IN THE APPELLATE DIVISION OF THE HIGH COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 4

Civil Appeal No 8 of 2021

Between

New Ping Ping Pauline

… *Appellant*

And

(1) Eng's Noodles House Pte Ltd
(2) Ng Weng San
(3) Teng Chai Hai
(4) Ng Mui Hong
(5) Ng Mei Ling
(6) Eng's Char Siew Wantan Mee Pte Ltd

… *Respondents*

In the matter of Suit No 20 of 2019

Between

New Ping Ping Pauline

… *Plaintiff*

And

(1) Eng's Noodles House Pte Ltd
(2) Ng Weng San
(3) Teng Chai Hai
(4) Ng Mui Hong
(5) Ng Mei Ling
(6) Eng's Char Siew Wantan Mee Pte Ltd

… *Defendants*

Version No 1: 19 Jul 2021 (16:18 hrs)

EX-TEMPORE JUDGMENT

[Companies] — [Common law derivative action]

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New Ping Ping Pauline and others
v
Eng's Noodles House Pte Ltd

[2021] SGHC(A) 4

Appellate Division of the High Court — Civil Appeal No 8 of 2021
Belinda Ang Saw Ean JAD, Woo Bih Li JAD and Quentin Loh JAD
19 July 2021

19 July 2021

Woo Bih Li JAD (delivering the judgment of the court *ex-tempore*):

1 This appeal arises out of the dismissal of the appellant's claims in HC/S 20/2019 ("Suit 20") by the Judge below (the "Judge") in their entirety. In Suit 20, the appellant, a minority shareholder in the first respondent (the "Company"), claimed to be acting in a representative capacity for the Company in bringing claims for, *inter alia*, (a) unlawful means conspiracy against the second to sixth respondents, and (b) breach of fiduciary duties owed to the Company by the second and third respondents. The fourth, fifth, and sixth respondents counterclaimed against the appellant in the tort of passing off below, but have not appealed the Judge's dismissal of the counterclaim.

The Facts

2 The appellant (also referred to as "Pauline") is a 47.5% shareholder of the first respondent, Eng's Noodles House Pte Ltd (defined earlier as the

"Company"). She is the wife of one Jason Sim Chong Ang ("Jason"), and it is not in contention that her shares in the Company were held as a "nominee shareholder" for Jason.[1]

3 The Company was incorporated on 27 February 2012 as a collaboration between the late Mr Ng Ba Eng ("Mr Ng") and Jason. Mr Ng, who had up to that point run a successful wanton noodles stall at Dunman Street, had been approached by Jason, a businessman, who had proposed the collaboration. Mr Ng agreed, and the Company eventually commenced operations at 287 Tanjong Katong Road (the "287 Premises"). At the point of incorporation, Jason's wife, *ie,* Pauline, and Mr Ng's son, *ie,* the second respondent ("Desmond"), were the sole shareholders and directors. Pauline and Desmond each held one share in the Company, which had a share capital of $2.00.

4 The third respondent ("Bill") was an employee at one of Jason's companies, Jason Parquet Specialists Pte Ltd. In early 2012, Jason introduced Bill to Desmond. Bill did not know Desmond and the Ng family prior to that point. Following Jason's introduction, Bill joined the Company to assist in accounts and finances on a part-time basis. Following the issuance of additional shares on 12 August 2015, Pauline and Desmond had their shareholdings reduced to 47.5% each, while Bill received 5% of the Company's shares.

5 The fourth and fifth respondents ("Mui Hong" and "Mei Ling" respectively) are Desmond's sisters. Mui Hong is older than Desmond, while Mei Ling is younger. Mui Hong and Mei Ling each hold 50% of the shares in the sixth respondent, Eng's Char Siew Wantan Mee Pte Ltd ("Eng's Char

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[1] Appellant's Affidavit of Evidence-in-Chief ("AEIC") at [17].

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Siew") and have been the sole directors of Eng's Char Siew since its incorporation on 5 March 2018.

6 Given their relevance to the appeal and the potential for confusion given the similar names, it is helpful at the outset to address the distinctions between the Company (Eng's Noodles House Pte Ltd), Eng's Char Siew, and a non-party, Eng's Wantan Noodle Pte Ltd ("Eng's Wantan"). While all three companies were/are in the business of selling wanton noodles, a number of distinctions are pertinent:

(a) First, the Company was incorporated on 27 February 2012, whereas Eng's Wantan was incorporated on 28 February 2018, and Eng's Char Siew was incorporated on 5 March 2018.

(b) Second, the Company's shareholders after the issuance of additional shares on 12 August 2015 were Desmond (47.5%), Pauline (47.5%), and Bill (5%). Eng's Char Siew is owned in equal shares by Mui Hong and Mei Ling although Pauline suggests that Desmond is involved in its business. By contrast, Eng's Wantan is, as Pauline herself accepts, in reality owned by the Lao Huo Tang Group,[2] which is in turn run by one Thomas Hong, a friend of Jason's.[3].

(c) Third, the Company's premises for business (until its cessation of business on 28 February 2018) was at the 287 Premises. It is not in contention that Eng's Wantan now occupies the 287 Premises for business and has done so since about May 2018. Eng's Char Siew, on

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2 Transcript of 21 July 2020, Page 31, Lines 18 to 24.

3 Appellant's AEIC at [56].

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the other hand, has occupied the premises at 248/250 Tanjong Katong Road (the "248 Premises") since it opened for business in May 2018.

The absence of Eng's Wantan as a party in Suit 20 is significant because it is alleged that Pauline and Jason are involved in it, and have aided it. We will consider the position of Pauline and Jason *vis-à-vis* Eng's Wantan, and the relevance of that relationship, in greater detail below.

Issues

7 On appeal, the appellant argues, contrary to the Judge's findings:

(a) First, that all the requisite elements of unlawful means conspiracy to injure the Company are made out against the second to sixth respondents;

(b) Second, that Desmond and Bill had in fact breached their fiduciary duties to the Company, and in particular that Desmond's breach of his fiduciary duties ought to sound in damages; and

(c) Third, that the Judge erred in finding that Pauline was not entitled to rely on a common law derivative action to bring her claims in Suit 20, and which are the subject of the present appeal.

While Pauline sets out her arguments on appeal in the order set out above, it is apparent that the *entirety* of the appeal hinges on point (c). If Pauline is *not* in fact entitled to rely on a common law derivative action to bring her claims, then *all* the rest of her arguments on appeal are academic, because she would then not be permitted to bring the claims in unlawful means conspiracy and for breach of fiduciary duty *on behalf of the Company*.

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The Common Law Derivative Action

The Law

8 An issue was raised as to whether Pauline was required to obtain leave to bring a common law derivative action and if so, at what stage should leave be considered. It is not necessary for us to address the leave issue because, as we elaborate below, the action fails because it is not filed in good faith in the interest of the Company. There are three substantive requirements for relying on a common law derivative action, as set out by Steven Chong J (as he then was) in *Sinwa SS (HK) Co Ltd v Nordic International Ltd and another* [2016] 4 SLR 320 ("*Sinwa SS*") at [12]:

> (a) First, it must be proved that the company is entitled, *prima facie*, to the relief claimed. This means that 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 (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1] at [21].
>
> (b) Next, the action must fall within the proper boundaries of the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189. The rule is that, in any action in which a wrong is alleged to have been done to a company, the proper plaintiff is the company itself (see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 210–211). The only true exception to the rule is "fraud on the minority" which applies when the alleged wrongdoer has committed a "fraud" against the company and is himself in control of the company. As it is not in dispute that this exception applies in the present case, I will comment no further on the controversies surrounding the definition of "fraud" in this context as elucidated by Andrew Ang J in [*Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 (at [49]–[55]].
>
> (c) Finally, in exercising its discretion whether to grant leave to commence a derivative action, the court will consider if the action is ***bona fide* in the best interest of the company rather than for some ulterior or purely self-serving purpose** (see [*Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [69]]. The court, at this stage, will also consider other factors such as any unreasonable delay in bringing the action (Tan

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> Cheng Han, *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 9.78) and the availability of any viable alternative remedies (see [*Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1] at [61]–[64]; *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 at [30]].
>
> [Emphasis added]

9 Chong J went on at [54] to echo the observation of the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [55] in the context of the *statutory* derivative action, that "there is an obvious overlap between the *prima facie* threshold [*ie,* the first stage] and the requirement of good faith, in that an applicant with an unmeritorious claim will also typically be unable to demonstrate that he is acting **in good faith and for the benefit of the company**" [emphasis added].

The Court's decision on Pauline's claims

10 We are satisfied that Pauline cannot be said to have been acting in good faith in the interest of the Company for the reasons stated below:

11 First, the Company is dormant, and exists as a shell for all intents and purposes. Its business ceased on or about 28 February 2018, and it has had no operations since then.

12 Second, to the extent that Pauline suggests that the second to fifth respondents had appropriated or usurped the Company's assets or business for themselves and left the Company for dead, Pauline had done the same thing. The lease of the 287 Premises was expiring on 15 March 2018. It was held in the name of Desmond. However, Desmond did not want to sign the new lease as he wanted Pauline to sign. On 8 January 2018, Bill informed the real estate agent for the 287 Premises, Jane Wan, that Pauline was to sign the new lease.

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However, Pauline expressed surprise. The agent then suggested that the new lease could be in the Company's name and that Pauline could sign for the Company. Pauline did not follow up to ensure that a new lease would be obtained for the continuation of the Company's business at the 287 Premises. Instead, Jason introduced Thomas Hong to Jane Wan, and Eng's Wantan eventually secured a lease of the 287 Premises.

13 Thus, although Pauline complained that Desmond and Bill were attempting to secure the lease of the 287 Premises for their friend, her own husband had in fact helped Thomas Hong to secure the lease for Eng's Wantan. It is not suggested that Pauline was unaware of this manoeuvre. She represented Jason's interest at all material times.

14 In the circumstances, it is ironic, to say the least, that the Statement of Claim states at [23(4)] that: " As a result of [Desmond's] deliberate failure to renew the lease of the Premises before its expiry, the Premises was eventually rented to a 3rd party to the detriment of the Company…". As discussed, the third party who obtained the lease for the 287 Premises was Eng's Wantan and not Eng's Char Siew.

15 Moreover, the involvement of Pauline and Jason in Eng's Wantan is described by the Judge as follows:

> 118 … I agree that on a balance of probabilities, Pauline (together with Jason) assisted in the set-up of Eng's Wantan Noodle. First, Pauline admitted at trial that Jason co-managed Eng's Wantan Noodle. Second, Pauline's own evidence shows that she was involved in setting up Eng's Wantan Noodle. The accountants she hired to look into the Company's finances were told that "the shareholders [of the Company] have each set up their own respective noodle house in the vicinity of [the Company's] location". Third, Pauline and Jason were instrumental in the setting up of Eng's Wantan Noodle. It was

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> Jason who introduced Thomas to the real estate agent to enable Thomas to secure the lease for the 287 Premises; it was Jason who "recommended" Mr Law Boon Meng, the Company's head chef, to work for Eng's Wantan Noodle; it was Jason who had assisted with Eng's Wantan Noodle's renovation of the premises; and it was Pauline who gave Eng's Wantan Noodle the use of the main operational telephone number which customers had used to call the Company for six years.

16 It is important to note that while Pauline argued that (a) the representatives of Eng's Wantan have not been called as witnesses and there are gaps in the evidence relating to Eng's Wantan,[4] and that (b) the Judge ought not to speculate about the relationship between Pauline, Jason, Thomas Hong, and Eng's Wantan, the fact is that Pauline and Jason did give evidence. It was for them to refute any evidence marshalled against them. Besides, beyond the vague assertions mentioned above, the Appellant's Case stopped short of challenging the specific findings of the Judge below about their relationship with Thomas Hong and/or Eng's Wantan.

17 In so far as Pauline alleged that the telephone number in question was her own personal number, the point was that it was the number used by customers of the Company. Furthermore, it was not open to her to complain about Eng's Char Siew appropriating the Company's business when she was assisting Eng's Wantan to do the act complained of.

18 Also, while Pauline argued that Eng's Wantan only became involved after Desmond and Bill had given up the lease of the 287 Premises, that is untrue for the following reasons.

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[4] See Appellant's Case at paras 141 and 147.

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19 First, as mentioned, Pauline was asked in January 2018 to sign the lease for the Company for the new period, but did not do so. Secondly, just as she argued that any steps taken by the sisters and Desmond were not planned overnight, then likewise, any step taken by Pauline, Jason, and Thomas Hong must have been planned before Desmond and Bill allegedly "gave up" the lease. The Ng family (whether involving only the two sisters mentioned or with Desmond) on the one hand and Pauline and Jason on the other were each making their own plans for the eventual situation when the Company was no longer operating. The difference is that Eng's Wantan had successfully "usurped" the lease of the 287 Premises. We understand that Eng's Wantan is also operating at other outlets.

20 In the Appellant's Case, Pauline argued that the second to fifth respondents were seeking to usurp not only the Company's business but its intellectual property as well. Indeed, in her claims below, she had alleged that the Company was entitled to various intellectual property and sought to restrain the second to fifth respondents from using intellectual property allegedly belonging to the Company. The argument arose because a sole proprietorship belonging to Mui Hong had registered a trade mark on or about 3 October 2017. This was referred to as the Chilli Mark in the proceedings below. The right side of the mark comprised two chillies with a flame in the background, while the left side comprised two Chinese characters. The right side of the mark was used on a signboard of the Company. The two Chinese characters were used separately on the signboard. The Chilli Mark was assigned to Eng's Char Siew subsequently. In addition, Mui Hong also registered other name marks in the name of Eng's Char Siew. Two of them have the name "ENG'S", and one has the two Chinese characters only (see the Judgment at [41]). Pauline thus alleged

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that the second to fifth respondents had usurped the Company's assets for themselves.

21 However, it is undisputed that Eng's Wantan has also been using the "ENG'S" name as part of its corporate name and the business it is operating. It had also registered three franchise marks, two of which included the "ENG'S" name while the third was for "1960 Eng's Heritage".[5] There was no complaint by Pauline that Jason and Thomas were using Eng's Wantan to usurp the Company's assets for themselves.

22 To this end, the appellant was forced to admit the indefensibility of her position under cross-examination:[6]

> Q: I'm also putting it to you if indeed you were protecting the interests of the company, you would have also sued Eng's Wantan Noodle. Do you agree or do you disagree?
>
> A: Yes.
>
> Q: "Yes" meaning what, Mdm New?
>
> A: It's a "yes" or "no" question, right?
>
> Q: Yes, do you agree with me that if you were indeed protecting the interests of the company, you would have also sued Eng's Wantan Noodle?
>
> A: Yes.
>
> Q: So you agree?
>
> A: Yes.

23 This was a case of the pot calling the kettle black. The appellant's absence of good faith is clear, and she was simply trying to bully the second to fifth respondents into submission. Accordingly, even if the first two

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5 Judgment at [36].

6 Transcript of 21 July 2020, p 45 lines 5 to 15.

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requirements for a common law derivative action were satisfied, the Judge was justified in finding that the appellant should not be permitted to rely on a common law derivative action. In the circumstances, the appeal fails *in limine*, and there is no need to even consider the first two requirements.

A Licence Agreement and Goodwill

24 We now address an argument of Mui Hong, Mei Ling, and Eng's Char Siew. In the proceedings below, they counterclaimed against Pauline for passing off. They claimed that each member of the Ng family held the right to the goodwill of the business. There was an oral agreement in which Mr Ng granted a licence to the Company to use the goodwill of his business and the subject of the licence agreement included various trade names involving the use of the "Eng's" name. However, the Judge found that the counterclaimants had failed to establish the existence of the licence agreement or their ownership to the goodwill and dismissed their counterclaim.

25 Although there is no appeal against the decision to dismiss the counterclaim, the counterclaimants argue before us that the Judge should have found that a licence had been granted to the Company to use the goodwill and the trade names, and that the said licence had lapsed. We note that the claim to goodwill was raised below not only for the counterclaim, but was also the crux of the second, fourth, fifth, and sixth respondents' defence below[7]. Hence, the absence of an appeal does not preclude these parties from seeking to support the Judge's decision in dismissing Pauline's claims by relying on the licence agreement. Nevertheless, in the light of what we have said about the absence of

[7] Judgment at [129].

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good faith on Pauline's part, the existence of the licence agreement is academic and we express no view on it.

26 We add that we understand that there are disputes on intellectual property rights pertaining to the marks registered by Mui Hong, whether for herself or Eng's Char Siew. These disputes will have to be resolved by the relevant officer, tribunal, or court hearing the disputes.

Miscellaneous

27 We now mention two miscellaneous points. First, we were surprised that the same lawyer appeared for the Company and for Bill in the present case, given that Bill was being sued for wrongs he had ostensibly committed against the Company. There is a conflict of interest. The Company should have been a neutral party and, if necessary, represented by an independent lawyer. For the appeal, Bill is to bear the costs of the representation alone.

28 Second, the Appellant's Case stated at [118] that "[a] detailed **and impartial** analysis [of what transpired in February 2018] would have led [the Judge] to a different conclusion" [emphasis added]. However, Pauline was not in fact alleging that the Judge was biased. She appeared to be merely questioning certain findings of the Judge, but her case had carelessly suggested that the Judge was partial. If the lack of caution was her lawyer's, that will be more unfortunate as words are a lawyer's tools of trade.

Conclusion

29 The appeal is dismissed.

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30 The parties have filed costs schedules. We award costs of the appeal to the second, fourth, fifth and sixth respondents fixed at $55,000 inclusive of disbursements and to Bill fixed at $20,000 inclusive of disbursements. The usual consequential orders apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Yeo Choon Hsien Leslie and Tan Shu Ann, Jolene (Sterling Law Corporation) for the appellant;
Ong Ziying, Clement, Ning Jie and Leonard Chua Jun Yi (Damodara Ong LLC) for the first and third respondents;
Leo Cheng Suan, Teh Ee-Von and Lee Shu Xian (Infinitus Law Corporation) for the second, fourth, fifth, and sixth respondents.

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