IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 140

Originating Summons No 1260 of 2017

Between

Ganesh Paulraj

… *Applicant*

And

Avantgarde Shipping Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Companies] — [Striking off defunct companies] — [Restoration of struck off company]

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Introduction

1 This case concerns an application for the restoration of a struck-off company under s 344(5) of the Companies Act (Cap 50, 2006 Rev Ed). The primary issues of this case are as follows: (a) whether the Applicant, a director of the company, had sufficient standing to make such an application; (b) whether any practical benefit accrued to the company from restoration; and (c) whether the respondent here would suffer prejudice. I found in favour of the Applicant and the Respondent has appealed against my decision allowing the restoration of the company.

Background

2 The present application involves the restoration of a struck-off joint venture entity, A&T Offshore Pte Ltd (the "Company"), for the purposes of pursuing a certain contractual claim against the Respondent. The Company was incorporated in October 2014, with both the Respondent, Avantgarde Shipping Pte Ltd, and the Applicant's company, Tuff Offshore Engineering Services Pte Ltd ("Tuff"), as shareholders. The Applicant and two others (one of whom was related to the Respondent) were directors of the Company at all material times. In 2016, the Company applied to be struck off the register on its own motion and was eventually struck off in April 2017.

3 By way of background, the Applicant's spouse, Ms Mahalakshmi D/O Mahalingam ("Maha"), was the sole director and legal shareholder of Tuff. She, however, held the shares in Tuff on behalf of the Applicant. The Applicant later became a director of Tuff in October 2017.

4 As noted above, the present application concerns a certain contractual claim against the Respondent. While the circumstances surrounding the contractual claim, and the relationship between the contractual claim and the present application, are to some degree disputed, it suffices to note the following. The Respondent, at some point during the history of the parties, was awarded a lucrative contract to convert an oil tanker into a production and storage vessel to be delivered to a Malaysian entity. The Respondent subsequently entered into a contract with the Company for the provision of integrated project management services ("Integrated Project Management Services Contract"), presumably in support of the previously mentioned vessel conversion project. According to the Applicant, the Company then entered into a back-to-back contract with Tuff for the same scope of work as set out in the

Integrated Project Management Services Contract. While the Company was the contracting party under the Integrated Project Management Services Contract, Tuff performed the actual work and received payment from the Respondent. As a result of this apparent redundancy, the director with a connection to the Respondent suggested that the Company be shut down to avoid compliance with regulatory requirements. The Applicant and the other director agreed to the suggestion and an application to have the Company struck off the registered was made thereafter. As it transpired, there remains an outstanding sum purportedly owed by the Respondent to Tuff. The Respondent asserts that the only relevant contract was between the Respondent and the Company and thus owed Tuff nothing. It is this outstanding sum that motivated the Applicant to take up the present application. According to the Applicant, the restoration of the Company is necessary to vindicate the Applicant's purported contractual claim.

5 ACRA was informed of the application to restore but did not participate in the present proceedings.

Applicant's Case

6 The Applicant relies on the framework for restoration laid down in *Re Asia Petan Organisation Pte Ltd* [2018] 3 SLR 435 ("*Re Asia Petan*") and submitted that, being a director, he had the requisite *locus standi* to seek restoration of the Company. Further, he had a pecuniary interest in the resuscitation of the Company as his wife held shares in Tuff on his behalf.

7 As regards the purpose of the restoration, it is to allow the Company to commence an action against the Respondents. Such a claim need only be made out on a *prima facie* basis in an application of the present nature. Further, there

is a practical benefit to the Applicant as payment could be made to Tuff if the contractual claim were successful.

8 Moreover, no prejudice will be suffered by the Respondent. The fact that the Applicant was involved in the initial striking off application should not bar the restoration. It was reasonable for the Applicant to apply to strike off the Company earlier. Further, the cause of action against the Respondent did not arise out of the striking off, and there is no applicable time bar. While the Respondent denies the claim by the Company, it will be able to defend the matter at a later forum where the merits of the claim are more properly ventilated.

Respondent's Case

9 The Respondent argued that the Applicant had no *locus standi*, and that the Applicant had not given a proper explanation for his changed stance given that he had applied to strike off the company in the first place. It is not clear what claim the Company has against the Respondent, nor why restoration is necessary. The Applicant is seeking to pursue Tuff's claim backdoor through the Company. There is no practical benefit in restoring the Company. There has also been delay in the bringing of the application.

10 Furthermore, the Applicant withheld facts from the court. These facts related to the circumstances surrounding the dealings between the various parties showing that Tuff had no claim against the Respondent. The present application was also brought for ulterior motives, with collusion between various parties to fabricate false claims against the Respondent. Prejudice would also be suffered as the Respondent had no contract with Tuff, nor did it owe

Tuff money. In any event, any restoration would only be to the benefit of Tuff.

Decision

11 I ordered the restoration of the Company as I was satisfied that the requirements of s 344(5) were met; namely, that the Applicant qualified as a person aggrieved and that it was just that the Company be so restored. I followed the approach laid down in *Re Asia Petan* and came to the following conclusions: (a) that the Applicant had *locus standi*; (b) that the purpose identified for the restoration was sufficient (*ie*, that there was practical benefit to such restoration); and (c) that there was no prejudice against the Respondent. Finally, I was satisfied that there existed no exceptional countervailing circumstances against the restoration.

Analysis

The law governing restoration

12 The restoration of companies struck off the register of companies is governed by s 344(5) Companies Act, which reads, in material portions:

> If any person feels aggrieved by the name of the company having been struck off the register, the Court, on an application made by the person at any time within 6 years after the name of the company has been so struck off may, if satisfied … otherwise that it is just that the name of the company be restored to the register, order the name of the company to be restored to the register …

The omitted portion concerns the alternative ground for restoration of carrying-on of business, which is not relevant here. As is apparent, the time bar was not applicable either.

13 The law in relation to the question of restoration was reviewed in *Re Asia Petan*; the Respondent did not seriously challenge its approach, and I was, with respect, satisfied that it was sound. In *Re Asia Petan*, the learned Judicial Commissioner, after surveying the relevant foreign case law, said (at [31]):

> In the light of the above, I hold that s 344(5) of the Act should be interpreted broadly. To demonstrate *locus standi*, a person must demonstrate some proprietary or pecuniary interest arising from the company's restoration. Such interest need not be firmly established or highly likely to prevail, but it must not be merely shadowy. When considering whether it would be just to restore a company to the register, a court has to have regard to all the circumstances of the case, including but not limited to: (a) the purpose of restoring the company; (b) whether there would be any practicable benefit arising from the restoration; and (c) whether there would be prejudice to any persons. If the court were so satisfied, it should order a restoration unless there are exceptional countervailing circumstances. These principles are applicable in the context of an application to restore a company to the register pursuant to s 344(5) of the Act, regardless of whether the company was previously struck off under s 344 or the new s 344A, on its own application or by the Registrar.

Re Asia Petan expressly did not lay down an exhaustive and conclusive list of factors.

Locus Standi

14 On the question of standing, I was satisfied that the Applicant had sufficient standing under the *Re Asia Petan* formulation (*ie*, that a person must demonstrate some proprietary or pecuniary interest arising from the company's restoration) for two reasons. First, as a director of a company that may have possible outstanding claims, the Applicant would have a pecuniary interest in the restoration of the Company. Second, and in any event, a shareholder of a company (corporate or otherwise) would have the requisite pecuniary interest in the restoration of a company. It follows that a director of such a shareholder

would also be an appropriate applicant under s 344(5); the Applicant being one such director.

15 Whether or not such an action which is said to give the applicant an interest in the s 344(5) application would be successful is not relevant. What matters is the *potential for some recovery* for the company. Thus, the fact that the other directors and shareholders in the present application may later resist any such pursuit is immaterial – the test for standing is not concerned with the stance of others, who may have different viewpoints from the applicant. Their interests, if at all to be considered, goes towards the consideration of benefit and prejudice.

16 I am of the view that the test for standing need not to be as narrow as the *Re Asia Petan* formulation may be perceived to be. Even if there were no separately demonstrable pecuniary interest, a director of the struck off company, by his position alone, has sufficient connection and proximity to the Company that would independently furnish some basis for standing as an applicant under s 344(5). This, however, is subject ultimately to the establishment of the separate factor of a practical benefit accruing. In other words, a director may not necessarily to have to show an interest that is proprietary or pecuniary in nature to have *locus standi*, but in order to succeed in the application, the director must at the very least show a practical benefit from the Company's restoration.

17 The objective of the *locus standi* requirement is to limit s 344(5) applications to those who have some direct and tangible interest in the outcome. A director has sufficient pecuniary interest in the restoration of the company, *qua* director. The performance of the functions and duties of a director in

relation to a possible claim would be a sufficient basis. He could be exposed for failure to pursue claims or matters in the interest of the company.

18 I do not read the requirements summarised in *Re Asia Petan* as being exhaustive. The requirement of proprietary or pecuniary interest endorsed in *Re Asia Petan* intrinsically examines the sufficiency of interest by way of potential injury, harm or detriment. This is to limit the field of potential applicants for restoration; so that those merely officious or opportunistic, without any real connection to the company, could not bring themselves within the statute. The language of the test in *Re Asia Petan*, for instance, could encompass a person outside the company who has some sort of claim against the company, but exclude someone from within who has no real stake in its restoration; the objective being that the applicant has some legitimate interest in the s 344(5) application. Hence, although *Re Asia Petan* casts the requirement of interest in a particular manner, the underlying rationale is the need to sieve out unmeritorious applications. In my view, this rationale offers robust guidance to courts faced with the question of standing.

19 The proposition that the test of standing should not be narrowly perceived and that the court is ultimately guided by rationale is evident in the English authorities. In the case of *In re Wood & Martin (Bricklaying Contractors) Ltd* [1971] 1 WLR 293 ("*In re Wood & Martin*"), Megarry J had to construe the phrase "any other person who appears to the court to be interested" in s 352 of the UK Companies Act 1948 (c 38) (UK). The applicant before the court was somewhat unique. He was a liquidator who was, as a matter of technicality, invalidly appointed as the company had already been struck off the register prior to his appointment during the company's voluntary winding up exercise. In considering the liquidator's standing (which Megarry J called a liquidator de son tort), Megarry J differentiated an earlier decision of his*, In re*

Roehampton Swimming Pool Ltd [1968] 1 WLR 1693 ("*In re Roehampton*"), which he characterised as a plain case where the applicant had no shadow of a pecuniary or proprietary interest. Megarry J eventually held that the liquidator de son tort in question was an applicant with, at the very least, some proprietary or pecuniary interest in the restoration of the company in question (at p 297). It was thus apparent that Megarry J was not proposing to impose a definitive test, but that it is simply sufficient to postulate that the existence of a pecuniary or proprietary interest which would bring an applicant within the English provision.

20 To further the discussion, in the earlier decision of *In re Roehampton*, Megarry J rejected an application put forward by a solicitor acting for a claimant against the company. Unsurprisingly, the solicitor was not found to be an interested person within the English legislation, although Megarry J accepted that the claimant himself would have the requisite interest. His Lordship stated (at p 1698):

> … In relation to making an order for the revival of a defunct company, it seems to me more probable that the word refers to a pecuniary or proprietary interest than that it embraces all matters of curiosity or concern.

Tying both cases together, it is clear that Megarry J had the objective of giving a realistic and practical circumference to standing, and to exclude the merely curious or concerned. This underscores my point on the rationale behind the standing requirement.

21 One decision referred to in *Re Asia Petan,* the more recent Australian case of *Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Limited* [2010] NSWSC 1369 ("*Arnold*"), could be read as taking a narrower approach. The Court there was concerned with the termination of a creditors' voluntary

winding up and considered the question of restoration by way of analogy in *obiter dicta*. While the Court adopted a test measuring standing by reference to legal rights and interests, and referred to the English decision of *In Re Wood & Martin*, the Court there also observed that the sole member "of a company that is deregistered on winding up in which all known property has been duly collected [and] applied … does not … have any interest … in bringing the company back into existence" (at [44]). It may be thought that the Court's ruling in *Arnold* points against the Applicant here. But that sole member in *Arnold* could only point to an intangible interest (*ie*, protecting his reputation) and the Court there was actually concerned with the halting of liquidation and deregistration in Australia, leaving intact the existence of the company elsewhere.

22 I further note that in *Arnold*, the Court considered the possibility of an application being made under the equivalent of s 455 by the sole director. The Court there stated that it was well-established that a director does not by reason of the directorship alone have a person aggrieved status, and should have some additional interest of a tangible kind. I would, with respect, separate the issue of standing from the separate consideration of the purpose of restoration, and consider that a director would have sufficient standing to apply, though the director should point to some purpose that benefits the company. It is pertinent that the Court in *Arnold* did not apply the same framework of analysis as that ultimately adopted in *Re Asia Petan*. Further, the situation here was different as the director here sought restoration in relation to a possible claim by the Company.

23 Thus, on the facts here, as the Applicant was a director of the struck out company, I found that there was sufficient connection and proximity to the company to at least recognise standing: the applicant is clearly not a stranger to

the company. The fact that the Applicant was the direct beneficial shareholder of Tuff, gave him an interest through Tuff as a shareholder of the Company and therefore, coupled with the claim that Tuff may have in the company pursuing its claim, there was sufficient pecuniary interest in the company's restoration.

Purpose of restoration conferring practical benefit

24 The restoration of the Company was intended to enable the pursuit of the contractual claim against the Respondent. That would confer sufficient practical benefit. Even if the contractual claim were unmeritorious, that would not be a bar against restoration of the Company.

25 The Respondent argued that Tuff, in fact, had no claim against it. But the Company's claim need not be made out before me. Whether or not the claim will be made out, or whether the Respondent ultimately has a defence, was not a bar unless the claim was hopeless or very likely to fail. The case here, however, does not involve a hopeless claim. Similarly, any collusion as alleged by the Respondent, whether involving Tuff, the Company, or persons associated with either, was also immaterial to the present proceedings.

26 The Respondent also pointed out that the Applicant may have an eye to an eventual claim by Tuff against the Company. But this is, to my mind, a separate and irrelevant matter to the present application. The fact that the Company itself may be subject to a claim by Tuff is not a reason to bar restoration. In the interim, if the funds are recovered by the Company, it is an inflow. Any eventual outflow of funds to Tuff from the Company would have to be determined in subsequent proceedings. The point of the legislation is to empower the court to consider whether restoration should be allowed, so that

the company is brought back to existence. The proceedings following after need to be considered in another forum.

Prejudice

27 The exposure of the Respondent to the contractual claim would not count as relevant prejudice. The existence of the claim or otherwise was not dependent on the striking off; it arose independently. This independence meant that there could be no real complaint that the restoration of the company would cause any new consequence for the Respondent. The Respondent would have had to face that very claim had the Company continued its existence. As noted above, the merits or otherwise of the Company's claim is immaterial as well. That has to be determined in separate proceedings.

28 The Respondent may have, as it claimed, a valid defence against Tuff which would defeat entirely Tuff's claim. Essentially, the Respondent was arguing it should be left only to fend off Tuff, which it felt it could do successfully, and not be exposed to any claim by the Company. That was not relevant prejudice for the purposes of restoration. It would also not be prejudice either that Tuff may have an alternative, or even better, claim in restitution or other basis; the Applicant is entitled to seek the revival of the Company even if there is some other possible claim. The Court's discretion is not to be invoked only as a last resort. To my mind, what should count as prejudice is anything arising off of the striking out, which may have led to a change of position, or detriment, including any delay, aside from any time bar. There was no such detriment at all here flowing from the striking off.

Other factors

29 That the Applicant had himself sought to strike off the company in the first place did not disqualify his application either. The Applicant's participation in the striking off does not remove his standing. Nor did it negate any practical benefit from the restoration. It was conceivable that the Applicant doing so could cause prejudice, for instance, if there was a common understanding between the Applicant and others that the Applicant would pursue the striking off, in return for some benefit conferred upon him by others. But that really went to the question of prejudice, and the application would not be refused simply because the Applicant had caused the striking off in the first place.

30 There may be some situations in which the conduct of an applicant in striking off could bar restoration; the discretion given to the Court is a broad one. But merely having been the instigator of the striking off, without anything more, was not to my mind sufficient.

Miscellaneous

31 Some objections were raised by the Applicant to the Respondent's affidavit, but these were not, in the end, material to my decision.

Orders made

32 Accordingly, I granted the order sought by the Applicant.

Aedit Abdullah
Judge

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