IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHCR 8

Suit No 107 of 2017
Summons No 1668/2017

Between

(1) MCH International Pte Ltd
(2) Wong Kok Hwee
(3) Sing Lee Mee Yoke

… *Plaintiffs*

And

(1) YG Group Pte Ltd
(2) YG Logistics Pte Ltd
(3) Liong Chung Yee
(4) Tan Keng Beng
(5) Ang Chee Siong

… *Defendants*

JUDGMENT

[Civil Procedure – Striking Out]

MCH International Pte Ltd and others
v
YG Group Pte Ltd and others

[2017] SGHCR 8

High Court — Suit No 107 of 2017 (Summons No1668 of 2017)
Tan Teck Ping Karen AR
15 May 2017

31 May 2017 Judgment reserved.

Tan Teck Ping Karen AR:

Introduction

1 The 1st defendant, YG Group Pte Ltd ("YGG"), applied to strike out parts of the statement of claim ("SOC") under O 18 r 19 of the Rules of Court ("the Rules"). I reserved judgment and now give my decision.

Background facts

2 YGG is a joint venture company incorporated by the 1st plaintiff, MCH International Pte Ltd ("MCH") and the 2nd defendant, YG Logistics Pte Ltd ("YGL") for the purpose of acquiring logistic companies in China through Yong Gui Investment Pte Ltd ("the Target"), a holding company. MCH and YGL are the only shareholders of YGG.

3 The 2nd plaintiff ("Henry") is a director of MCH and was a director of the YGG. The 3rd plaintiff is Henry's wife.

4 The 3rd defendant ("Simon") is a director of YGL and is also a director of YGG.

5 The Board of Directors of YGG currently consist of:

(a) The 4th defendant ("Bernard");

(b) The 5th defendant ("Michael"); and

(c) Simon.

6 The claim by the 1st, 2nd and 3rd plaintiffs (collectively referred to as "the plaintiffs") relate to, *inter alia*, damages and/or loss suffered due to the alleged lawful/unlawful conspiracy by the defendants with the sole or predominant intention of damaging or destroying the financial and/or business interests of the plaintiffs and breaches of a Shareholders Agreement between the MCH, YGL and YGG.

7 Prior to the commencement of this action, the parties were involved in the following actions:

(a) HC/S 104/2016 ("S104") commenced by YGL against MCH, Henry and YGG for alleged breach of a Deed of Undertaking.

(b) HC/ S 337/2016 ("S337") commenced by YGL against MCH seeking immediate payment of the loan extended for the purpose of the acquisition and against Henry and the 3rd plaintiff as guarantors under the personal guarantee.

8 The plaintiffs pleaded at paragraphs 80 to 85 of the Statement of Claim in this action, *inter alia*, that as a director of YGG, Simon had breached his fiduciary duties to YGG due to the commencement of S104 and S337 and the steps taken by YGL and/or Simon to wrest control of YGG from Henry. The plaintiffs also pleaded that, in the event the court finds that Bernard and Michael were validly appointed as directors of YGG, they too have similarly breached their fiduciary duties owed to YGG.

9 As a result of the alleged breach of fiduciary duties, the plaintiffs seek, *inter alia*, the following reliefs:

(a) Relief (f): a declaration that Bernard and Michael have breached their fiduciary duties as directors of YGG.

(b) Relief (g): a declaration that Simon has breached his fiduciary duties as a director of YGG;

(c) Relief (h): an order that the defendants account to the plaintiffs for any and all loss and damage suffered by the plaintiffs as a result of the defendants' breaches of fiduciary duties and/or wrongful breaches, conduct, acts and/or omissions as set out in the Statement of Claim;

(d) Relief (r): if necessary, an order that MCH be granted leave to bring civil proceedings in the name and on behalf of YGG against the Simon, Bernard and Michael on such terms as the Court may direct.

10 YGG seeks an order that paragraphs 80 to 85 and reliefs (f), (g), (h) and (r) be struck out as the plaintiffs have no legal capacity or right to bring an action for any alleged breach of fiduciary duties by the current directors of

YGG (namely, Simon, Bernard and Michael). It was submitted that the proper plaintiff to seek redress for any alleged breach of fiduciary duties is YGG.

The proper plaintiff rule

11 It is trite law that it is the company who is the proper party to sue the wrongdoer in respect of any breach of fiduciary duty owed to the company: the proper plaintiff rule in *Foss v Harbottle* (1843) 2 Hare 461 ("*Foss v Harbottle*").

12 YGG argued that the said paragraphs and reliefs should be struck off because:

(a) The plaintiffs have no legal capacity or right to bring an action for any alleged breach of fiduciary duties by the current directors of YGG (i.e. Simon, Bernard and Michael) as the proper plaintiff in such claims is YGG.

(b) Insofar as the claims in the said paragraphs and relief sought in (f), (g) and (h) of the Statement of Claim are brought by MCH for and on behalf of YGG by a statutory derivative action, leave has not been obtained by MCH and such leave is required before a statutory derivative action may be brought against Simon, Bernard and Michael.

(c) Further, even if the plaintiffs have validly commence a statutory derivative action under s 216A Companies Act, any and all loss and damage suffered are payable to YGG, instead of the plaintiffs as sought in relief (h) of the Statement of Claim.

13 The plaintiffs do not dispute the proper plaintiff rule. However, they submit that the said paragraphs and reliefs should not be struck off because:

(a) If necessary, the plaintiffs seek leave from the trial judge in this action for leave to commence a statutory derivative action under s 216A of the Companies Act if the court finds the notice requirement under s 216A of the Companies Act has not been met;

(b) Even if the trial judge does not grant leave for a statutory derivative action under s 216A of the Companies Act to be commenced by the plaintiffs, the plaintiffs could still maintain a common law derivative action against Simon, Bernard and Michael; and

(c) The said paragraphs may give rise to a claim for relief under s 216 of the Companies Act.

14 I will examine each of the arguments raised by the plaintiffs in turn.

Statutory Derivative action under s 216A of the Companies Act

15 The relevant portions of s 216A of the Companies Act states:

> **216A. Derivative or representative actions**
>
> …
>
> (2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action or arbitration in the name and on behalf of the company or intervene in an action or arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the action or arbitration on behalf of the company.
>
> (3) No action or arbitration may be brought and no intervention in an action or arbitration may be made under subsection (2) unless the Court is satisfied that –
>
> > (a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action or arbitration;

> (b) the complainant is acting in good faith; and
>
> (c) it appears to be prima facie in the interest of the company that the action or arbitration be brought, prosecuted, defended or discontinued.
>
> (4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3) (a), the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

16 It is clear from s216A of the Companies Act that the plaintiffs have to obtain leave to court prior to the commencement of a statutory derivative action.

17 In the present case, the plaintiffs have not served notice on the board of YGG as required under s 216A(3)(a) of the Companies Act nor have they obtained leave under s216A of the Companies Act to commence the statutory derivative proceeding against Simon, Bernard and Michael prior to the commencement of this action. The plaintiffs argued that it would be impracticable to serve such a notice as they take the position that the appointment of Bernard and Michael as directors of YGG is wrongful and invalid. The notice, if served, would be an implicit recognition of the "rogue board". Further, they say that after this action was served on YGG, no steps were taken by the "rogue board" to commence any action against Simon, Bernard and Michael. Therefore, the plaintiffs submit that, if necessary, the trial judge in this action should grant leave for the derivative action even though the requisite notice requirement has not been met.

18 YGG's position is that leave to commence a derivative action has to be obtained prior to the commencement of this action. Since no such leave has been obtained, the plaintiffs do not have *locus standi* to commence a derivative action on behalf of the YGG against Simon, Bernard and Michael.

19 The notice requirement under s 216A Companies Act was examined by Judith Prakash J (as she then was) ("Prakash J") in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 ("*Carolyn Fong*"). Prakash J held at [13] that s 216A(4) gave the court the power to dispense with notice or to make such orders as the court thinks fit for the giving of notice if it is not expedient or impractical to give notice prior to the commencement of the application under s 216A of the Companies Act.

20 Prakash J went on to hold that what would amount to "impracticality" would be a question of fact, and the court would be entitled to look at the totality of circumstances to determine whether impracticality existed. The scope of matters to be considered should not be restricted to the state of affairs at the time of filing the application for leave but, in addition, encompass the conduct of the relevant parties after such an application had been brought to the notice of the company: *Carolyn Fong* at [17].

21 It is, therefore, clear that the court has power to dispense with the notice requirements when it is impractical for notice to be given. As such, the plaintiffs' concerns about the service of notice on the "rogue board" of YGG is not a basis to bypass an application for leave to commence a statutory derivative action pursuant to s 216A of the Companies Act. If the plaintiffs had concerns regarding service on the "rogue board", the plaintiffs should still have commenced an application for leave under s 216A of the Companies Act with an application pursuant to s 216A(4) for dispensation of the notice requirement.

22 Further, in an application under s 216A, the main questions to be considered are whether the complainant is acting in good faith and whether the proposed action is in the interest of the company. These are distinct issues

from the issues in the plaintiffs' action, i.e. the duties owed to the company by Simon, Bernard and Michael and whether there is a breach of those duties. If the plaintiffs are permitted to commence this action without leave, these issues would be bypassed and not brought up for consideration in this action: see *Ng Heng Liat v Kiyue Co Ltd* [2003] 4 SLR(R) 218 ("*Ng Heng Liat*") at [22] and [23].

23 In light of the above, I find that, despite the concerns raised by the plaintiffs in respect of the service of notice on the "rogue" board, the plaintiffs are required to seek leave to commence the statutory derivative action *prior* to the commencement of this action, As the plaintiffs have not obtained leave, they do not have *locus standi* to bring a statutory derivative action and so the said paragraphs and reliefs are to be struck out on the basis that there is no reasonable cause of action.

Common law derivative action

24 The plaintiffs submit that, even if they do not have leave to commence a statutory derivative action, the said paragraphs and reliefs should not be struck out as they are entitled to maintain a common law derivative action.

Preliminary observations

25 A complainant may commence both a statutory derivative action as well as a common law derivative action as the issue of whether the common law derivative action co-exist with, or has been abrogated by, s 216A of the Companies Act has not been conclusive determined by the Singapore Courts. See *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1023 ("*Petroships*") at [70]. However, the Court of Appeal in *Petroships* did observe at [71]:

> What *does* appear clear, however, is that, as a matter of ***practicality***, it does not seem efficient or effective for a party to initiate a common law derivative action when a statutory derivative action pursuant to s 216A is available. As Margaret Chew has perceptively observed (see *Chew* at p 324; *cf Walter Woon on Company Law* at para 9.73):
>
> > … However, it would be unusual for a complainant, for practical reasons, to ignore section 216A and to pursue the convoluted course of a common law derivative action, since section 216A provides, at the least, a clear, simplified and efficient procedure. Furthermore, in an application pursuant to section 216A, it is submitted that the onus does not lie on the complainant to show 'fraud on the minority', in particular, wrongdoer control. Therefore, from the pragmatic point of view, it would seem to be in the interests of the complainant to pursue a statutory derivative action where he is a member of an unlisted company. Where a complainant chooses to forego the simplified statutory derivative action route, and opts (in the case of an unlisted company) to launch an application to pursue a derivative action by the common law route, the question then has to be with what motive the action is pursued. Where such a motive may be classified as one that is ulterior and the complainant is held not to be approaching the courts with 'clean hands,' should an alternative remedy be available (for instance, the statutory derivative action), it is conceivable that proceeding under the common law may be considered an abuse of process.

26 The plaintiffs in this action are entitled to commence a statutory derivative action under s 216A Companies Act. They have, however, also chosen to maintain an alternative cause of action based on a common law derivative action. When a complainant who is entitled to seek leave to commence a statutory derivative action chooses to concurrently maintain a common law derivative action, it is imperative that the complainant pleads facts that would clearly show that a common law derivative action has also been commenced. This is to ensure that the general rule with regard to pleadings is met and neither party is taken by surprise in relation to the case

that he must meet at trial: *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*") at [31].

Requirements for a common law derivative action

27 I turn now to consider whether the plaintiffs have satisfied the requirements to commence a common law derivative action.

28 To maintain a common law derivative action, the plaintiffs have to satisfy both procedural and substantial requirements.

Procedural requirements

29 The procedural requirements are:

(a) A minority shareholder must bring an action on behalf of himself and all the other shareholders of the company, excluding the majority wrongdoers.

(b) The wrongdoers must be named as defendants. The company must also be joined as defendants so that it is bound by the result of the action.

(c) The statement of claim must disclose that it is a derivative action, and recite the facts that made it so.

See *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417 ("*Abdul Rahim*").

30 It was observed by Hoo Sheau Peng JC in *Venkatraman Kalyanaraman v Nithya Kalyani* [2016] 4 SLR 1365 ("*Venkatraman*") at [69] that according to *Abdul Rahim*, an action that does not meet these procedural

requirements is liable to be struck out as being frivolous and vexatious (that is, under O 18 r 19(1)(b) of the Rules of Court).

Substantive requirements

31 The plaintiffs also have to satisfy two substantive requirements before the court will grant leave for the commencement of a common law derivative action: see *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 ("*Sinwa SS (2010)*") at [20]:

(a) The company has a reasonable case against the defendant;

(b) The plaintiff has *locus standi* to bring the action.

32 The company has a reasonable cause of action if it is demonstrated that the company is entitled, *prima facie*, to the relief claimed. The plaintiff must show that the company has a reasonable, or legitimate, case against the defendant for which the company may recover damages or otherwise obtain relief: *Sinwa SS (2010)* at [21].

33 For a plaintiff to have *locus standi* to bring the action, the plaintiff has to establish that he falls within the "fraud on the minority" exception to the rule in *Foss v Harbottle*. There are two constituent elements to this exception: fraud and control: *Sinwa SS (2010)* at [48].

Fraud

34 What is considered "fraud" for the purpose of establishing "fraud on the minority" is controversial. The orthodox view is that unratifiable wrongs which are so egregious that no ratification is possible would constitute "fraud on the minority". It is clear from case law that dishonesty or cheating by a

director would be an ratifiable wrong but it is not clear how far beyond actual dishonesty it would extend: *Sinwa SS (2010)* at [49]-[50].

Control

35 Andrew Ang J in *Sinwa SS (2010)* at [59] held that shareholding is not the sole determinant of control. He was of the view that the crucial question was whether the defendant was able to prevent an action from being brought against him. The crux of the matter is whether the errant director was able to suppress an action against himself *qua* director.

ANALYSIS

36 After considering the facts, I find that the plaintiffs have not satisfied the requirements to maintain a common law derivative action.

37 First, one of the procedural requirements is that the Statement of Claim must disclose that it is a derivative action and recite the facts that made it so. The plaintiffs submit that they have satisfied this requirement by seeking relief (r) and by pleading that Simon, Bernard and Michael have breached fiduciary duties owed to YGG which caused YGG and MCH to suffer loss and damage. I note that relief (r) (see [9(d)] above) states that leave is being sought to commence a derivative action only "if necessary". This begs the question of whether the plaintiff truly intent to commence a derivative action. Therefore, the mere fact that relief (r) has been sought is not sufficient to disclose that a common law derivative action has been commenced.

38 Second, to have *locus standi* to commence the common law derivative action, the plaintiffs have to plead facts which establish the elements of control and fraud. No such facts have been pleaded. The plaintiffs have merely

pleaded that there has been a breach of fiduciary duties owed to YGG due to the commencement of S104 and S337 and acts done to wrest control of YGG from Henry (see [7] and [8] above). The mere fact that there has been an alleged breach of fiduciary duties does not automatically lead to an allegation of fraud. Similarly, the facts in support of control have also not been pleaded.

39 Third, apart from one reference to loss and damage suffered by YGG, the entire statement of claim refers to the loss and damage suffered by the plaintiffs. Moreover, apart from relief (r), an examination of the reliefs sought by the plaintiffs show that no relief is being sought on behalf of YGG. In fact, *all* the defendants, including YGG, are asked to account to the plaintiffs for loss and damage *suffered by the plaintiffs*. If this is indeed a representative action, then the statement of claim should include relief that the loss and damage suffered by YGG be accounted for, which does not appear to be the case here.

40 As such, I am of the view that the said paragraphs and reliefs do not satisfy the requirements for a common law derivative action and are to be struck out on the basis that they are frivolous, vexatious and an abuse of process.

Minority oppression

41 At the end of his oral submissions, the plaintiffs' counsel submitted that the said paragraphs could also give rise to a cause of action based on minority oppression under s 216 of the Companies Act. This came as a surprise as the Statement of Claim does not appear to raise this cause of action. This was also not raised in the reply affidavits and the written submissions tendered prior to the hearing.

42 The counsel for the plaintiffs acknowledged that this cause of action is not expressly pleaded in the Statement of Claim but relied on the Court of Appeal decision in *Ng Kek Wee* as support for the position that a party does not have to expressly plead its claim for relief under s 216 of the Companies Act for the court to grant relief under that provision. He argued that the facts pleaded in support of the claim for minority oppression may be found in the paragraphs which YGG seeks to strike out as well as substantially the whole of the statement of claim. It was submitted that if the relief under s 216 was not adequately pleaded, then the court should allow the pleadings to be amended, rather than grant an order to strike out.

43 Naturally, counsel for YGG expressed his surprise that relief under s 216 was being sought by the plaintiffs. He pointed out that the facts pleaded and the reliefs sought by the plaintiffs were based on the tort of conspiracy and that there had been no prior indication that the plaintiffs were seeking relief for minority oppression under s 216 of the Companies Act. Further, it was submitted that in *Ng Kek Wee*, the complainant had clearly stated that the conduct of the company was conducted in a manner "oppressive" to the complainant and in a way designed to "unfairly discriminate" against the complainant. It was submitted that the plaintiffs in this action had not pleaded any material facts which support a s 216 claim.

44 I agree with the counsel for YGG. While the Court of Appeal in *Ng Kek Wee* did agree that there is no requirement to expressly plead that the claim was for relief under S 216 of the Companies Act, the Court clearly stated that the material facts relied on in support of a claim for relief under s 216 of the Companies Act have to be pleaded to put the company on notice that the complainant's claim was one for relief under s 216 of the Companies Act: *Ng Kek Wee* at [31].

45 I find that the statement of claim lacks the material facts to support a claim for relief under s 216 of the Companies Act. It has to be borne in mind that a claim for relief under s 216 can only be brought by a shareholder of YGG, namely, MCH. However, the claims made by the plaintiffs in the statement of claim have consistently pleaded that due to the actions of the defendants, *all* the plaintiffs have been injured which resulted in *all* the plaintiffs suffering lost and damage. MCH has failed to plead how the alleged wrongdoing is oppressive or disregards *its* interest as a shareholder of YGG.

46 The only instance in which MCH is singled out as having suffered loss and damages is in the paragraphs which YGG seeks to strike out. Even then, this is a bare assertion that due to the breaches of fiduciary duties, MCH has suffered loss and damage, without an explanation as to how these breaches support a claim of oppressive conduct.

47 In seeking leave to amend to include a claim under s 216 of the Companies Act, the plaintiffs are essentially seek leave to amend the statement of claim to include a cause of action which is not supported by the facts that have been pleaded. As such, this would not be an appropriate case to grant leave to amend to introduce this new cause of action.

Conclusion

48 Accordingly, for the reasons stated above, YGG's application to strike out is allowed. I will hear parties on the issue of costs.

Tan Teck Ping Karen
Assistant Registrar

Mr Chua Cheng Yew and Ms Sun Ran (Wong Tan & Molly Lim LLC) for the plaintiff;
Mr Navin Jospeh Lobo and Mr Oon Shaun Kim San (Bird & Bird ATMD LLP) for the first defendant.
