IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 180

Originating Summons No 933 of 2018

In the matter of an application under Section 216A of the Companies Act (Cap. 50)

Between

Ganesh Paulraj

… *Applicant*

And

(1) A&T Offshore Pte Ltd
(2) Avantgarde Shipping Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Companies] — [Members] — [Derivative action]

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Ganesh Paulraj
v
A&T Offshore Pte Ltd and another

[2019] SGHC 180

High Court — Originating Summons No 933 of 2018
Aedit Abdullah J
4, 30 October 2018; 14, 22 May 2019

31 July 2019

Aedit Abdullah J:

Introduction

1 The applicant, who was the beneficial owner of a shareholder of the first respondent, sought and was granted leave to commence a statutory derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") through the first respondent against the second respondent, the other shareholder of the company.

Background

2 The first respondent was incorporated in October 2014 with the second respondent, Avantgarde Shipping Pte Ltd, and the applicant's company, Tuff Offshore Engineering Services Ptd Ltd ("Tuff"), as its shareholders. The

applicant was appointed as one of the three directors of the first respondent.[1] The other two directors were Rajeev Kumar Madhusoodanan Nair ("Mr Nair") and Devanandan Kizhakkoot Kunjayyappan ("Mr Kunjayyappan").[2]

3 The first respondent was voluntarily wound up and struck off the register in April 2017. On the applicant's application in Originating Summons No 1260 of 2017, I allowed the restoration of the first respondent under s 344(5) of the Companies Act. The decision to restore was appealed by the second respondent and subsequently dismissed by the Court of Appeal in Civil Appeal No 54 of 2018.

4 The applicant then sought leave under s 216A of the Companies Act to commence a statutory derivative action for the purposes of pursuing a certain contractual claim of the first respondent against the second respondent.

5 The first respondent was not represented and did not participate in this application.

Summary of the applicant's case

6 The applicant submitted that the requirements under s 216A of the Companies Act were satisfied. Sufficient notice was given to the directors of the first respondent.[3] Alternatively, this was an appropriate case for the dispensation of the notice requirement pursuant to s 216A(4) of the Companies

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1 Applicant's affidavit dated 1 August 2018 at p 6.

2 Applicant's submissions at para 21.

3 Applicant's submissions at paras 40-52.

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Act.[4] The remaining requirements that the applicant be acting in good faith, and that the application be *prima facie* in the interests of the first respondent, were met as the first respondent would potentially receive a significant pecuniary benefit if the action against the second respondent were to be successful.[5]

Summary of the 2nd respondent's case

7 The second respondent argued that the applicant did not comply with the requirements in s 216A of the Companies Act. The actions taken by the applicant did not fulfil the notice requirement.[6] The applicant was not acting in good faith as he was motivated by a collateral purpose in seeking recovery of the sums allegedly owed to the first respondent, namely, to facilitate Tuff's recovery of a similar debt owed to it by the first respondent.[7] It was also not *prima facie* in the first respondent's interests to allow the statutory derivative action as the claim by Tuff was fictitious and based on misrepresentations and omissions of the applicant.[8]

The decision

8 I allowed the application to commence a statutory derivative action. I found that effective and sufficient notice for the purpose of the requirements of s 216A of the Companies Act was given to the directors. Alternatively, dispensation should be given under s 216A(4) of the Companies Act in the

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4 Applicant's submissions at paras 53-56.

5 Applicant's submissions at paras 57-79.

6 Second respondent's submissions at paras 7-13.

7 Second respondent's submissions at paras 14-22.

8 Second respondent's submissions at paras 20, 23-27.

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circumstances of the case. The applicant was acting in good faith: the fact that he may eventually obtain a benefit from any recovery did not negate his good faith in pursuing the action for the benefit of the company. The action was *prima facie* in the interests of the first respondent as it was not so unmeritorious that it should be rejected out of hand at this point. The fact that the first respondent may in the end be subjected to a claim for that same amount of money did not mean that its claim should not be pursued at all: whether or not such a claim was to be made against the first respondent, and whether it could or would resist, were matters for another occasion.

The statutory derivative action

9 I first set out the relevant portions of s 216A of the Companies Act:

> **Derivative or representative actions**
>
> **216A.—**(1) In this section…
>
> "complainant" means —
>
> (*a*) any member of a company;
>
> …
>
> (*c*) any other person who, in the discretion of the Court, is a proper person to make an application under this section.
>
> (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 the Court under subsection (2) if the directors of the

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> company do not bring, diligently prosecute or defend or discontinue the action or arbitration;
>
> (*b*) the complainant is acting in good faith; and
>
> (*c*) it appears to be prima facie in the interests of the company that the action or arbitration be brought, prosecuted, defended or discontinued.
>
> (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.

Locus standi

10 A preliminary issue was whether the applicant had *locus standi* to bring an application under s 216A of the Companies Act as he was not a member of the first respondent. The second respondent did not contest the standing of the applicant, but I was satisfied in any event that he had sufficient standing.

11 Section 216A(1)(*c*) of the Companies Act confers on the Court the discretion to allow any person it regards as a "proper person" to apply for a statutory derivative action. I was satisfied that this was an appropriate case in which to do so.

12 The applicant was the beneficial owner of Tuff, which in turn was the 40% shareholder of the first respondent.[9] The applicant controlled Tuff's shareholding, giving the applicant a clear interest and sufficient connection to the company to bring the present application to commence a statutory derivative action. Moreover, it would have been open to the applicant to take out a fresh

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9 Applicant's affidavit dated 1 August 2018 at para 1.

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application in the name of Tuff to commence the same statutory derivative action sought in the present proceedings.

Notice

13 Section 216A(3) of the Companies Act requires that 14 days' notice of an intention to apply for leave of Court to commence a statutory derivative action on behalf of a company be given to its directors. The present application was filed on 1 August 2018.

14 The applicant argued that sufficient notice was given to the directors of the first respondent. The applicant's solicitors had informed the second respondent, of which Mr Nair was the managing director, on 20 March 2018 of his intention to apply for leave to commence a statutory derivative action.[10] For convenience, the contents of the letter are set out:

> **NOTICE OF APPLICATION UNDER SECTION 216A OF THE COMPANIES ACT (CHAPTER 50) BY GANESH PAULRAJ**

[10] Applicant's affidavit dated 1 August 2018 at paras 23-24.

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> 1. We act for **GANESH PAULRAJ** ("our client") and refer to the above matter.
>
> 2. We are **HEREBY INSTRUCTED TO AND DO PUT YOUR CLIENT, RAJEEV KUMAR MADHUSSODANAN NAIR, ON NOTICE** pursuant to Section 216A(3)(a) of the Companies Act (Chapter 50) (the "Act") of our client's intention to apply to the Court under Section 216A(2) of the Act for leave to bring an action in the name and on behalf of A&T Offshore Pte Ltd (the "Company" for the purpose of prosecuting an action on behalf of the Company.
>
> 3. All our clients'[sic] rights are expressly reserved.

15 This was followed by a more detailed letter on 4 April 2018, the relevant portions of which stated:[11]

> …
>
> 3. Be that as it may, our client intends to carry out the following actions on behalf of A&T Offshore Ptd Ltd: -
>
> i. Claim against Avantgarde Shipping for breach of contract; and
>
> ii. Claim against [Mr Nair] for breach of fiduciary duties as director of A&T Offshore Pte Ltd and/or conspiracy with Avantgarde Shipping Pte Ltd to act against A&T Offshore Pte Ltd.

16 Mr Kunjayyappan, for his part, was informed of the applicant's intentions at a meeting in July 2018.[12]

17 In the alternative, the applicant submitted that, following the approach in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 ("*Carolyn Fong*"), the notice requirement could be dispensed with pursuant to s 216A(4) of the Companies Act. There was no evidence of any

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11 Applicant's affidavit dated 1 August 2018 at p 329.

12 Applicant's affidavit dated 28 September 2018 at p 24.

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serious deliberation or investigation of the intended claim against the second respondent. Mr Nair was also aware of the intended claim since the earlier proceedings in Originating Summons No 1260 of 2017 related to the restoration of the first respondent.[13]

18 The second respondent took the position that sufficient notice was not provided to either Mr Nair or Mr Kunjayyappan. The letters were sent to the second respondent's solicitors and not Mr Nair's (see [14]-[15] above).[14] They also did not contain sufficient detail on the intended cause of action which the applicant planned to pursue on behalf of the first respondent.[15] As for Mr Kunjayyappan, the applicant failed to notify him entirely prior to the filing of the present application.[16]

19 I was of the view that effective notice was given within the statutory object of s 216A of the Companies Act.

20 In *Carolyn Fong*, Judith Prakash J stated that the rationale for the notice requirement was to afford a company's directors a chance to consider if it would be willing to pursue the complaint on its own. This would avoid unnecessary legal costs in dealing with the issue of whether leave should be granted (at [14]).

21 That approach, with respect, has much to commend it, as focussing on the realities of the situation. What was advocated by the second respondent

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13 Applicant's submissions at paras 54-56.

14 Mr Nair's affidavit dated 26 September 2018 at para 12.

15 Mr Nair's affidavit dated 26 September 2018 at paras 10-11.

16 Second respondent's submissions at paras 11-12.

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required that any notice given to a director under s 216A of the Companies Act fully set out the intended course of action without regard to the context in which the notice was given. This would have given too much weight to form at the expense of substance. The original application to restore the first respondent was filed on 7 November 2017.[17] This application was strongly resisted by the second respondent. Notably, both Mr Nair and Mr Kunjayyappan filed affidavits in the proceedings. These affidavits made it clear that they understood the nature of the claims to be pursued against the second respondent.[18] It was hard to conceive that the directors were not aware that an application under s 216A of the Companies Act was being planned and would be pursued. Against that context, I was satisfied that sufficient notice was given to the first respondent's directors.

22 Even if valid notice was not given to the first respondent's directors, I was satisfied that dispensation with the notice requirement should be given pursuant to s 216A(4) of the Companies Act (see [9] above).

23 Notice can be dispensed with where it is impracticable for the applicant to give notice. In determining whether impracticability exists, the Court is not restricted to the state of affairs at the time of filing, but can also consider the conduct of parties after the application has been brought to the company's attention: *Carolyn Fong* at [17].

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17 See Originating Summons No 1260 of 2017.

18 See Mr Devanandan's affidavit dated 31 January 2018 in OS 1260/2017 at paras 4-7; See also Mr Nair's affidavit dated 11 January 2018 in OS 1260/2017 at para 39.

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24 Even though the legal requirements for notice might not have been satisfied, the first respondent's directors would have had an indication of the claims which the applicant sought to bring against the second respondent. Yet, there did not seem to have been any serious attempt to investigate them.

25 Mr Nair vehemently opposed the statutory derivative action application. This was to be expected given that the claim was to be made against the second respondent, of which he was the managing director.

26 As for Mr Kunjayyappan, it appeared that he had no interest in investigating any potential claims the first respondent might have against the second respondent. In an email to the applicant dated 24 September 2018, Mr Kunjayyappan stated that he had no wish to be involved in the first respondent's matters.[19]

27 The relationship between the applicant and Mr Nair also appeared to have broken down completely, with each accusing the other of wrongdoing in relation to the first respondent's affairs.

28 To my mind, the dysfunctional state of the first respondent's board, with the applicant and Mr Nair at loggerheads and Mr Kunjayyappan adopting a disinterested stance, rendered it unable to properly investigate any potential claims against the second respondent. It was my view that it would not have made any difference regardless of whether notice was validly served or not. It was unlikely to have led to a *bona fide* effort to investigate any of the applicant's

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19 Applicant's affidavit dated 28 September 2018 at p 22.

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claims. This satisfied the requirement of impracticability and justified dispensing with the notice requirement.

Good faith

29 The good faith requirement in the context of a statutory derivative action under s 216A of the Companies Act was recently summarised by Judicial Commissioner Ang Cheng Hock in *Jian Li Investment Holdings Pte Ltd & 2 Ors v Healthstats International Pte Ltd & 2 Ors* [2019] SGHC 38 (at [42] and [44]):

> 42 There are two main facets to the "good faith" requirement: *Ang Thiam Swee* at [29]–[30]; *Maher v Honeysett and Maher Electrical Contractors* [2005] NSWSC 859 at [28]. The first relates to the merits of the proposed derivative action. The applicant must honestly or reasonably believe that a good cause of action exists for the company to prosecute. It follows as a corollary that an applicant may be found to lack good faith if it is shown that no reasonable person in his position, and knowing what he knows, could believe that the company had a good cause of action to prosecute: *Ang Thiam Swee* at [29].
>
> …
>
> 44 Secondly, an applicant may be found to be lacking in good faith if it can be demonstrated that he is bringing the derivative action for a collateral purpose: *Ang Thiam Swee* at [30]. The onus is on the applicant to demonstrate that he or she is "genuinely aggrieved", and that any collateral purpose is sufficiently consistent with the purpose of "doing justice to a company" so that he or she is not abusing the statutory remedy and, by extension, also the company, as a vehicle for the applicant's own aims and interests: *Ang Thiam Swee* at [31], citing *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [19].

30 The mere fact that an applicant acts out of self-interest does not mean that he is acting in bad faith. The motivations of an applicant will only amount to bad faith in so far as they go to show that his judgment has been clouded by purely personal considerations: *Pang Yong Hock* [2004] 3 SLR(R) 1 at [20].

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31 The second respondent argued that the applicant acted in bad faith as the statutory derivative action was brought for a collateral purpose, namely, to enable Tuff to recover sums allegedly owed to it by the first respondent. This would benefit the applicant personally as Tuff's beneficial owner.[20] There were also arguments raised against the "inconsistent and contradictory" evidence provided by the applicant under the good faith requirement.[21] I considered the latter more relevant to the third requirement that the action be *prima facie* in the interests of the first respondent.

32 What the authorities suggest is that there is a degree of overlap between the good faith requirement and whether the company will benefit from the intended cause of action. The fact that the company is likely to benefit, while not determinative, is a strong indicator of the applicant's good faith.

33 On the facts, while there might have been an element of self-interest in the applicant's decision to bring the statutory derivative action, I did not think that this meant that he was acting in bad faith. As I found below, it was *prima facie* in the first respondent's interests that the claim against the second respondent be pursued as it stood to benefit significantly. I was thus of the view that the applicant had discharged his burden of proving that he was acting in good faith.

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20 Second respondent's submissions at para 19.

21 Second respondent's submissions at paras 20-21.

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Interests of the company

34 The second respondent raised two grounds as to why this requirement was not satisfied. First, there was no reasonable basis for the complaint the applicant intended to pursue against the second respondent.[22] Second, that the first respondent would not benefit from the proposed action as it would be subject to an action by Tuff for any amount recovered from the second respondent.[23]

35 I was satisfied that the cause of action intended to be pursued by the applicant was *prima facie* in the interests of the first respondent.

36 The requirement in s 216A(3)(*c*) of the Companies Act requires that the applicant convince the court that the company's claim is "legitimate and arguable": *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [53]. It must have a reasonable semblance of merit and must not be frivolous, vexatious, or bound to be unsuccessful: *Ang Thiam Swee* at [54], citing *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 ("*Urs Meisterhans*"). At this stage, the standard of proof is low and only the most obviously unmeritorious claims will be culled: *Ang Thiam* Swee at [55]. Further, since only affidavit evidence is before the court at this stage, the court is not required to make an extensive inquiry into the merits of the claim and should not be drawn into an adjudication on the disputed facts: *Urs Meisterhans* at [25].

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22 Mr Nair's affidavit dated 26 September 2018 at paras 44-47.

23 Mr Nair's affidavit dated 26 September 2018 at paras 50-51.

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37 It appeared to me that most of the objections raised by the second respondent to show that there was no reasonable basis for the applicant's proposed action should more appropriately be heard in the main action. The second respondent took issue with the applicant's construction of contracts purportedly entered into between the first respondent and the second respondent, and between the first respondent and Tuff.[24] The second respondent also argued that the applicant had not produced documentary evidence to show that the second respondent was indebted to the first respondent.[25] Being disputed facts, these were not matters which the Court was concerned with at the leave stage.

38 The claim to be pursued against the second respondent was for unpaid debts arising from an agreement purportedly entered into on 22 April 2015, with Mr Kunjayyappan signing on behalf of the first respondent.[26] Having considered the documents exhibited in the applicant's affidavit, I was satisfied that a legitimate and arguable claim was disclosed; the proposed action was not so unmeritorious that it should be rejected out of hand.

39 I also did not agree with the second respondent that the proposed action would not *prima facie* be in the first respondent's interests because it would be subject to a claim for the same amount from Tuff. It was not in dispute that the first respondent stood to obtain a significant sum from the second respondent if it were to succeed in its claim. The possible recovery by Tuff was a separate matter, and the question of whatever damages or defences existed between them

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24 Mr Nair's affidavit dated 26 September 2018 at para 46

25 Mr Nair's affidavit dated 26 September 2018 at para 40.

26 Applicant's affidavit dated 1 August 2018 at para 9, p 13.

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was to be determined on another day. What mattered was the benefit as between the first respondent and the second respondent.

Orders made

40 I allowed the application to commence a statutory derivative action in the first respondent's name against the second respondent. The applicant was to have control of the suit on behalf of the first respondent.

Aedit Abdullah
Judge

Vijai Dharamdas Parwani and Chang Guo En Nicholas Winarta Chandra (Parwani Law LLC) for the applicant;
The first respondent absent and unrepresented;
Tan Wen Cheng Adrian and Low Zhi Yu Janus (August Law Corporation) for the second respondent.

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