress for wrong done to company, shareholder's underlying improper motive (e.g.: spite or malice) irrelevant (Malitskiy & Anor v Oledo Petroleum Ltd., BVIHC(COM) 2012/0083, 18 January 2013; aff'd by Court of Appeal, BVIHCMAP 2013/0006, 16 August 2013, on other grounds) – No lack of good faith or underlying improper motive of applicant, although all steps by both camps in various litigation aimed as much at overall war of attrition as righting of specific wrongs.

Parties agreed company did not intend to pursue proposed proceedings given deadlock so first alternative requirement of subsection 184C(3)(a) met – Second alternative requirement also met – Given that sole director of company put subsidiary into liquidation, sole director should not have conduct of proceedings to remove subsidiary from liquidation, and pointless to leave conduct of proceedings to determination of shareholders/members as a whole given effective deadlock at that level.

Even if subsection 184(C)(2) and (3) considerations satisfied, Court would exercise discretion to decline leave given deadlock, breakdown in relationship and intractable disputes, loss of substratum (end of venture for which subsidiary formed), and just and equitable that subsidiary be liquidated.

Application dismissed.

[1] LEON J [Ag.]: The Applicant applied under section 184C of the BVI Business Companies Act, 1984 ("Act") for leave to bring derivative proceedings in Hong Kong in the name of and on behalf of the First Respondent, Merit Fortune Holdings Limited ("Merit Fortune"), primarily to seek declarations that the wholly owned subsidiary of Merit Fortune, Luck Silver Limited ("Luck Silver"), a Hong Kong company, was "improperly and unlawfully placed into liquidation" in Hong Kong, and that the liquidators should be discharged.[1]

[1] Fixed Date Claim Form, 17 July 2015, paragraph 1. The description was somewhat different, although not materially so, in the "Outline of Submissions on Behalf of the Applicant (For Hearing of Application on 1st September 2015") ("**Applicant's Outline**"), paragraph 1, and in the First Affirmation of Chang Dafa dated 17 July 2015 ("**Chang Affirmation**") on behalf the Applicant (he is a director of the Applicant) and in support of the Application, paragraph 59.

[2] The grounds in support of the relief proposed to be sought in the proposed Hong Kong proceedings ("Grounds"), while not set out anywhere as clearly as they might have been, appeared from an affirmation in support of the Application to be the following:[2]

a. the liquidation of Luck Silver was commenced in contravention of the requirements of the provision of Hong Kong law under which it was commenced, Section 228A of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance ("Ordinance");
b. the costs to engage the provisional liquidators and liquidators of Luck Silver "were improperly incurred and could have been avoided";
c. Merit Fortune and its ultimate beneficial owners were denied the opportunity to decide the future of Luck Silver and in particular, whether it should be liquidated, and if so, by means of what procedure;
d. the interests of the shareholder (Merit Fortune) and creditors of Luck Silver were unfairly prejudiced as a result of the improper initiation of the liquidation of Luck Silver and the failure of the sole director of Luck Silver to properly hold a creditors' meeting following the commencement of the liquidation as required; and
e. the purported creditors meeting, which was scheduled to be held immediately after an Extraordinary General Meeting of Luck Silver, was invalid and of no effect.

[3] The proposed proceedings claiming that Luck Silver was "improperly and unlawfully placed into liquidation" therefore appeared to focus and be grounded on, primarily and essentially, the appropriateness and manner of the use of Section 228A of the Ordinance to commence the liquidation of Luck Silver, and secondarily:

[2] Chang Affirmation, paragraphs 59 and 60.

a. the decision-making processes used or not used to put Luck Silver into liquidation, and
b. the initial steps taken or not taken in the liquidation of Luck Silver (the three focuses collectively, the "Focus of the Proposed Derivative Proceedings").

Essentially all of these are matters of Hong Kong law.

[4] The Application is opposed by the Second Respondent, Mr. Chu Kong ("Chu"). Merit Fortune took no position and did not participate in the Application.

Context: Part of "Serious and Trenchant" Disputes between Two Businessmen and their "Camps" Arising from Irretrievable Breakdown of Their Business Relationship

[5] In is important to appreciate the broader context of this Application.

[6] It is part of numerous court proceedings in this jurisdiction and in Hong Kong[3] arising from the total and irretrievable breakdown of the longstanding and wide-ranging business relationship between two businessmen, Mr. Lau Wing Yan ("Lau") and Chu.

[7] The two men are the principle ultimate beneficial owners of the businesses involved in the proceedings. The disputes were described by Chu as being "serious and trenchant disputes between the two camps"[4], with "camps" referring to the two men and their respective associates and supporters in the businesses and in the disputes. Lau and Chu "are wholly incapable of reaching consensus on anything."[5]

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[3] At the Court's request in one of the proceedings, the parties provided the Court with a comprehensive list as of about November 2015 that shows 12 proceedings in the two jurisdictions. The Second Respondent's "Outline of Submissions on Behalf of the Second Defendant – Hearing 1 September 2015" ("**Chu's Outline**"), paragraph 8, refers to four of the sets of proceedings in this jurisdiction and three sets of proceedings in Hong Kong.

[4] Chu Outline, paragraph 8.

[5] "Outline of Submissions on Behalf of the Applicant (For Hearing of Application on 1st September 2015") ("**Applicant's Outline**"), paragraph 30.

[8] Much of the considerable evidence on this Application dealt with the wide-ranging disputes between these two men and their "camps" in general and in relation to the particular business venture involving Luck Silver.

[9] In this Court's Judgment dated 29 April 2016 in Fortune Bright Global Limited v Central Shipping Co Limited, BVIHC(COM) 2015/0038 ("Fortune Bright"), in relation to the 'sister' cargo shipping venture of Central Shipping Co., Limited, this Court described the situation as follows:

> [48] … this Court has concluded that there has been total and irretrievable breakdown of the longstanding relationship of mutual trust, confidence and cooperation between Mr. Lau and Mr. Chu.

[10] Further observations by this Court in Fortune Bright are pertinent:

> [9] It is this Court's strong sense, having read the evidence and heard submissions, as well as having heard certain other proceedings involving these men and/or their business vehicles, that there may not be 'a bad guy' and 'a good guy' at the end of the day. It may be that both have contributed to a material degree to the breakdown, and perhaps both have come close to or possibly even crossed lines of appropriate commercial conduct on occasions in the course of their many disputes in company dealings, in commercial dealings and in litigation. Certainly both have looked for and found ways to take advantage in their company and court disputes of the structures they chose when their longstanding relationship was characterised by mutual trust, confidence and cooperation.
>
> [10] It would surprise nobody to find that Mr. Chu and Mr. Lau blame each other for the breakdown. In this case, and in other litigation between them, one makes strong allegations about the other.
>
> [11] Thus far they appear to be completely unwilling to find a commercial solution, to find a way to part company, and to find a way to end considerable litigation that is consuming an undue and disproportionate amount of this Court's resources and one would expect the resources of the courts in Hong Kong.
>
> . . . . .

> [13] Thus far the courts have not been able to manage the resolution of the disputes in a coordinated manner.
>
> [14] In this case, it may be said (although it is not the basis of this Court's decision on this Application) that the parties are not just damaging themselves but are consuming a disproportionate amount of the resources of the courts, a public resource funding by the states involved. In an era of the CPR and the Overriding Objective in CPR 1.1, it may be queried whether any parties have a right to litigate endlessly in the public systems rather than in a reasonable manner, while making genuine efforts to reach resolutions.

Background to this Application

[11] Luck Silver was incorporated as a special purpose vehicle in December 2012 to own a dry bulk vessel, the MV Mineral Pearl ("Mineral Pearl"), from early 2013. Mineral Pearl was sold prior to the commencement of the liquidation.

[12] The sole director of Luck Silver was a Mr. Lei ("Lei"). He made the formal decision to put Luck Silver into liquidation and conducted the initial matters in the liquidation. There was evidence from him on this Application, as described below.

[13] The shares of Merit Fortune (Luck Silver's parent corporation) were held 20% by the Applicant and 80% by Starry Fortune Global Limited ("Starry"). All three companies were BVI companies. Merit Fortune's directors were Lau and Chu. Accordingly, Merit Fortune was deadlocked at the director level and at the ultimate beneficial owner level.

[14] The shares of the Applicant (the 20% shareholder of Merit Fortune) were owned 25% each by Ms. Sun and Messrs. Chang, Lu and Hu. Its three directors were Messrs. Chang and Lu and Ms. Sun. Messrs. Chang and Ms. Sun were in the Lai camp.

[15] The shares of Starry (the 80% shareholder of Merit Fortune) were owned 50% each by Lau and Chu. They were the directors of Starry. Accordingly, Starry was deadlocked.

Derivative Actions – Section 184C of the Act

[16] Section 184C of the Act gives this Court a discretion, on the application of a member of a company, to grant leave to that member to bring proceedings in the name and on behalf of that company.

[17] Derivative proceedings are extraordinary, and generally speaking they are permitted only when there is a sufficiently meritorious claim that the company cannot or will not bring. A classic case is where the claim sought to be brought is against the company's directors for breaches of their obligations, and the directors decline to bring the proceedings.

[18] As correctly pointed about by Chu's counsel in Chu's Outline and in oral submissions, the granting of leave to bring a derivative claim is exceptional. The effect of granting leave is to wrest control of an essential aspect of the management of the affairs of the company – the ability to decide to commence and then to conduct legal proceedings – from the directors and giving it to one or more shareholders.

[19] The directors ordinarily are charged with making or supervising the making of such decisions[6], and are required to act honestly and in good faith, in what the directors believe to be the best interests of the company, for a proper purpose, and with the care, diligence, and skill that reasonable directors would exercise in the same circumstance.[7]

[20] Presumably those reasons significantly motivated the legislating of the mandatory statutory considerations for granting leave to bring derivative proceedings.

[6] Act, Section 109.
[7] Act, Section 120 – 122.

[21] Having said all of that, the Act sets out the mandatory considerations for the Court's exercise of its discretion to grant leave, and jurisprudence in this jurisdiction has fleshed out those considerations and the approach to be taken by the courts on applications for leave to bring derivative proceedings.

[22] In determining whether to grant leave, subsection (2) of Section 184C of the Act requires that the Court take the following five matters into account:

a) whether the member is acting in good faith;

b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;

c) whether the proceedings are likely to succeed;

d) the costs of the proceedings in relation to the relief likely to be obtained; and

e) whether an alternative remedy to the derivative claim in available.

[23] The Applicant submitted that there is no reason why any particular consideration should 'trump' another. It is for the Court to determine the weight to attach to each of the five matters.[8] That appears logical, as the appropriate discretionary weighing will depend on all the circumstances of each matter.

[24] The "good faith" consideration in subsection 184C(2)(a) of the Act enables the Court to withhold permission from a shareholder who wishes to use the procedure otherwise than for the benefit of the company in question – in order to achieve a collateral purpose. On the other hand, once it is shown that the bringing of the proposed claim is in the interests of the company, that it has a real prospect of success, and that the true object of the shareholder is to seek redress on the

[8] Applicant's Outline, paragraph 31.

company's behalf for a wrong done to the company, it appears that the shareholder's underlying improper motive (e.g.: spite or malice) is irrelevant.[9]

[25] The Court of Appeal clarified the meaning of the subsection 182C(2)(c) – "the proceedings are likely to succeed" consideration – in its 2015 judgment in Basab Inc. v Accufit Investment Inc. and Double Key International Limited ("Basab")[10]. The Court concluded that the correct meaning of the phrase is "whether it is more probable than not that the proceedings will succeed." Accordingly, an applicant is not required to demonstrate that success is an absolute certainty, nor that the probability of success is very strong.

[26] Success in this context must mean not just that it is likely that the cause of action will be established (or its equivalent in proceedings such as the proposed derivative proceedings here – that is, establishing that the proposed claimant or applicant is correct in the allegations to be made about this improper use of Section 228A of the Ordinance) but also that it is likely that meaningful and effective relief will be obtained (which need not be measured monetarily but which must be meaningful and effective from both a legal and commercial perspective). In this case meaningful and effective relief would be setting aside or staying the liquidation. A pyrrhic victory would not be success.

[27] In addition, in Basab the Court of Appeal concluded that the potential nature of derivative claims, especially those which may be both complex and defended, do not predispose themselves to a "cursory review". The court needs to carry out a "full and proper evaluation" of the evidence then before it and the arguments advanced by both parties in order to determine "whether the proceedings are likely to succeed."[11] While the Court of Appeal focused on the "likely to succeed" consideration, as that was the prime focus of the issue before it in Basab, this

[9] Malitskiy & Anor v Oledo Petroleum Ltd., BVIHC(COM) 2012/0083, 18 January 2013 at paragraph 14, per Bannister J. (affirmed by Court of Appeal, BVIHCMAP 2013/0006, 16 August 2013 per Mitchell, JA, on other grounds). See also Iesini & Ors v Westrip Holdings Ltd & Ors [2011] 1 BCLC.

[10] BVICHCMAP 2014/0020, Judgment, 9 November 2015, paragraph 39.

[11] Basab, paragraphs 41 – 43.

Court reads the Court of Appeal's judgment as requiring the same level of review – a "full and proper evaluation" – in respect of the other statutory considerations as well.

[28] Implicit in the holdings of the Court of Appeal that a court considering an application for leave must know the specifics of the proceedings for which it is being asked to give leave for at least two reasons:

- first, the court needs to know the specifics so that it can assess the subsection 183C(2) considerations properly, including but not limited to the "likely to succeed" consideration (paragraph (c)), the considerations respecting the "costs" and "relief" (paragraph (d)), and the "alternative remedy" (paragraph (e)); and
- second so that the court is not giving the applicant a "blank cheque" such that the applicant may commence proceedings not reasonably contemplated by the application and the court's order granting leave.

[29] The Act does not specify the manner in which the applicant needs to make known to the court the specifics of its proposed proceedings but in one way or another it must do so. Providing draft court pleadings to the court being asked to grant leave would be one way but it is not the only way.

[30] Further, subsection 3 provides that leave may be granted only if the Court is satisfied that:

> a) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
>
> b) 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 or members as a whole.

[31] Chu's counsel pointed out that the subsection 184C(2) considerations have been described as "important" and the subsection 184C(3) alternative tests have been described as "stringent".[12]

[32] Section 184C is discretionary, and as is made clear by the opening words of subsection 184C(2) ("without limiting subsection (1)"), the broad mandatory statutory considerations in subsections (2) and (3) do not mean that the court cannot decline leave based on some other appropriate consideration. For example, possibly there will be cases in which not just the interests of the company need to be considered but also the interests of other stakeholders and/or the public interest.

Evidence on this Application

[33] The substantive evidence on this Application, as noted above, was extensive and far reaching in terms of the range of issues and matters between the Lau camp and the Chu camp that were raised. The affirmations and affidavits, in summary, included the following:

a. Chang Affirmation[13], which in addition to setting out the proposed proceedings and their grounds, as described above, among other things:
    i. provided the background and the ownership, governance structure and business purpose of Luck Silver;
    ii. described two oral agreements allegedly made among all but one of the ultimate beneficial owners on their own behalves and on behalf of various companies including those discussed in this Application, the essence of which was that all decisions on specified significant matters could only be made with the majority vote of the ultimate beneficial owners;

[12] Nigel Gray v Allen Leddra et al, BVIHC(COM) 2011/0078, Judgment, 4 April 2012, paragraph 9, per Bannister, J.
[13] 23 pages / 67 paragraphs.

iii. described the alleged intended role of Lei, the sole director of Luck Silver, as a nominee only without decision-making authority;
iv. referenced the agreement to sell the Mineral Pearl;
v. outlined alleged concerns about the actions of Lei which led to the removal of $1 million from Luck Silver for "safekeeping" and the Hong Kong court proceedings that ensued;
vi. referred to the broader disputes between Lau and Chu; and
vii. described the commencement and initial steps in the liquidation of Luck Silver and concerns about them including about the veracity of what Lei stated in the document filed to commence the liquidation and the real motivation for doing so.

b. First Affidavit of Adrian Paul Elms[14] ("Elms") of DLA Piper Hong Kong, solicitors for the Applicant, sworn 17 July 2015 ("Elms Affidavit"), to which Chu objected, as discussed further below, which (in relation to the first of the Grounds) Elms explained why, and opined that, the requirements for the use of Section 228A of the Ordinance to commence the liquidation of Luck Silver were not met, primarily based on a Hong Kong High Court judgment quoted at length and exhibited[15], leading to his opinion that it was improper for Lei to have used the mechanism of Section 228A and that the proposed derivative action "will likely succeed in the Hong Kong court"; he opined on no other matter of Hong Kong law and in particular not on any of the other Grounds nor on the remedy likely to be granted if the proposed proceedings succeed (as explained below).

c. First Affidavit of Chu Kong sworn 29 July 2015 and Second Affidavit of Chu Kong sworn 20 August 2015[16], in which Chu, among other things,

[14] 6 pages / 10 paragraphs.
[15] Seg Investments Ltd v Seg International Securities (HK) Ltd ("**Seg**"), [2005] HKCU 1413, HCMP 4211/2003, 14 October 2005 per Deputy High Court Judge To, paragraphs 18 – 22, affirmed by Hong Kong Court of Appeal, [2008] HKCU 212, CACV 369,382 and 383 of 2005, 6 February 2008.
[16] 6 pages / 18 paragraphs and 23 pages / 66 paragraphs.

i. set out his conclusory (without reasons) view that the proposed derivative proceedings are "not in the overall (commercial) interests of [Merit Fortune]";
ii. set out the opposition to the proposed derivative proceedings of (1) two other shareholders of the Applicant who are in his 'camp' (Mr. Lu and Mr. Hu) and constituted 50% of the shareholders, and (2) he and Messrs. Lu and Hu who constitute 50% of the beneficial owners of Merit Fortune;
iii. set out that he and Messrs. Lu and Hu have no objection to the decision to put Luck Silver into liquidation and consider it was "appropriate";
iv. denied that he instructed or influenced Lei's decision to put Luck Silver into liquidation (the Applicant noted that no written communications between Chu and Lei were exhibited by either of them but of course that may mean there was something they did not want to show or it may mean that there were no relevant written communications);
v. set out at length and in some detail the background to the shipping ventures relating to MV Mineral Pearl and MV Grain Pearl;
vi. denied the two oral agreements discussed by Chang;
vii. discussed his alleged wrongful removal in June 2014 as a director of Pacific Bulk Shipping (Cayman) Limited ("PB Cayman"), a company that was then under Lau's control, the background to and business role of that company, and the dispute following from his removal as a director;
viii. discussed the sum of $1.378 million held by PB Cayman on Luck Silver's behalf (referred to elsewhere as an "undisputed debt" in the context of a statutory demand);
ix. responded to various matters in the Chang Affirmation and set out in broad detail a considerable amount about the wide-ranging disputes between the Chu camp and the Lau camp; and

x. stated that Luck Silver had and will have no business activities and given the protracted disputes between Chu and Lau, it would be a practical solution for reputable and independent insolvency practitioners to wind down Luck Silver.[17]

d. First Affirmation of Lei Yanzhuang[18] dated 20 August 2015 in which Lei, among other things:

i. stated that he takes a "neutral stance" in respect of the disputes between Chu and Lau;

ii. set out the background to Luck Silver as a special purpose vehicle to hold the vessel MV Mineral Pearl;

iii. stated that he considered that he was a "regular" director of Luck Silver "with all the powers and duties attached to that role" (although the Applicant questioned why he did not have bank signing authority if that were so) and a duty "to exercise my powers in the best interests of [Luck Silver]", and not a "nominee director" in the sense of being merely a "puppet" of the ultimate beneficial owners;

iv. stated the his understood that his appointment as sole director was consented to by Chu and Lau;

v. described the sale of MV Mineral Pearl, an agreement to distribute the net proceeds in accordance with the beneficial interests in Luck Silver, the steps towards distribution of such net proceeds, a dispute involving Lu, an alleged misappropriation of $1 million by the Lau camp to PV Cayman, the inability of Luck Silver to fulfill its dividend distribution obligations because of the alleged misappropriation, and the steps and Hong Kong court proceedings that followed in relation to the alleged misappropriation;

vi. denied that he did not act in good faith when he instituted legal proceedings against PB Cayman or that in doing so "that I only

[17] Chu's exact words, found in Second Affidavit of Chu Kong, paragraph 51, are quoted below.
[18] 19 pages / 70 paragraphs.

followed the instructions of Mr. Chu"; and denied other allegations made by Chang in the Chang Affirmation;

vii. stated his belief that there were "no other options" to putting Luck Silver into voluntary liquidation pursuant to Section 228A of the Ordinance and doing so "was in all the circumstances in the best overall interests of" Luck Silver, which "began to suffer from serious cash-flow difficulties arising from the accumulation of legal expenses" as a result of the Hong Kong litigation arising from the alleged misappropriation, and had outstanding liabilities that were far greater than its estimated realizable value, but because of the deadlock in the Merit Fortune's board it was not possible to rely on it for an injection of funds or a rescue;

viii. notably, did not explain why he did not consult or seek the views of the ultimate beneficial owners or at least Merit Fortune or its directors before coming to his decision to commence the liquidation;

ix. notably, given the prominence in this Application of the issue of the appropriateness of the use of Section 228A of the Ordinance, did not explain why Section 228A was used as opposed to an alternative liquidation method;

x. notably, did not explain why the Section 228A form (dated 1 April 2015) was completed as it was, in that the person completing the form was required by the instructions on the form to state the "reason(s) why" it was necessary to wind up the company under Section 228 of the Ordinance and why it was considered "not reasonably practicable for the winding up to be commenced under another section of the Ordinance" – on the form Lei simply stated that he "considers that it is not reasonably practical" for the winding up to be commenced under any other section of the Ordinance;

xi. explained that he passed a written resolution to commence the liquidation under Section 228A of the Ordinance, appointed provisional liquidators and filed the required forms;

xii. told that he called and chaired a meeting of unsecured creditors that appointed the liquidators; and

xiii. asserted that Merit Fortune did not file a proof of debt to entitle it to attend the creditors' meeting.

e. First Affirmation of Lau Wing Yan[19] dated 26 August 2015 in which Lau, among other things:

i. responded to various matters in opposing affirmations / affidavits and in particular to things said by Chu, including about their business relationships;

ii. disputed that Chu was removed as a director of PB Cayman without Chu's consent;

iii. sought to demonstrate that Lei was a nominee director of Luck Silver:

iv. denied that this Application was triggered by the statutory demand on PB Cayman and explained that the need for this Application became evident prior to service of the statutory demand;

v. questioned why the liquidators refused to withdraw the statutory demand after the full amount of the Luck Silver claim was deposited with a stakeholder;

vi. disputes that Lei has taken a neutral stance between the two camps;

vii. questioned why Lei continued to act as a director without compensation and questioned who is paying Lei's legal expenses;

viii. questioned Luck Silver's financial position (Estimated Statement of Affairs) as stated and exhibited by Lei; and

ix. questioned the independence of the liquidators for various reasons.

[34] This Court is puzzled why much of this evidence was needed having regard to the Grounds and to the Focus of the Proposed Derivative Proceedings.

[35] The Court was not being asked to, nor could it, determine most of the facts, issues and disputes raised in all of this evidence. It only needed the evidence relevant to

[19] 20 pages / 56 paragraphs.

determine the considerations (including the "acting in good faith" consideration) for giving or not giving leave to commence the derivative proceedings sought to be brought, and relevant to the discretion to deny leave even if considerations are satisfied.

[36] The Court appreciates that some background and context was needed. However, that could have been provided in much more general terms, outlining that there are disputes between the two camps on various matters, without making the case for which side is right or wrong on the issue. There was little or no relevance to much of the evidence of the asserted evil-doing of the two camps.

[37] Nor was there a need to respond to the other side's irrelevant accusations, however false they may be believed to be (such as by saying "the party is not going to respond to X, Y and Z as it is not relevant to the issues in these proceedings, and by not responding the party should not be taken as accepting the allegation or suggesting that he/she/it does not have a response").

[38] Having said that, this Court is mindful of the need for it to carry out a "full and proper evaluation" of the evidence before it on this Application and to consider fully the arguments advanced by both parties. This Court has done so, reviewing all of the evidence for all facts (contested and uncontested) that relate to each of the statutory and other considerations as discussed above and considering fully the arguments advance by both parties.

Applicant's and Chu's Overall Positions

[39] The Focus of the Proposed Derivative Proceedings, as noted above, and the focus of the Applicant's position was on three matters:

a. the decision-making process by which the decision to place Luck Silver into liquidation was made, and in particular that the stakeholders (be they members or creditors) were not consulted by the sole director, Lei;

b. the appropriateness and manner of the procedure that was used, being section 228A of the Ordinance, to commence the liquidation of Luck Silver, it being asserted by the Applicant that it is a procedure that may be used only when it is not reasonably practicable to proceed under a different provision of the Ordinance (e.g.: a creditors' winding up or a voluntary winding up following a resolution of a meeting of members) and where there is an element of urgency[20]; and

c. the initial steps taken or not taken in the liquidation of Luck Silver that were said to be troubling.

[40] On the first matter, the Applicant's contention was that Lei, as sole director of Merit Fortune, was a nominee only (with no experience in ocean vessel chartering/management) and was to act on instructions of the ultimate beneficial owners. Lei and Chu denied that Lei was a nominee only. The Applicant asserted that Lau was not consulted but Chu was consulted. Lei and Chu denied that Chu was consulted.

[41] The Applicant referred to evidence on the point that was capable of more than one interpretation in relation to the time being referred to by Chu: "I agreed with Mr Lei's decision to put [Luck Silver] into voluntary liquidation" and that Chu "did not and does not" see anything wrong with that decision.[21]

[42] In the third point regarding steps in the liquidation, the Applicant asserted that Merit Fortune was not notified of the creditors' meeting or asked to submit a proof of claim for Luck Silver's debt to Merit Fortune, and Lau was excluded from the Luck Silver creditors meeting as a representative of Merit Fortune. As set out in the evidence summary above, Lei offered explanations.

[20] This point is made in the Applicant's Outline, paragraph 18, however the Court notes that Chu objected to the "expert evidence" of Elms in the Elms Affidavit in this regard, as outlined later in this Judgment.

[21] Applicant's Outline, paragraph 17.

Analysis of Considerations for Granting Leave

[43] In this case, it makes the most sense to commence by looking at the consideration in subsection 184C(2)(c) of the Act, that is whether the proposed derivative proceedings in Hong Kong, as and to the extent specified by the Applicant, are likely to succeed.

[44] Success in this case means that the claimant in the proposed derivative proceedings is likely to (a) establish one or more of the proposed Grounds, which distill down into the Focus of the Proposed Derivative Proceedings, and (b) obtain meaningful and effective relief, which would be ending the liquidation of Luck Silver. Essentially these are matters of Hong Kong law. This analysis of likely success must involve a consideration of the evidence of Hong Kong law that has been tendered, including of course whether it is admissible given Chu's objections to it.

[45] In this case, the analysis and outcome of the 'likely success' consideration materially affects all of the other subsection 184C(2) considerations. As noted above, the applicable test is "whether it is more probable than not that the proceedings will succeed."

[46] This Court then turns in this Judgment to the other four considerations in subsection 184C(2), in the sequence that appears to make the most sense in the context of this case.

[47] The subsection 184C(3) considerations are quite straight-forward in this case, and are discussed following the subsection 184C(2) considerations.

[48] Finally, the Court considers whether it should exercise its discretion so as to decline leave, even if the subsection 184(C)(2) and (3) considerations were satisfied such that the Court could grant leave. In this case that will involve a consideration of whether it is appropriate – and just and equitable – in the view of

this Court that Luck Silver should be wound up and liquidated, and liquidated by professional liquidators.

Consideration 2(c) – Whether Proposed Derivative Proceedings Are Likely to Succeed

[49] **Applicant's** Basic Position. The Applicant's position was the proposed derivative proceedings would be likely to succeed, as required by subsection 184C(2)(c) of the Act, based on the "expert evidence" in the Elms Affidavit.[22]

[50] **Chu's** Basic Position. Chu's position was that the Applicant has not shown that the proposed derivative action would be unlikely to succeed, and thus not met the requirement of subsection 184C(2)(c) of the Act.

[51] Chu submitted this is so because, first, in the absence of a draft pleading it was unknown the form the proposed derivative proceedings would take – that is, the specifics of the proposed proceedings were unknown, and second, there was no admissible evidence as to the viability or merits of any proposed derivative proceedings because (a) the expert evidence tendered was without this Court's permission as required by CPR 32.6(1) and Chu would be prejudiced by retrospective permission, and (b) irrespective of permission, the purported expert evidence was inadmissible as it was not independent but from the Applicant's Hong Kong lawyer and as such adhered to none of the formal requirements prescribed by CPR 32.

[52] Objection that Form / Specifics of Proposed Proceedings Not Provided. With respect to Chu's first objection about not knowing the form or specifics the proposed derivative proceedings would take, while it would have been preferable for the Applicant to provide a draft pleading or set out in some other clear and specific manner the proceedings it proposed to bring, this Court has been able to derive, articulate and limit what the Applicant proposed to include in its derivative

[22] Chu objected to the "expert evidence" in this regard, as outlined later in this Judgment.

proceedings and what this Court would permit if it permits the derivative proceedings at all. It has done so in what has been defined as the Focus of the Proposed Derivative Proceedings.

[53] Objection that Expert Evidence Tendered Without Permission. The first part of Chu's second objection was that the Applicant's expert evidence was tendered without this Court's permission as required by CPR 32.6(1) and Chu would be prejudiced by retrospective permission because he had not submitted expert evidence on Hong Kong law since there was no admissible evidence to reply to.

[54] However, this Court considers that Chu 'rolled the dice' on whether the Elms Affidavit would be admitted, deciding not to submit any expert evidence on Hong Kong law.

[55] Chu should have anticipated that retrospective permission would be sought, and might be granted in the interests of a just result, if he made his 'lack of permission' objection. It was in his power to avoid the potential prejudice about which he complained.

[56] Notwithstanding his objections to the Elms Affidavit, Chu could have submitted Hong Kong law expert evidence to counter the Applicant's expert evidence on a contingent basis, or he could have submitted it on the basis that it would be the only admissible evidence of Hong Kong law if the Elms Affidavit were excluded. The asserted prejudice is of his own doing.

[57] Having chosen to take this tactical approach, if the Elms Affidavit were to be admitted, Chu was without his own expert evidence of Hong Kong law and if the Elms Affidavit is admitted, this Application must be determined having regard to the expert evidence of Elms on Hong Kong law only.

[58] Objection that Expert Not Independent. The second, and more significant, part of Chu's second objection to the Elms Affidavit was that irrespective of permission, the purported expert evidence was inadmissible as it was not independent. The

Elms Affidavit was from a lawyer with the Applicant's Hong Kong law firm. As such, submitted Chu, the Elms Affidavit adhered to none of the formal requirements prescribed by CPR 32 with which an expert witness needs to comply, which requirements are both substantive and procedural.

[59] CPR 32.3 provides that an expert witness has a duty "to help the court impartially" which "duty overrides any obligation to the person by whom he or she is instructed or paid".

[60] CPR 32.4 provides that the expert's evidence "must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation" and "[a]n expert witness must provide independent assistance to the court by way of objective unbiased opinion."

[61] The dictionary definitions of "independent" largely are along the lines of "not influenced or controlled in any way by other people, events, or things".

[62] CPR 32.14(2) provides that an expert witness' report must include at the end, among other things, "a statement that the expert witness – (a) understands his or her duty to the court as set out in rules 32.2 and 32.4; (b) has complied with that duty; …"

[63] Chu's Outline submitted an expert must be independent of the party appointing him.[23] That is not quite what the rule says.

[64] Boiling down CPR 32.3 and 32.4, they require that the expert witness provide impartial, independent, objective and unbiased help to the court.

[65] If a lawyer has a duty to a court, as an officer of the court, can he or she provide such expert witness assistance even if the lawyer is a member of a law firm that acts for a party? Of course, Elms in not an officer of this court, and the Court does

[23] Chu Outline, paragraph 47(d).

not know if the ethical rules that bind him would require a comparable duty to this Court. Elms did not address this.

[66] There may be circumstances in international commercial litigation where the exigencies of time and/or cost and/or available expertise may make it practical, if not ideal, to consider receiving expert evidence on foreign law from a lawyer in a law firm representing the party, particularly if not on a central issue. It may be that the rules on expert witnesses in some contexts should not be read as strictly as submitted by Chu. It may be that in such contexts evidence can be received from such a lawyer and given appropriate weight.

[67] In this case, however, given that (a) Elms did not establish a duty to this court (directly or indirectly) or provide any other form of assurance that his evidence was impartial, independent, objective and unbiased help to this Court, (b) the issue of Section 228A of the Ordinance is central and critical to this Application, (c) the requirements of CPR 32.14 have not been met even in substance if not in form, and (d) the Applicant has not explained any exigencies of time and/or cost and/or available expertise that made it practical and expedient for the Court to receive and admit expert evidence on foreign law from a lawyer in the Hong Kong law firm representing the Applicant, this Court does not admit Elms' evidence in the Elms Affidavit.

[68] No Alternative to Expert Evidence in this Case. In light of the shortcomings in the Applicant's expert evidence on Hong Kong law, it is necessary to consider whether there can be any alternative to deal with Hong Kong law that is available at this stage on this Application.

[69] In some situations, a court that has not been provided with evidence of the applicable foreign law can assume it is the same as the law of the court's jurisdiction. However sensible that may be when the court is trying a dispute and can render a substantive judgment on it, it makes no sense when the court needs

to assess on a balance of the probabilities whether a claim will succeed under a foreign law if the claim is permitted to be brought in the foreign jurisdiction.

[70] It would be particularly strange and inappropriate to make the assumption that the law in Hong Kong, being a statutory (ordinance) provision, is the same where there is no comparable provision in the court's own law – in this case, no equivalent in the Insolvency Act, 2003 of the Virgin Islands to Section 228A of the Ordinance enabling directors, if they form the opinion that a company cannot by reason of its liabilities continue its business, to pass a resolution to that effect and stating that they consider it necessary to commence a winding up under a process which is not known in the Virgin Islands, because it is not reasonably practicable for the winding up to be commenced under one of the other methods (which are methods known under the Insolvency Act, 2003).

[71] Post-Hearing Request for Opportunity to Submit Compliant Expert Evidence. In post-hearing correspondence to the Court, counsel for the Applicant sought the opportunity to submit additional expert evidence. In part the Applicant submitted, as it had done during the hearing, that it had not appreciated that Chu would be objecting to the Elms Affidavit. Counsel for Chu submitted that an indication had been given at an earlier hearing in relation to this matter on 30 July 2015.

[72] While there are various reasons why that approach might not be followed, the Court had some sympathy for the position in which the Applicant found itself with respect to the objection. However, apart from the unusual nature of the request at a post-hearing stage, and apart from the reasons noted above why relaxing the expert evidence rules on foreign law would not be appropriate in this case, the Elms affidavit did not deal at all with the remedy a Hong Kong Court might grant.

[73] Even fully compliant expert evidence on the matters covered by Elms would not get the Applicant home – that is, it would not be able to satisfy this Court of the "likely to succeed" consideration and it did not deal with the likely remedy. This is discussed more fully below.

[74] Only One of Grounds Addressed in Expert Evidence. While this Application was based on several Grounds, which this Court distilled into the Focus of the Proposed Derivative Proceedings, the Elms Affidavit addressed only one of the Grounds, the alleged impropriety of the use of Section 228A of the Ordinance.

[75] It did not address the other Grounds, or to be more succinct, the other two matters in the Focus of the Proposed Derivative Proceedings – the decision-making processes used or not used to put Luck Silver into liquidation, and the initial steps taken or not taken in the liquidation of Luck Silver. Even if the Elms Affidavit were to have been admitted, there is no Hong Kong law evidence on the other Grounds and therefore no basis on which this Court can find that the Applicant is likely to succeed on those Grounds

[76] Deficient Evidence of Non-Compliance with Section 228A of Ordinance. There was a further consideration regarding "expert evidence" specified in Basab. The Court of Appeal held that it is insufficient for an expert merely to state a conclusion on a matter in issue; the expert must also present the analytical process by which the expert reached the conclusion.

[77] The appellant's expert in Basab gave his conclusion on a particular issue but failed to present to the court the analytical process by which he had arrived at his conclusion. The headnote summary in Basab at paragraph 3 summarized the requirement of expert evidence it his regard.

> 3. It is insufficient that an expert merely supplies his/her conclusions on a matter in issue between the parties. It is necessary for him/her to also present the analytical process by which he/she reached the conclusion.

[78] In this case, Elms did not present an analysis of why, in his opinion, "it is improper for Mr. Lei to use the mechanism under Section 228A to wind-up [Luck Silver] and the present winding-up of [Luck Silver] and also the appointment of liquidators of

[Luck Silver] is defective."[24] While he quoted Section 228A of the Ordinance and quoted at length from Seg, he did not draw upon the evidence before this Court on this Application to substantiate his conclusions of impropriety and defectiveness.

[79] In summarising Lei's evidence, above, this Court noted that Lei did not explain why the Section 228A form (dated 1 April 2015) was completed as it was, in that the person completing the form was required by the instructions on the form to state the "reason(s) why" it was necessary to wind up the company under Section 228 of the Ordinance and why it was considered "not reasonably practicable for the winding up to be commenced under another section of the Ordinance". This Court noted that on the form Lei simply stated that he "considers that it is not reasonably practical" for the winding up to be commenced under any other section of the Ordinance.

[80] While those were this Court's observations, Elms did not refer to the form dated 1 April 2015 and opine that the way it was completed by Lei was non-compliant with Section 228 of the Ordinance and the reasons such was the case. Subject to the objections to Elms' evidence, doing so would have been evidence on impropriety and defectiveness without even the need to deal with the evidence of the fact witnesses, in which there were many points of disagreement.

[81] Absent any evidence from Elms that explained the basis for his opinion, this Court was left without a reasoned explanation of Elms' opinion of impropriety and defectiveness. This Court's observations cannot be substituted for expert evidence of Hong Kong law.

[82] No Evidence on Likely Remedy in the Proposed Proceedings. As indicated above, the Court is particularly concerned that Elms did not address clearly the remedy that likely would be granted if the claim is established in the proposed derivative proceedings.

[24] Elms Affidavit, paragraph 10.

[83] Even if the Elms Affidavit was admitted and given full weight, and leaving aside the 'reasoned opinion' concern outlined above, the failure to address the remedy clearly means that this Court cannot conclude that the proposed proceedings are likely to succeed.

[84] In Seg, the Hong Kong Court of Appeal raised questions about the civil consequences of improperly invoking Section 228A of the Ordinance, including the remedies if such a finding were made.

[85] Of greatest concern is the Court of Appeal's statement in paragraph 47 of its judgment that if Section 228A of the Ordinance was improperly invoked that the proper course might be, after granting a stay pursuant to other provisions of the Ordinance[25], to allow the winding-up to proceed on grounds of insolvency[26] (which it did not order in that case since the purported resolution was not a resolution of the board).

[86] The Elms Affidavit did not address if this is a possibility, or a likely possibility, generally or in particular in the circumstances of this Application.

[87] While the evidence of Chang and Lau disputes the insolvency of Luck Silver, Lei asserts otherwise. This Court cannot resolve the discrepancy in the evidence on insolvency on this application. But if there is insolvency, it appears that it may be grounds on which the Hong Kong court would allow the winding-up to proceed, even if the Section 228A procedure was used improperly to commence the liquidation.

[25] The court of first instance had relied on its inherent jurisdiction to declare a resolution passed for the purpose of Section 228A void and of not effect. The Hong Kong Court of Appeal referred in regard to remedies to Bozeil Asia (Holding) Ltd v CAL International Ltd & Another [1997] HKLRD 1 at 10F where the High Court had noted the absence of a provision for a declaration but that the remedy could be a stay of the winding-up. This judgment was exhibited to the Elms Affidavit.

[26] Ordinance, Section 177(1)(d) – "unable to pay its debts".

[88] Further, this Court is left to wonder whether the Hong Kong court, even if it grants a stay following successful derivative proceedings, and even if it does not find insolvency, might allow the winding-up to proceed on a just and equitable basis[27].

[89] It seems that a Hong Kong court might find there is a deadlock, a breakdown in the relationship, and a loss of substratum, along the lines that this Court discussed in reasonably analogous circumstances in relation to the 'sister venture' of Chu and Lau, and members of their respective camps, in Central Shipping Co., Limited ("Central") and the cargo vessel M.V. Grain Pearl. In that case this Court held, over the opposition of Chu, that the company should be liquidated.[28]

[90] Indeed, strikingly Chu states clearly and convincingly in the Second Affidavit of Chu Kong in relation to Luck Silver (as summarized above) much as this Court found in relation to Central:

> The reality is [Luck Silver] does not have and will not have any business activities – its only business was carried out through MV "Mineral Pearl" and that vessel was sold. From a layman's perspective, given the protracted disputes between Mr. Lau and me, it would seem a practical solution for a reputable, independent firm specializing in insolvency matters to handle the winding down of [Luck Silver].[29]

[91] The absence of Hong Kong law evidence, and supporting submissions, on the remedy that a Hong Kong court might grant in the proposed derivative proceedings is troubling given the mandatory considerations in subsection 184C(2)(c) ("likely to succeed"), as well as in subsection (d) ("cost … in relation to the remedy likely to be obtained").

[92] So even if the evidence of Elms is admitted, this Court is unable to be satisfied that the proposed Hong Kong derivative proceedings are likely to succeed.

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[27] Ordinance, Section 177(1)(f).
[28] Fortune Bright.
[29] Second Affidavit of Chu Kong, paragraph 51.

[93] Accordingly, the Application must be dismissed.

Consideration 2(d) – Costs of Derivative Proceedings in Relation to Likely Relief

[94] There are two aspects to the Section 184C(2)(d) consideration, (a) the costs of the proposed derivative proceedings and (b) the likely relief that would be obtained.

[95] The Applicant simply submitted, in respect of this consideration, that "[t]he Respondents [presumably Chu] do not suggest that the proceedings would be particularly expensive (actually, as noted below, Chu did submit they would be expensive), or that if successful (which is likely to be the case) [Merit Fortune] will not recover its costs."[30]

[96] The Applicant did not explain why the proceedings would not be "particularly expensive" or what "particularly expensive" might mean.

[97] Chu's position was that the costs of the proposed derivative action would be excessive in relation to the relief likely to be obtained, thus not meeting the consideration in subsection 184C(2)(d). He submitted that the proceedings would be heavily contested and therefore the costs will be significant.

[98] Also Chu submitted that if the Applicant were to be granted an indemnity, it would have a carte blanche to spend Merit Fortune's assets. On the counterbalancing side, benefit of the likely relief, if obtained, would remove from liquidation an insolvent company that is in the hands of two experienced insolvency professionals, not one of the warring camps.

[99] The Applicant did not indicate who the intended defendant(s)/respondent(s) would be in the proposed derivative proceedings, what the budget for the proposed litigation would be, or whether there would be the resources to pay costs, if awarded. Nor was there evidence about the cost regime in Hong Kong, and in

[30] Applicant's Outline, paragraph 40.

particular, the anticipated percentage recovery if Merit Fortune's derivative claim were to be successful.

[100] Absent factual evidence, as opposed to conclusory views, this Court cannot balance the costs in relation to relief.

[101] Given the determination above about the possible relief, this Court is left wondering how much might be spent (gross and net of any costs recovery) and what benefit, if any, might be obtained from the expenditure.

[102] The cost/benefit consideration does not lead to the conclusion on the balance of probabilities that the proposed litigation would be a good investment.

Consideration 2(e) – Availability of Alternative Remedy

[103] The Applicant's position in relation to the alternative remedy consideration in subsection 184C(2)(e) of the Act was that the Respondents (presumably Chu) did not suggest any alternative procedure, which was the case.

[104] However, this Court considers that the initial burden is on an applicant to deal with this consideration.

[105] An applicant should do more than say that the respondent has not suggested any alternative procedure. It should make an affirmative statement, if necessary with evidence, and in the case of a situation in which the remedy might be in a different jurisdiction, provide evidence of foreign law in relation to legal remedies.

[106] The applicant's evidence and submissions should be to the effect that no other remedy exists under the law of the jurisdiction(s) in question or if there is an alternative remedy, the applicant's evidence and submissions should explain the alternative remedy and explain why it isn't adequate (which may include the likelihood of being able to obtain it and the likely cost of doing so). Likewise if the

alternative remedy could be said to be a commercial remedy not requiring the involvement of the courts, it should be addressed.

[107] Then it is for a respondent to respond if its position differs from the applicant's position, either explaining to the court why the alternative remedy/remedies raised by the applicant is/are both good and available, or providing evidence and/or submissions of some other alternative and why it is good and available.

[108] Chu's position was that the availability of an alternative remedy factor, as set out in consideration in subsection 184C(2)(e) of the Act, was not relevant to this Application. He submitted that there is no alternative remedy because there is no actionable wrong.

[109] This submission was not helpful. A respondent on an application for leave to bring derivative proceedings is seldom if ever going to accept that there is an actionable wrong. A respondent, if desirous of addressing this consideration, should point to some other route which the applicant could pursue the alleged wrong.

[110] Chu submitted further that if the concern of the Lau camp was the action taken by the liquidators in making the statutory demand on PB Cayman, the statutory demand could have been challenged or resisted.

[111] This submission also was not helpful to the Court. While Chu had asserted this collateral objective for the actions of the Lau camp in seeking to bring the proposed derivative proceedings, the Applicant was not asserting that it should be given leave for that reason. There was no reason to make the submission in relation to this consideration.

[112] Given the evidence and submissions, this Court is not in a position to find that there is any alternative remedy to challenge the liquidation of Luck Silver in Hong Kong pursuant to Section 228A of the Ordinance or at all.

Consideration 2(b) **–** Whether Derivative Action in Interests of Company

[113] **Applicant's Position.** The Applicant's position was the proposed derivative action would be in the interest of Merit Fortune, as required by subsection 184C(2)(b) of the Act, because the decision to liquidate its only subsidiary, Luck Silver, using the extraordinary procedure of Section 228A of the Ordinance was made for no apparent or explained reason and without consulting Merit Fortune (presumably again a reference to its directors and members, or at least Lau and members of his camp).

[114] The Applicant further asserted that the proposed derivative proceedings would be in the interests of Merit Fortune because of the monies said to be owing to it by Luck Silver.

[115] **Chu's Position.** Chu's position was that the proposed derivative action would not be in the interest of Merit Fortune, as required by subsection 184C(2)(b) of the Act, because there were "solid commercial reasons" for placing Luck Silver into liquidation and it was done in the exercise of proper, reasonable and sound commercial judgment by its sole director, Lei.

[116] In particular, Chu submitted that Luck Silver was balance sheet insolvent, had cash flow issues, and shareholder financing would not be available to it in light of the stalemate situation between the two camps and a presumed unwillingness of the Lau camp to fund litigation against itself. Accordingly liquidation was a proper, reasonable and inevitable business decision by Lei.

[117] Chu also referred to the alleged misappropriation/conversion by the "Lau Shareholders" and the litigation against them.

[118] A further point in respect of this factor, which Chu raised in respect of the cost/benefit factor (subsection 184C(2)(d) of the Act), is that the relief, if obtained,

would remove from liquidation an insolvent company that is in the hands of two experienced insolvency professionals, not one of the warring camps.

[119] Chu did not address this factor from the perspective of whether liquidation of Luck Silver using the extraordinary procedure of Section 228A of the Ordinance was in the interests of Merit Fortune.

[120] Views of Directors on Commercial Matters. Subsection 184C(2)(b) of the Act requires the Court, in assessing the interests of the company, to take account of the views of the company's directors on commercial matters.

[121] The Applicant submitted that Lau favoured the proposed derivative action whilst Chu did not, and the provision cannot mean that the directors must be ad idem or the company would bring the proceedings itself.

[122] This Court agrees that the provision does not require the directors to be ad idem.

[123] The classic derivative action situation is one where the directors may be ad idem in not wanting to bring proceedings, particularly when they would be proceedings against the directors themselves for alleged wrongdoing. However the bottom line ad idem view of the directors, in and of itself, does not matter.

[124] This Court also does not read the provision respecting the need for it to take account on the views of the company's directors on commercial matters as contemplating a referendum or opinion poll of the director's 'yes' or 'no' view on whether leave should be given, with a majority view, or a unanimous view, carrying any weight in and of itself.

[125] The point of that part of subsection 184C(2)(b) seems to be that the Court should be able to, and must, consider the reasoned views of directors on commercial matters, if offered, whether individually or collectively.

[126] In other words, the directors' reasoning may be made known to the Court so that it has the benefit of directors' thinking, experience and perspective on commercial matters in coming to its decision on whether the proposed derivative proceedings are in the interest of the company that would be bringing the proceedings. This is consistent with the general deference of courts to the business judgment of directors, albeit in a different context.

[127] Derivative Action Not in Interests of Merit Fortune. This Court finds that it has not been shown that the proposed derivative proceedings would be in the interests of Merit Fortune.

[128] First, bringing proceedings to challenge the liquidation under Section 228A of the Ordinance cannot be said to be in Merit Fortune's interests unless it has been shown that the proceedings would have a reasonable prospect of resulting in the liquidation being set aside, assuming setting aside the liquidation would be in the interests of Merit Fortune. As discussed above in relation to the "likely to succeed" consideration, likely success has not been shown.

[129] Second, as discussed elsewhere in this Judgment, this Court considers that the intractable disputes between Chu and Lau and their respective camps, and the end of the venture for which Luck Silver was formed, leads to the conclusion that Luck Silver should be wound up and that the winding up should be handled by professional liquidators in the circumstances.

Consideration 2(a) – Whether Applicant Member Acting in Good Faith

[130] The Applicant submitted that the unexplained inappropriate manner in which Luck Silver was placed into liquidation demonstrated, in effect objectively, that in raising real concerns about it, the Applicant was proceeding in good faith.

[131] Chu's position was the Applicant was not proceeding in good faith, for two reasons.

[132] First, he relied in this regard on the professed urgency for the Application initially asserted by the Applicant and the alleged lack of opportunity it attempted to afford to Chu to respond.

[133] Second, he relied on his assertion that the Application was largely motivated by a desire to prevent the liquidators of Luck Silver from pursuing, through the statutory demand process, an allegedly undisputed debt owed to Luck Silver by PB Cayman. Chu submitted that this Application was commenced days after the statutory demand was served and is brought "not for the benefit of Merit Fortune, but rather, for the personal benefit of the Lau camp, as controllers of PB Cayman."[31]

[134] If it had been shown that the bringing of the proposed proceedings had a real prospect of success, this Court would have found on a balance of the probabilities (as noted above) that the proposed proceedings were in the interests of Merit Fortune (Section 184C(2)(b)) and that the true object of that Applicant was to seek redress on the Merit Fortune's behalf for it being put into liquidation wrongly, and therefore that the Applicant was acting in good faith (Section 184C(2)(a)).

[135] The Court cannot and does not find that there was a lack of good faith or even that there was an underlying improper motive on the part of the Applicant such as spite or malice, although all steps being taken by both camps in the various litigation seems aimed as much at the overall war of attrition as the righting of specific wrongs.

Consideration 3(a) **–** No Intent to Pursue the Proposed Proceedings.

[136] The positions of the Applicant and Chu were consistent on this consideration: Merit Fortune does not intend to pursue the proposed proceedings given that it is

[31] Chu Outline, paragraph 27 – 30. PB Cayman is a company "under the control, since 24 June 2014, of the Lau camp." Chu's alleged that he was unlawfully removed as a director of PB Cayman and through a corporate vehicle (Trenus Oceanway Limited) brought unfair prejudice proceedings in Hong Kong against PB Cayman and its parent (Smartplace Limited).

deadlocked. Both of them agreed that the first alternative requirement of subsection 184C(3)(a) of the Act would be met.

[137] This Court agrees. It is satisfied the Merit Fortune does not intend to bring the proposed proceedings.

Consideration 3(b) – Interests of Company that Conduct of Proceedings Not Be Left to Directors

[138] Chu's bald position in respect of the alternative condition of subsection 184C(3)(b) of the Act was that there are no grounds for finding that the conduct of the proposed proceedings should not be left to the sole director, Lei.

[139] Given that it was Lei who put Luck Silver into liquidation, it would seem obvious that if proceedings should be pursued to remove Luck Silver from liquidation, Lei should not have conduct of the proceedings.

[140] The other aspect of this consideration is whether conduct of the proceedings should be left to the determination of the shareholders or members as a whole. Given the effective deadlock at the shareholder/member level, leaving the determination to the shareholders or members as a whole would be pointless.

[141] The Court is satisfied that it is in the interests of Merit Fortune that the conduct of the proposed derivative proceedings, if permitted, should not be left either to Lei, nor to the determination of the shareholders/members of Merit Fortune as a whole.

Discretion Not to Grant Leave Even if Statutory Considerations Satisfied

[142] As discussed above, this Court is of the view that even if the subsection 184(C)(2) and (3) considerations are satisfied such that the Court could grant leave to commence derivative proceedings, the Court has a discretion to decline leave.

[143] In this case the Court would decline to grant leave to bring the proposed derivative proceedings in Hong Kong even if the statutory considerations had been satisfied on the basis that the Applicant sought to satisfy them.

[144] As noted above, there is a deadlock, a breakdown in the relationship, and a loss of substratum, along the lines that this Court discussed in reasonably analogous circumstances in relation to the 'sister venture' of Chu and Lau, and members of their respective camps, in Central where this Court held, over the opposition of Chu, that the company should be liquidated.

[145] The intractable disputes between Chu and Lau and their respective camps, and the end of the venture for which Luck Silver was formed, leads to the conclusion that Luck Silver should be wound up.

[146] This Court is of the view that it is just and equitable in all the circumstances for Luck Silver to be wound up, and for the liquidation to be handled by professional liquidators.

Conclusion – For Greater Certainty

[147] What Was Not Decided About Lei's Use of Section 228A. So that it is clear to the parties, to Lei, and to all members of both camps, this Court did not find that the use by Lei of Section 228A of the Ordinance was appropriate or lawful. As stated in this Judgment, those are matters of Hong Kong law and in any event not matters that this Court would decide on an application for leave to bring derivative proceedings under section 184C of the Act.

[148] It does appear from a plain English reading of the 228A Form as completed by Lei that the information it seems to require was not set out.

[149] However this Court was not in a position to determine, on the evidence before it, the potential consequences under Hong Kong law even if this reading of the completed form is correct under Hong Kong law.

[150] No Blank Cheque to Lei. Also it should be made clear to Lei, to the parties, and to all members of both camps, that this Court has not given Lei a blank cheque with respect to Luck Silver's conduct or to the liquidators' conduct of the liquidation and related matters (if any).

[151] In other words, Merit Fortune and anyone else who may have a right to seek assistance of this Court in invoking available court remedies in Hong Kong or elsewhere are not foreclosed from returning to this Court for potentially available relief, under Section 184C of the Act or otherwise, in respect of matters that were not, and could not have been, before this Court on this application.

[152] That may be no more than stating the 'legal obvious', but in the context of the disputes between Chu and Lau and their respective camps, as characterised by them and by this Court in this Judgment and in the Fortune Bright Judgment, it seems prudent to remind, and caution, all concerned.

[153] Seeking a Commercial Resolution. Finally, this Court ends where it began, with a strong encouragement to Chu and Lau and their respective camps to make voluntary use of non-adjudicative dispute resolution methods, whether mediation, some other form of alternative dispute resolution, or direct or indirect commercial negotiation, to try to find a commercial resolution to end their business relationships (and if that cannot be achieved after best efforts, to narrow and focus the true issues and develop a cost and time efficient method of having them resolved).

[154] If the courts in Hong Kong share this Court's perspectives on these matters, it may be that they will weigh in to encourage and support these suggestions if they are

able to do so. To the extent it can do so, this Court stands willing to support the Hong Kong courts in that regard.

ORDERS

[155] Accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

1. The Application is dismissed.

2. The costs of the Application are reserved to be determined by this Court following submissions thereon.

Justice Barry Leon
Commercial Court Judge
8 July 2016