IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 180

Originating Summons No 227 of 2020 and Summons No 2145 of 2020

Between

Chng Kheng Chye

… *Applicant*

And

(1) Kaefer Prostar Pte Ltd
(2) Kaefer Integrated Services Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Companies] — [Statutory derivative action] — [Leave to commence]

Chng Kheng Chye
v
Kaefer Prostar Pte Ltd and another

[2020] SGHC 180

High Court — Originating Summons No 227 of 2020 and Summons No 2145 of 2020
Valerie Thean J
12 June 2020

3 September 2020

Valerie Thean J:

Introduction

1 The plaintiff, Mr Chng Kheng Chye ("Mr Chng"), is a minority shareholder in Kaefer Prostar Pte Ltd (the "Company"). He sought leave to commence a derivative action against Kaefer Integrated Services Pte Ltd ("Kaefer Singapore"), a company that was wholly owned by the Company's majority shareholder, Kaefer Gmbh ("Kaefer Germany"). The issue in contention was whether Kaefer Singapore owed the Company S$1,544,142.47. Majority and minority shareholders held opposing views and Mr Chng therefore applied for leave to commence a suit on behalf of the Company under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"). I dismissed the application and now furnish my grounds of decision.

Facts

Background to the dispute

2 Mr Chng holds 20% of the shares in the Company. Kaefer Germany holds the remaining 80% shareholding. Kaefer Singapore is wholly owned by Kaefer Germany.

3 On 1 April 2016, Kaefer Singapore entered into a subcontract with PT McDermott Indonesia for the provision of insulation and fireproofing work to be carried out for the Yamal LNG plant in Russia (the "Yamal Project").[1] It was mutually agreed that the Company would complete the Yamal Project on Kaefer Singapore's behalf.[2] The Yamal Project subsequently concluded around April 2017.[3] Upon successful completion of the Yamal Project, Kaefer Singapore paid the Company S$1,931,291.95.[4]

4 The parties joined issue on whether an additional S$1,544,142.47 ("the Sum") was rightfully due to the Company. Mr Chng's evidence was that the Sum was retained by Kaefer Singapore on the condition that Kaefer Singapore and Kaefer Germany recognise that the Company was entitled to the Sum. This was the Sum Mr Chng sought to pursue by way of derivative action against Kaefer Singapore.

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1 Victor Arthur Bogos' 2nd Affidavit dated 6 April 2020 ("VAB2") at Tab 3: Respondent's Bundle of Documents ("RBOD") at p 203.

2 Victor Arthur Bogos' 1st Affidavit dated 6 April 2020 ("VAB1") at [13]: RBOD at p 29; Chng Kheng Chye's 1st Affidavit dated 19 February 2020 (CKC1") at [4]: RBOD at p 8.

3 VAB1 at [17].

4 CKC1 at [4]: RBOD at p 8; VAB1 at [16]: RBOD at p 30.

5 The respondents disagreed with Mr Chng's version of events, and contended the application was made for collateral purposes: namely, for Mr Chng to inflate the value of his shares in anticipation of a share buyout. In or around September 2019, Mr Chng sought for Kaefer Germany to purchase his 20% shareholding. This was governed by a Shareholders Agreement of 20 July 2016 and an Addendum of 1 September 2016 between Mr Chng, the Company and Kaefer Germany (collectively, "the SHA"). The SHA gave Kaefer Germany the exclusive option to require Mr Chng to sell his shares. A formula was set out in the SHA to calculate the value of Mr Chng's shares. This formula was premised on the Company's average annual audited earnings before tax for the financial period from 1 January 2016 to 31 December 2018, with a proviso for a minimum base price of S$3m if exercised by Kaefer Germany. Kaefer Germany declined to exercise the option. When Mr Chng sought to sell his shares, he valued his shares at S$3m. Kaefer Germany's price, calculated using the formula prescribed by the SHA but without the price floor of S$3m, was about S$792,000. The share buyout fell through but formed the context for this dispute. Mr Chng first raised the issue of the Sum in that negotiation, and the respondents contended that Mr Chng's motive for taking out a derivative action arose out of this failed negotiation.

Summary of issues and decision

6 Under s 216A(3) of the Companies Act, three requirements must be met in order for leave to be granted for a derivative action to commence. The provision reads:

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

7 In this case, the requisite notice under s 216A(3)(*a*) was furnished. The respondents disputed only the second and third conditions. The second condition, good faith, investigates the applicant's honest or reasonable belief in the merits of the claim: *Jian Li Investments Holding Pte Ltd and others v Healthstats International Pte Ltd and others* [2019] 4 SLR 825 ("*Jian Li Investments"*) at [43]. The third condition, that the proposed action is *prima facie* in the interests of the company, involves an objective assessment of the legal merits of the claim: *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [58].

8 The issues in dispute were the following:

(a) On the subject of good faith: whether Mr Chng was pursuing this application purely in a self-interested bid to inflate the Company's value, and not for the best interests of the Company.

(b) On the subject of the action being *prima facie* in the interests of the Company: whether there was an arguable and legitimate case for the Company's supposed entitlement to the Sum from Kaefer Singapore. Summons 2145 of 2020 ("SUM 2145") was related to this issue, as Mr Chng sought to file a further affidavit to support his application for leave to commence the derivative action.

9 In the present case, the onus of establishing the two requirements was on Mr Chng. I was of the view that neither requirement had been satisfied. I explain each in turn, starting with the best interests of the Company for reasons that I explain at [28].

Whether the action is in the best interests of the Company

10 Section 216A(3)(*c*) of the Companies Act requires an applicant to "cross the threshold of convincing the court that the company's claim would be legitimate and arguable": *Ang Thiam Swee* at [53].

11 Kaefer Singapore relied upon six Management Agreements that documented and regulated Kaefer Singapore's payment obligations to the Company. These documents collectively reflected an obligation on the part of Kaefer Singapore to pay the Company a total of S$1,931,291.95 for the scope of work envisaged. None of the documents bore out Mr Chng's assertion that the remaining S$1,544,142.47 of the profits from the Yamal Project were rightfully the Company's. Mr Chng was the Managing Director of the Company at the time, but alleged that he had "never seen" the Management Agreements. Despite not having dealt with them, he was sure that they had been prepared for "accounting purposes to account for the $1,931,291.95 that has been paid to the Company".[5]

12 Mr Chng contended that Kaefer Singapore had agreed with the Company that Kaefer Singapore would retain S$1,544,142.47 of the profits from the Yamal Project whilst acknowledging that the Company was entitled to the same. This, he said, was captured in an oral agreement reflecting a sum

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5 Chng Kheng Chye's 2nd Affidavit dated 22 May 2020 ("CKC2") at [8].

additional to the S$1,931,291.95 paid. When asked for documentary evidence, Mr Chng acknowledged in correspondence with Kaefer Germany's CEO, Mr Steen Hansen: "I don't have your requested documentation except the number verbally given to me by Kevin."[6] I will discuss the aforementioned "Kevin" below at [17].

13 Mr Chng's case for an oral agreement rested entirely on an email dated 8 March 2017 ("the 8 March email").[7] That email was completely irrelevant. It was an email about the proposed share buyout of Mr Chng's shares, not about any agreement between the Company and Kaefer Singapore. Its first line read: "This is to documented [*sic*] down the understanding and arrangement for the final 20% sell out by [Chng] at the end of 2018". The remainder of the email did not assist either.

14 Mr Chng also raised another email, from Mr Gregory Daniot ("Mr Daniot"), who was concurrently the Chief Financial Officer for the Company and Kaefer Singapore at the relevant time.[8] That too discussed Mr Chng's personal entitlement to a dividend pay-out from the Yamal Project, rather than an entitlement owing to the Company. As Mr Chng acknowledged, "[this dividend entitlement] would have to be dealt with in another forum".[9] It did not reflect any alleged agreement between the Company and Kaefer Singapore.

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6 VAB1 at Tab 7: RBOD at p 183.

7 CKC1 at Exhibit CKC-2: RBOD at p 15.

8 CKC2 at Exhibit CKC-6: RBOD at p 360.

9 CKC2 at [10].

15 There was a "Project Account" attached to Mr Daniot's email.[10] Mr Chng, somewhat quizzically, claimed that the Project Account was "proof".[11] But this Project Account did not assist his case at all. All the Project Account showed was that there was a total profit of S$3,475,434.42 from the Yamal Project, of which S$1,931,291.95 was paid to the Company (see above at [2]) while the remaining S$1,544,142.47 was retained by Kaefer Singapore. This merely suggested (without necessarily proving) that the Company had been contracted to complete the same work at a different fee from that which Kaefer Singapore was paid for the Yamal Project. Kaefer Singapore was perfectly entitled to do this. This was a matter of contract between the parties, and in this case, the two companies were related companies. Mr Chng pointed out that the Management Agreements do not necessarily prove that *only* S$1,931,291.95 was due to the Company. In his words, they "only [go] to show that S$1,931,291.95 was paid by Kaefer Singapore to the Company".[12] But the difference between the evidence adduced by both sides was crucial. Kaefer Singapore and Kaefer Germany, on the one hand, reflected a credible, consistent and documented position. Mr Chng, on the other hand, stood on his bare allegation even though at the material time, as Managing Director, he could well have documented any arrangement if one existed.

16 I concluded that there was no evidence to support his claim and that accordingly, there was no legitimate and arguable case on which to maintain a derivative action on behalf of the Company against Kaefer Singapore.

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10 CKC2 at Exhibit CKC-6: RBOD at p 363.

11 Applicant's Written Submissions ("AWS") at [32].

12 Chng Kheng Chye's 3rd Affidavit dated 2 June 2020 ("CKC3") at Exhibit CKC-1, at [9].

Leave to file further reply affidavit

17 In this context, I declined to grant leave for Mr Chng to file a further affidavit ("the SUM 2145 Affidavit"). Prior to the summons, Mr Chng had filed two affidavits, and the assistant registrar had disallowed any further replies. Notwithstanding, Mr Chng filed an application for a further reply, which was fixed for hearing at the same time as the application for leave to commence the derivative action. The proposed affidavit, nonetheless, did not contain any documentary evidence to support Mr Chng's contentions, but merely further bare assertions. A statutory declaration from one Mr Kevin Tan ("Mr Tan") was its main feature.[13] Mr Tan was the Regional Financial Controller at Kaefer Singapore who resigned on 13 March 2017. This was the man to whom Mr Chng referred when he explained to Mr Hansen that a verbal confirmation of the agreement between the Company and Kaefer Singapore had been given: see [12] above. His evidence was troubling for at least three reasons.

18 First, Mr Tan did not file an affidavit, but his statutory declaration was exhibited in Mr Chng's affidavit. Secondly, there was no explanation why Mr Tan's testimony was not procured much earlier in the application. Third and most importantly, Mr Tan's statutory declaration simply did not assist Mr Chng's case at all. Mr Tan indicated that he was not personally privy to any agreement about entitlement to the Sum. While Mr Chng's position all along was that Mr Tan was the one who made the promise, Mr Tan's declaration stated that the arrangement was made between one Justin Cooper (hitherto unmentioned in Mr Chng's affidavits and featured for the first time in Mr Tan's statutory declaration) on behalf of Kaefer Singapore, and Mr Chng. He had

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13 CKC3 at Exhibit CKC-7.

merely been "informed of the agreement and therefore carried out the instructions accordingly".[14] Despite being the sole source of verification for Mr Chng up till that point, Mr Tan's statutory declaration did not explain or clarify the 8 March email upon which Mr Chng's case rested. He did not describe how the Sum was to be retained by Kaefer Singapore on a condition that it would be paid later to the Company. He simply asserted, at paragraph 4, that "the Company will be entitled to all of the profits from the Yamal Project". At paragraph 5, he then linked this to the acquisition of Mr Chng's shares: "[Mr Chng] was informed about the valuation of the pay-out wherein the profit from the Yamal project will be considered even though it may not be reflected in the Company's financial performance." His final line in paragraph 7 is wholly unexplained: "In the event [Kaefer Germany] does not wish to acquire 100% of the shares in the Company, the Yamal profit in [Kaefer] Singapore should be reflected back in the Company to ensure the correct value can be distributed to both shareholders ([Kaefer Germany] 80%, Chng Kheng Chye 20%)." Mr Tan did not substantiate any of these assertions with any documents.

19 Counsel for Mr Chng contended that the oral understanding could be established by calling at trial witnesses such as Mr Tan, Mr Chng, and Mr Cooper. To do so, however, where there was no credible substratum of evidence, could not be *prima facie* in the interests of the company. The unsubstantiated assertions made in the SUM 2145 Affidavit did not alleviate this difficulty. I declined to grant leave for the further affidavit.

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14 CKC3 at Exhibit CKC-7, at [5].

Good faith

20 Bad faith has a specific meaning in the s 216A context. The Court of Appeal in *Ang Thiam Swee* ([7] *supra*) clarified at [13]:

> As such, it is not the questionable motivations of the applicant *per se* which amount to bad faith; instead, bad faith may be established where these questionable motivations constitute a personal *purpose* which indicates that the company's interests will not be served, *ie*, that s 216A(3)(*c*) will not be satisfied. [emphasis in original]

21 In other words, bad faith must be understood in light of and in consideration of an applicant's disregard for the company's interest. This may manifest as, among others, "judgment … clouded by purely personal considerations" or "[an evinced intention to] damag[e] or destro[y] the company out of sheer spite or worse, for the benefit of a competitor" (*Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [20]). A collateral purpose would not disqualify a cause if it is "sufficiently consistent with the purpose of 'doing justice to a company'": *Ang Thiam Swee* at [31].

22 Here, the onus was on Mr Chng to prove his good faith in the application: *Ang Thiam Swee* at [23]. To that end, he disavowed any collateral purpose[15] or any interest in personal gain ("If [Kaefer Germany] does not wish to purchase my shares then so be it")[16]. He claimed that he was "legally bound to act in the best interest of the Company"[17] as its Managing Director and this application was merely an expression of this duty.

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15 CKC1 at [9].

16 CKC2 at [7].

17 AWS at [37].

23 Mr Chng, however, wore many hats within the Company. He was not just its Managing Director but a shareholder as well. To that end, the respondents contended that Mr Chng had commenced proceedings as an entirely self-interested shareholder. Being obviously dissatisfied with Kaefer Germany's offer of S$792,000 for his 20% shareholding in the Company,[18] Mr Chng was seeking to increase the value of his shares through this derivative action. This would enable him to seek a higher dividend pay-out for his 20% shareholding in the Company.[19] Between these two characterizations of Mr Chng – the dutiful Managing Director or the self-interested shareholder – I found that the objective evidence better supported the latter. In making this finding, I relied on the lack of evidence supporting Mr Chng's assertions of good faith; the timing of the application; and the lack of merit in this application.

24 In establishing his good faith, Mr Chng exhibited "the latest ACRA search" documenting his position in the Company.[20] This did not prove his good faith, and beyond this, I was left with nothing more than his assertions that he had been acting in the Company's best interests as its Managing Director. There was no evidence of Mr Chng pursuing or enquiring into this alleged entitlement prior to this application, as one would expect of a dutiful Managing Director.

25 Instead, what little correspondence produced[21] suggested that Mr Chng had been pursuing his own interests as a shareholder. The Company's entitlement to the Sum was only previously discussed in the context of an

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18 VAB1 at Tab 7: RBOD at p 184.

19 Respondents' Written Submissions dated 9 June 2020 ("RWS") at [73].

20 CKC3 at [15] and p 18.

21 VAB1 at Tab 7: RBOD at pp 182 - 184.

anticipated share buyout: the "profit [that] should be in [the Company's] book but was diverted to Kaefer Singapore" was discussed with a view to "evaluating [Mr Chng's] current share price",[22] and the "Yamal job which Kevin Tan divert [*sic*] to Kaefer Singapore" was only brought up by Mr Chng in a bid to claim "[his] portion of share".[23]

26 To this, the respondents added that the timing of this application strongly suggested that Mr Chng had not been acting in good faith. The respondents pointed out that Mr Chng only brought this application after failed negotiations in September 2019[24] about the price of the share buyout, because of his personal interest in the matter. Indeed, Mr Chng understood that if the Company was entitled to the Sum sought, the value of his shares would be higher than "what's on offer now".[25] He had a personal interest in the matter and was well aware of it. Such self-interest could constitute a personal purpose that impugns the applicant's good faith: *Ang Thiam Swee* ([7] *supra*) at [13].

27 Notwithstanding, self-interest could very well align with the interests of the company: see above at [21]. In this regard, any sums obtained in a successful suit would increase the value of Mr Chng's shareholding, and "where the complainant [seeks] to restore value to his shares in the company, this is often taken as a positive indication of good faith": *Corporate Law*, Hans Tjio, Pearlie Koh & Lee Pey Woan (Academy Publishing, 2015) at para 10.062. Mr Chng's self-interest therefore was not dispositive.

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22 VAB1 at Tab 7: RBOD at pp 182.

23 VAB1 at Tab 7: RBOD at pp 183.

24 VAB1 at Tab 7: RBOD at pp 182 - 184.

25 VAB1 at Tab 7: RBOD at p 182.

28 I return to the merits of the application. As clarified by the Court of Appeal in *Ang Thiam Swee* ([7] *supra*) at [29], the good faith requirement in s 216A(3)(*b*) is both separate and connected to the merits of the application. Separate, because the conceptual integrity of the good faith requirement requires an assessment of the applicant's honest and reasonable belief; an inference of bad faith cannot be drawn from the lack of an arguable cause of action. But yet the two issues are connected, because a court "may find that the applicant lacks good faith if no reasonable person in his position could believe that a good cause of action existed". An applicant would have difficulty proving an honest or reasonable belief in the merits of the claim if the claim is frivolous (see *Ang Thiam Swee* at [55]). This was the case at hand, where Mr Chng sought to bring suit on behalf of the Company on the premise of bare allegation. No reasonable person in Mr Chng's position could have believed that an arguable case existed. The objective weakness of his case, when considered in tandem with his self-interest (see above at [26]) and earlier correspondence (see above at [25]), informed my finding that there was no good faith in this application.

Conclusion

29 I therefore dismissed both Originating Summons 227 of 2020 and SUM 2145. Costs for both applications were awarded to the respondents and fixed at S$8,000 inclusive of disbursements.

Valerie Thean
Judge

Yeo Choon Hsien Leslie and Tan Shu Ann Jolene (Sterling Law Corporation) for the applicant;
Lim Tat, Subir Singh Grewal and Soon Ser Jia Clarissa (Aequitas Law LLP) for the first and second respondents.