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

[2022] SGHC 34

Originating Summons No 508 of 2021

Between

Goh Heng Tee

… *Plaintiff*

And

(1) Tiong Hin Engineering Pte Ltd
(2) Goh Swee Hin
(3) Goh Swee Hock
(4) Goh Meng Hong

… *Defendants*

JUDGMENT

[Companies — Statutory derivative action]

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Goh Heng Tee
v
Tiong Hin Engineering Pte Ltd and others

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General Division of the High Court — Originating Summons No 508 of 2021
Philip Jeyaretnam J
7 February, 17 February 2022

17 February 2022 Judgment reserved.

Philip Jeyaretnam J:

Introduction

1 Is the juice worth the squeeze?

2 This is the question faced by boards of directors whenever they consider whether to commence litigation. How much benefit to the company will success bring and how much cost will be incurred? Cost is counted not only in legal and related expenses, but also in terms of management time, reputation and distraction.

3 When the court considers an application for leave to commence a statutory derivative action pursuant to s 216A of the Companies Act 1967 (2020 Rev Ed), it must decide whether bringing the action is *prima facie* in the interests of the company. The court should consider the same factors that the board of directors would, but with the advantage of dispassionate objectivity.

Such applications often concern potential actions against company insiders, and the board may, even if not conflicted, be mired in emotions and tensions that the court is free from.

4 Thus, the court should have regard to:

(a) the strength of any potential claim, including how readily available material evidence to prove it will be;

(b) the value of the claim;

(c) the likely costs of the claim, including the drawdown on management time, distraction from the conduct of the business and possible impact on reputation whether generally or with customers and suppliers in particular;

(d) the circumstances of and reasons for the board's decision not to take action; and

(e) the availability of alternative remedies that may offer a more efficient way of addressing the applicant's concerns.

5 All these factors go towards an overall assessment of "whether it would be in the practical and commercial interests of the company for the action to be brought", per the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [56].

6 As a practical matter, a statutory derivative action is more likely to be necessary and desirable where apparent wrongdoers are in control of the company and have concealed or stifled possible claims by the company against

themselves, as compared to where there is a majority of unconflicted directors (or shareholders) who have considered the matters complained of and concluded that it is not in the interests of the company to take action.

Background

7 The first defendant, which I shall refer to as the company, was started by the father of the plaintiff and the second to fourth defendants. The father passed away in 2013. The plaintiff and the second to fourth defendants are the directors of the first defendant.[1]

8 The plaintiff seeks leave by the OS to commence action in the name of the company against the second to fourth defendants as well as certain other members of the family and companies owned by other members of the family. However, the allegations that the plaintiff relied on in his written submissions and before me all concerned the second defendant and his immediate family, namely his wife and children.

9 This is not the first proceeding brought by the plaintiff in relation to the conduct of the company's business. On 2 July 2020, he filed an application to wind up the company both on the ground of insolvency and on the just and equitable ground. However, he discontinued that application.[2] One of the reasons he gave in favour of winding up the company was that the father, prior to his death, had expressed the desire that the family business be sold and the assets distributed to the family.[3] I pause to note that the patriarch and founder

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1 Plaintiff's affidavit dated 27 May 2021 ("Plaintiff's Affidavit") at para 3.

2 1st Defendant's affidavit dated 22 July 2021 ("D1's Affidavit") at para 55.

3 Plaintiff's affidavit dated 2 July 2020 at para 38, 1st Defendant's Bundle of Documents ("D1B") at p 38.

seems to have understood how difficult it can be for family companies to endure into a second or third generation and that it is often preferable for siblings to part business ways amicably rather than continue yoked together by their father's company.

10 The company had been principally run by the second defendant who was the eldest son of the founder,[4] while the plaintiff ran a subsidiary of the first defendant in China, Xiamen Tonghin Furniture Industries Co Pte Ltd ("Xiamen Tonghin").[5] The plaintiff, although a director, did not play any executive or management role in the company. There was another subsidiary in China that was run by another son.[6]

11 Over the years, various family members drew salaries from the company, including the plaintiff and his wife.[7] It appears to be common ground that there was no strict need for any of them to do commensurate work for the company.

12 After the father's death, various steps were taken along the path to ceasing business and distributing the assets of the company and its subsidiaries. This included Xiamen Tonghin's sale of its factory in China.[8] On 8 November 2018, a board meeting of the company was held, attended by the second and fourth defendants and a lawyer representing the plaintiff.[9] The three of them

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4 Plaintiff's Affidavit at para 3.

5 D1B at p 33, para 20.

6 D1B at p 32, para 19.

7 D1's Affidavit at paras 43–44.

8 D1's Affidavit at para 10.

9 D1's Affidavit at para 26.

agreed unanimously that the company would cease business operations with effect from 31 December 2018 and service the key contract of the company until its expiry date on 31 May 2019. It was further unanimously agreed that payment of salaries would cease on 31 December 2018, except in the case of the fourth defendant and another sibling of theirs, for whom salary would continue until 31 May 2019.[10]

13 On 20 April 2019, the company gave notice of a board meeting to, among other things, "discuss the operation of the [first defendant] after it cease business on 31/5/2019 and discuss the winding up of the [first defendant], a condition put forth by [the plaintiff] to settle the balance of the sale proceeds of factory of [Xiamen Tonghin]".[11]

14 It is unclear whether any board meeting in fact took place pursuant to that notice, but on 25 October 2019, Xiamen Tonghin commenced a suit in China, having previously issued a letter of demand on 15 April 2019, in respect of these sale proceeds which it alleged were partially withheld by the plaintiff.[12] I was informed during the oral hearing on 7 February 2022 that this litigation in China is ongoing.

15 On 8 April 2021, at an EGM of the first defendant which was attended by, among others, the plaintiff (via his proxy), the sale of the first defendant's remaining substantial asset, a property in Changi, was approved at the price of

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10 D1's Affidavit at p 148.

11 D1B at p 92.

12 D1's Affidavit at p 123.

$4.2m.[13] I was informed at the oral hearing that this sale was completed in January 2022.

16 Thus, the first defendant has ceased business and sold off its assets. In these circumstances, one obvious course of action would be for the first defendant to proceed to winding up, with the liquidator being empowered to consider whether any proceedings against any party should be commenced or continued. However, none of the parties believe that the first defendant should be wound up in the immediate future. The plaintiff contends that the first defendant should first pursue the litigation for which leave is sought in these proceedings, while the defendants contend that the first defendant should remain a live company until Xiamen Tonghin's litigation against the plaintiff in China concludes. In general, a winding up of a company tends to be a better alternative remedy where there is little or no live business or assets other than cash because the liquidator will be well placed to decide if any legal action by the company is in the interests of creditors or shareholders.

Decision

17 Section 216A of the Companies Act 1967 (2020 Rev Ed) has three requirements in respect of which the court must be satisfied:

(a) there must have been 14 days' prior notice to the board;

(b) the complainant must be acting in good faith; and

(c) the proposed action must *prima* facie in the interests of the company.

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[13] D1's Affidavit at pp 139–146.

18 That the first requirement has been met is not disputed. The other two requirements are disputed. I will deal with the *prima facie* interests of the company first before considering the plaintiff's good faith.

Interests of the company

19 Five breaches are alleged in the plaintiff's written submissions, but part of the third and the whole of the fifth were withdrawn at the oral hearing. It is significant that the alleged breaches concern the conduct of the second defendant and his immediate family and not the conduct of the third or fourth defendants. In this case the alleged wrongdoer is only one of four directors and only holds 26.6% of the shareholding. Thus, if the other directors and shareholders had found merit and substance in the plaintiff's complaints about the second defendant, there would have been a majority of both the board and the shareholders who could authorise legal action in respect of those complaints.

20 I now deal with the remainder in turn. The first breach concerns payments for goods and services that were, according to the company's accounts, funded by the second defendant as a loan to the company. The plaintiff has raised questions about whether these payments were properly made, given some gaps or discrepancies in the supporting documentation as noted in a preliminary report drawn up an accounting firm at the plaintiff's request. I do not agree that these concerns point to the conclusion that the transactions recorded in the books were made up or fictitious, and do not see how this is a basis to commence an action.

21 The second breach concerns the alleged diverting of business of the company to another company called Tiong Hin Light Furniture Industries Pte Ltd ("THL") and allowing THL to use the company's resources. THL was first

registered as a business on 10 September 2018 and then was incorporated on 2 January 2019. The second defendant's wife and daughter are its shareholders.[14] THL's name is similar to the company's name. THL has taken over part of the company's business, with the company's website redirecting traffic to it. This looks peculiar but is explained by the defendants on the basis that the company was ceasing operations. An arrangement was entered into whereby THL would receive the order but pay the company to fulfil the order with a profit margin of about 5 to 10%. The purpose of this was said to be to generate some revenue for the company pending sale of its Changi property.[15] The arrangement certainly calls for explanation internally within the company because it is a related party transaction. It is an arrangement that should have been put to the shareholders for prior approval. This was not done. However, prior to this action, the shareholders have had an opportunity to consider this arrangement. The plaintiff included this matter in a requisition notice dated 13 January 2021[16] for an extraordinary general meeting which was held on 15 March 2021.[17] The parties' tabulation of the voting[18] shows that only the plaintiff, who held 26.6% and the widow of his brother, who held 10.6% voted in favour of the resolutions set out in the requisition. One sister abstained on some of the resolutions but joined the majority voting against for certain others. The remainder, totalling 60.4% and comprising, apart from the second to fourth defendants two other sisters, voted against all the resolutions. It is material, but not decisive, to consider what position the shareholders who had no interest in THL took. Leaving the second

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14 Plaintiff's Affidavit at paras 8–9.

15 D1's Affidavit at para 32.

16 Plaintiff's Affidavit at p 549.

17 Plaintiff's Affidavit at p 552.

18 Plaintiff's solicitors letter to court dated 14 February 2022.

defendant out of the count, a majority of shareholders still voted against the resolutions in the requisition. This is an indication that they believed that the arrangement with THL was in the interests of the company.

22 The third breach concerns the salary paid to two daughters of the second defendant while they were working at other companies. Originally, the plaintiff also complained about salary paid to the second defendant's wife, but dropped this complaint at the oral hearing. I note that salaries were also paid to the plaintiff and to the plaintiff's wife. It is apparent that the company is a family business run largely on informal lines. While this is far from a model of corporate governance, the question for me is whether an action against some (but not all) of those who have received salaries from the company is in its interests. In my view, it is not in the company's interests to do so. Those drawing salaries are likely to have believed they were entitled to do so because of the company's general practice of doing so without strict regard to receiving commensurate work in return. Consequently, they would likely have a good defence to any claim for return of the salaries. It would be different if the plaintiff and his wife had not also participated in this practice, or if the salaries were so large that it would have been obvious to their recipients that the practice was improper. The amounts involved are relatively small, and there is some evidence that those drawing salaries did undertake items of work for the benefit of the company.

23 The fourth breach concerns certain machinery that was sold to a company owned by the second defendant's son, allegedly at an undervalue. There is no evidence the depreciated book value used for the transaction was in fact below market value. It also appears to be accepted that after the sale, the

company had the benefit of using the equipment.[19] The defendants justified the transaction as benefiting the company by giving it some cash flow. I am unable to find that this sale raises any legitimate claim, let alone one that justifies the expense of undertaking valuations of the machinery at the relevant time, which would be necessary before it even becomes arguable.

Good faith

24 An applicant for leave to commence a derivative statutory action will often be motivated by his own interests and feel some grievance and animosity toward the potential defendant or defendants. That state of mind is rarely sufficient of itself to disqualify him from obtaining leave if the intended action is in the practical and commercial interests of the company. In this case, however, the points raised by the defendants hold greater weight and substance. The defendants contend that the plaintiff has sought leave only in retaliation against the claim made against him by Xiamen Tionghin, and that he has acted vexatiously by applying for a winding up and then discontinuing that action in order to repeat his claims in this application.

25 I consider that to the extent that the plaintiff's allegations raise legitimate matters of concern they would have been more appropriately pursued in the winding up application. Thus, even if an action would be in the company's interests (which I have not found), the plaintiff acting in good faith should have continued with the remedy he originally chose, namely the application to wind up on the just and equitable ground. If pursuing the claims was truly in the company's interests, the liquidators could be expected to do so. I am unable to see why the plaintiff, acting in good faith, would prefer to pursue a derivative

[19] D1's Affidavit at para 52.

action rather than leaving a potential action in the hands of the company's liquidator. There is substance to the defendants' contentions that the plaintiff simply wishes to retain control over any litigation against them through this application, while drawing on the company's funds for such litigation.

26 There is also substance to the defendants' concern that this application has been brought to put pressure on the defendants to cause Xiamen Tionghin not to continue its claim against the plaintiff in China. Consequently, I also find that the plaintiff is not seeking leave in good faith.

Conclusion

27 By this application the plaintiff grasps at the husk of a business that his father proudly founded. In accordance with his father's wishes expressed before he passed away, the company has ceased business and its principal asset has been sold. The proceeds are ready for distribution to shareholders and the company can be wound up once practicable. Leaving the plaintiff and second defendant out, both the remaining directors, who are the third and fourth defendants, do not think legal action is warranted or worthwhile. Any juice is not worth the squeeze.

28 I dismiss this originating summons. I will hear counsel on costs.

Philip Jeyaretnam
Judge of the High Court

Vincent Yeoh Oon Weng (Malkin & Maxwell LLP) (instructed), Chia Yong Yong and Ho Kin Hung, Leslie (Chia Yong Yong Law Corporation) for plaintiff;
Ong Pei Ching, Kwoh Ji Wei and Wong Ling Yun (TSMP Law Corporation) for the first defendant;
Chiok Beng Piow (AM Legal LLC) for the second, third and fourth defendants.