Chong Chin Fook
v
Solomon Alliance Management Pte Ltd and others

[2016] SGHC 24

High Court — Originating Summons No 804 of 2015
Aedit Abdullah JC
1, 9, 11 December 2015; 2 February 2016

Companies — Members — Rights — Derivative actions

23 February 2016

Aedit Abdullah JC:

Introduction

1 The Plaintiff, a shareholder of Solomon Alliance Management Pte Ltd, the 1st Defendant ("the Company"), sought the Court's leave under s 216A(3) of the Companies Act (Cap 50, 2006 Rev Ed) to allow him to take over the conduct of a pending suit launched by the Company against another person, and a counterclaim brought by that person against the Company and the Plaintiff. In other words, the Plaintiff sought to control the conduct of proceedings in an on-going suit involving the Company. I found that the Plaintiff did not make out a sufficient case to have conduct of that suit. The Plaintiff has now appealed.

Background

2 The Company was founded by the Plaintiff; the 2nd Defendant; one Pang Chee Kuan, Capellan ("Pang"); one Helen Chong ("Helen"); and one Thomas Chin. It, among other things, marketed and sold unregulated investment products. The Company's current shareholders include the Plaintiff, Pang and Helen. The actual beneficial shareholdings appears to be a matter of dispute, but were not in play in the current case.

3 Management issues arose within the Company, particularly among the Plaintiff, Pang and Helen. The Plaintiff came to the view that Pang had breached his agreement with the Company governing Pang's sales, and had diverted business away from the Company. Eventually, the Plaintiff faced an Extraordinary General Meeting ("EGM") set for 10 March 2015 at which he was to be removed as a director and at which the 2nd and 3rd Defendants were to be appointed as directors of the Company. In the face of the pending EGM, the Plaintiff gave instructions on 5 March 2015 to solicitors to commence Suit 215 of 2015 against Pang. This suit alleged wrongful diversion of the Company's business in investment products to other entities, including one Megatr8 Inc Pte Ltd. Notices were also sent on 6 March 2015 to the Company's clients informing them of Pang's suspension from the Company.

4 A counterclaim alleging defamation was brought by Pang against the Company and the Plaintiff. The Company and the Plaintiff then issued Third Party Notices to each other seeking indemnification and/or contribution. An application to strike out Suit 215 was also filed by Pang against the Company's claim.

5 After their appointment as directors, the 2nd and 3rd Defendants obtained independent legal opinions from two law firms on the merits of Suit 215, and were advised to withdraw the suit. The opinions were sent to the Plaintiff. An Annual General Meeting was held on 20 July 2015 to discuss whether to continue Suit 215, but it was apparently inconclusive. A vote was taken with the other shareholders present apparently abstaining, leaving the decision to the Plaintiff. Subsequently, the Plaintiff received another e-mail from the 2nd Defendant on 22 July 2015 stating that the Company would look to him for costs should the suit fail.

6 Additionally, the Plaintiff launched a separate minority oppression suit in October 2015, Suit 1023 of 2015, against the Company and the other shareholders.

The Plaintiff's Case

7 The Plaintiff's primary contention is that the Defendants appeared to believe that there is a weak case.

8 The Plaintiff met the requirements of s 216A: notice was given, and he was acting in good faith. While the relationship between the shareholders had broken down, this was not sufficient to establish a lack of good faith. Whatever hostility or suspicion that existed did not cloud the Plaintiff's belief that the Company's interests would be served. The Company had a legitimate and arguable case, as there was clear evidence from a private investigator that Pang had been diverting business from the Company. The legal opinions obtained by the Company did not undermine this assertion of a sufficient case.

9 There was also the danger that the directors would not pursue Suit 215, motivated either by a grudge against the Plaintiff or their close relationship with Pang. The 2nd and 3rd Defendants would not pursue the matter with sufficient vigour.

10 Any possible conflicts of interest, with the Plaintiff facing a claim for contribution and/or indemnification by the Company, could be addressed by splitting the proceedings, such that the issue regarding contribution would be heard separately and court orders could be made limiting disclosure to the Plaintiff of relevant legal advice given to the Company; the cases cited by the Company on conflicts of interest were thus not relevant.

The 1st Defendant's Case

11 There were a number of disputes within the Company about the management of the Company and the relations among the shareholders. There were a number of claims and counterclaims which were inextricably interlinked.

12 A conflict of interest would result if the Plaintiff were to take over the suit, in a situation where the Company sought contribution and/or indemnification from the Plaintiff. Cases show that a conflict of interest would arise in such intertwined situations, and applications made in such contexts would be refused. The Plaintiff would unlikely instruct the Company's solicitors to pursue the Company's claim against him with any vigour. As it is, the Plaintiff was already a party to Suit 215, and could support the Company's case. His participation in the suit allowed him to put forward his case and version of events too. The minority oppression suit, Suit 1023, also indicated another conflict of interest.

13 The 2nd and 3rd Defendants had also been prosecuting the suit and defending the counterclaim diligently. While there were adverse legal opinions, the solicitors had not been instructed to withdraw Suit 215. The instructions as they stand were to proceed with the application, and to resist the striking out action. It was the Plaintiff who jeopardised the action by disclosing the adverse legal opinions to Pang's solicitors.

14 Bad faith was shown as the Plaintiff had sought to prosecute Suit 215 out of greed and spite, without regard to the Company's interests. The Plaintiff was thus acting out of a personal vendetta, with his judgment clouded. The Plaintiff had instructed the solicitor from M/s Eugene Thuraisingam LLP ("ETL") to escalate the case and blow it out of proportion, and had wanted to announce his claims against Pang and Helen whether or not their appointments in the Company could be suspended. His lack of *bona fides* was also shown by his refusal to provide the 2nd and 3rd Defendants with his views on the merits of the Plaintiff's claim. He had only brought in another legal opinion late in the day as an afterthought to support his position.

15 There was, in the circumstances, only a suspicion of wrongdoing by Pang and this was not sufficient. Alternative remedies were also available in Suit 1023, including a possible buyout of the Plaintiff's shares.

16 The Plaintiff would also plunder the Company's funds to further his own personal agenda.

The 2nd and 3rd Defendants' Case

17 The 2nd and 3rd Defendants associated themselves with the arguments of the Company. It was argued that it was not shown that the 2nd and 3rd Defendants were not diligently prosecuting Suit 215. No failure in prosecuting the suit was identified; the evidence showed that the 2nd and 3rd Defendants were taking every effort to act in the best interests of the Company: papers had been filed on time, and all court deadlines had been met. The Plaintiff had also been invited to give his views as to the continuation of the proceedings. The 2nd and 3rd Defendants had acted even-handedly throughout the proceedings.

18 In contrast, the Plaintiff was driven by a personal vendetta as underlined by the e-mails sent by him to the counsel from ETL. These showed that he wanted to threaten regulatory action, inflate the losses suffered, discredit the character of Pang, use the suit as a basis to suspend Helen and Pang's involvement in the Company, and announce the action taken against these two in order to humiliate them. The suit was also intended to be a bargaining chip to force a buy-out of the Plaintiff's shares in the company. These disclosed that the Plaintiff's judgment was clouded by purely personal considerations, that he lacked good faith, and that the action had been mounted for a collateral purpose.

19 As the 2nd and 3rd Defendants had not taken a position on whether the suit should be discontinued, it was not necessary to decide whether it would be in the interests of the Company to prosecute the Suit. However, even if the decision to withdraw the suit was taken eventually, it would be a management decision for the Company's board of directors to take. There was no reason to displace the 2nd and 3rd Defendants in their conduct of the suit.

The Decision

20 The Plaintiff's application did not succeed as the application was not made in good faith, and allowing the Plaintiff to have conduct of the action in Suit 215 was not *prima facie* in the interests of the Company, given the possibility of conflict. Importantly, as the application was in respect of an action already underway, the Plaintiff had to show that the Company was not prosecuting or defending the action with diligence. This, he failed to do.

Analysis

The requirements of s 216A(3)

21 An application under s 216A(3) would generally require that notice be given, that the applicant act in good faith, and that it was *prima facie* in the interests of the company in question for the action to be brought, prosecuted, defended or discontinued. In this case, the giving of notice was not in issue: the Plaintiff relied upon a letter dated 4 August 2015. There was, I found, a lack of good faith in the circumstances, and that it was not in the *prima facie* interests of the Company that the Plaintiff take conduct of the prosecution or defence of the action. In particular, I was of the view that in a case of the prosecution or defence of an *on-going* action, a different threshold (for the last requirement) applied as compared to the *commencement* of proceedings.

Lack of good faith

22 I was not satisfied that the Plaintiff was acting in good faith. The Defendants argued that the Plaintiff was motivated by a personal vendetta, citing his e-mail instructions to his solicitor from ETL which appeared to show that the Plaintiff wanted to use the lawsuit to get back at Pang, and to cause

reputational damage to him and Helen. The Defendants also pointed to the Plaintiff's failure to give reasons for starting and maintaining Suit 215 as evidencing a lack of good faith. I took this to mean that his failure to provide such reasons was further evidence of a personal vendetta on his part. I did not find that any of these examples cited by the Defendants were on their own sufficient to show a lack of good faith. However, taking them as a whole, and also taking into account the sequence of events leading to the commencement of Suit 215, I was of the view that good faith was lacking on the part of the Plaintiff.

23 The existence of personal animosity does not by itself preclude good faith, provided the action sought by the applicant benefits the company: see *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*"), where the Court of Appeal noted, after citing *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*"), at [13]:

> …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…

24 In *Pang Yong Hock*, the Court of Appeal had also observed that hostility between parties in a s 216A case would be bound to be present, and therefore hostility alone would normally be insufficient to show a lack of good faith for the purposes of s 216A.

25 There were a number of facts that would appear to establish good faith on the part of the Plaintiff. First, if it were true that there was a diversion of business by Pang, there would be harm to the Company and the pursuit of legal

proceedings would be for its benefit. Second, while there were independent legal opinions that the case was weak, such opinions, while perhaps relevant to the motivation and thinking of the parties, were however irrelevant in considering the objective strength of the case. Such an assessment had to be done by the Court. Based on what was before me, there was nothing that showed that Suit 215 was a non-starter.

26 However, these were outweighed by the cumulative effect of the communications between Plaintiff and ETL and the Plaintiff's actions in the face of the then-impending EGM to remove him as director. The Plaintiff explained that the communications complained of as merely demonstrating his belief in the case; he also complained that what was relied upon by the Defendants was just one part of a chain of correspondence, with the rest held back on the grounds of privilege, such that the Court could not get a full picture. That may be so, but taking together the strong language used by the Plaintiff with the giving of instructions to commence Suit 215 while he was facing an EGM for removal, the overall impression is of a person intent on pursuing matters against Pang come what may. That, to my mind, did show a clouding of judgment that was sufficient to demonstrate a disregard of the interests of the Company. In the words of the Court of Appeal in *Ang Thiam Swee* at [46], the Plaintiff here had "been animated by such a compound of private motives as to amount to a collateral personal purpose. Any justice done for the Company would be, at best, incidental to the advancement of [his] own aims."

Not* prima facie *in the interests of the Company

27 The threshold for making out a basis for the commencement of proceedings under s 216A is low, but in the present case, a higher threshold

should be applied since proceedings were already underway. In this case, there would also be a clear conflict of interest and detriment to the Company by allowing the Plaintiff to have conduct of the action.

Conduct of on-going proceedings

28 While this was apparently a novel point, I was of the view that the threshold for a shareholder or member of a company to effectively intervene and take over the conduct of on-going proceedings would not be the same as that for the commencement of an action.

29 When proceedings are already underway, the applicant seeking to take over conduct or, in the words of s 216A(3), the prosecution of proceedings should show that there was something wanting in the company's management or conduct of those proceedings before he is permitted to take over. This simply flows from the fact that proceedings are already underway: the company has not stood in the way of the commencement of the action and the active steps taken in relation to the matter. The company's resources would also already have been utilised, whether in the form of management or board oversight of the litigation, or in the incurring of costs relating to litigation. The direction and conduct of the matter should thus be left with the company, if only to minimise disruption, unless it can be shown that the company's prosecution of the matter can be impugned, for instance in situations of dilatory prosecution or when the prosecution is only a sham or façade.

30 There was nothing of such nature demonstrated in the present case. The Company had indicated in its arguments that it would continue to pursue proceedings diligently. Although it was true that the 2nd and 3rd Defendants had

not indicated what their final position regarding the continuance or withdrawal of the suit was, it was clear that at this time they were not proposing anything contrary to the current direction of the suit. At the very most then, the Plaintiff's application was premature vis-à-vis the 2nd and 3rd Defendants.

Conflict of interest

31 The interests of the Company could be adversely affected by the Plaintiff's conduct due to the risk of conflict. Conflict has been recognised as a basis to deny an application under the equivalent of s 216A in other jurisdictions.

32 In *Porter v Anytime Custom Mechanical Ltd* [2014] AJ No 350, the Alberta Court dismissed an application by a shareholder to have conduct of an action being defended by the company. The language of the Business Corporations Act in force in Alberta referred to such an application as an intervention. The Court there noted the possibility of conflict arising, as well as the fact that there was no evidence that the corporation was unwilling to instruct counsel. The possibility of conflict was thus a significant reason in Graesser J's dismissal of the application in that case.

33 Conflict of interest was also considered material in *Transmetro Corp Ltd v Kol Tov Pty Ltd* [2009] NSWSC 350 ("*Transmetro*"), and *McEvoy v Caplan* [2010] NSWCA 115 ("*McEvoy v Caplan*"). In these cases, Mr McEvoy, who was the applicant for leave to bring actions on behalf of two related companies, was also the Managing Director of the opposing parties. Not surprisingly, the New South Wales Supreme Court and Court of Appeal respectively found that there were conflicts of interest. In *Transmetro*, Barrett J found that there was a

fundamental conflict in Mr McEvoy's duties. His Honour found authority in various cases, notably one of them being *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52 ("*Chahwan*"), that examined whether the particular interest or characteristic of an applicant under the NSW equivalent of s 216A was taken into account. In *Chahwan*, the possibility of conflict was also found to be material consideration in a s 216A-equivalent action. In *McEvoy v Caplan*, the New South Wales Court of Appeal considered the possibility of effectively splitting the litigation in question to avoid a conflict of interest. However, the Court accepted the argument that the issues were not distinct and separate, and this rendered splitting impracticable. The New South Wales Court of Appeal accordingly affirmed the first instance decision.

34 These cases show that the presence of conflict of interest is a relevant consideration and that the splitting of proceedings may not always be sufficient to avoid such potential conflict.

35 I should note that the Company cited the decision of the Alberta Court of Queen's Bench in *Kovac v Opus Building Corp* [2010] AJ No 622 as authority for the proposition that the risk of conflict should be addressed. But this case was really one in which the issue was that of conflict on the part of counsel, and not on the part of the applicant.

36 Aside from the support from case authorities, conflicts of interest would also be relevant in s 216A applications as a matter of principle, since the interests of the company would be affected. Where the possibility of conflict is sufficiently high or serious, an application to prosecute proceedings should be refused. A clear example would be when the shareholder and the company are

opposing parties in the same proceedings. However, even where both parties are on the same side, conflicts of interest may still potentially arise.

37 In the present case, the Plaintiff faced a claim by the Company for contribution and/or indemnification. That by itself would be sufficient to raise a significant risk of conflict: the interests of the Plaintiff and the Company point in different directions. If the Plaintiff were to take over the Company's prosecution of the litigation, there would be, as argued by the Company, an inclination to avoid or minimise matters which may adversely affect the Plaintiff's position. If the Company were free to act in its own interest, it may for instance choose to look to the Plaintiff to bear full responsibility for the proceedings if it were to lose against Pang. Whether or not such a case could succeed at the end of the day is irrelevant; the Company should not be hindered or obstructed from making such a decision relation to its litigation.

38 The Plaintiff attempted to distinguish *Transmetro* on the basis that that case involved inconsistent claims and cross-claims. In contrast, there was commonality in the present case and the splitting of the two proceedings would be possible. However, I was not satisfied that this would sufficiently address the risk of potential conflict. While it may be that the factual matrix giving rise to conflict here is distinguishable from *Transmetro*, as there were no such inconsistent claims in the present case, there would still be conflict nonetheless arising out of the different interests that would be in play. In cases such as this, in the heat of on-going litigation, it is often too tempting for an involved party to think of his interests ahead of others. This is particularly so in this case, given the actual existence of a third party claim against the Plaintiff by the Company which has not been shown to be other than genuine. Such a possibility of conflict

affects both the existence of good faith, and whether it is *prima facie* in the interest of the Company that the action be brought, prosecuted, defended or discontinued by the Plaintiff.

39 Further, as noted by the Company, the factual basis of the Company's claim against the Plaintiff would be affected by the case of the Company against Pang, and Pang's counterclaim.

40 I did note that the 3rd Defendant was Pang's niece, and that it was contended that the 2nd Defendant, with whom the 3rd Defendant was said to have aligned herself, was hostile to the Plaintiff. In his oral arguments, the Plaintiff also argued that there were doubts about whether the 2nd and 3rd Defendants sufficiently believed in the case against Pang. Against these matters, however, was the fact that there was nothing to show that Suit 215 was being pursued with anything other than the requisite rigour. If there was indeed a conflict of interest on both sides, any conflict on the part of the 2nd and 3rd Defendants was not brought home to the Company. In any event, I did not find that such a possibility of conflict on the part of these Defendants was of a degree that outweighed that of the Plaintiff.

Legitimate and arguable claim

41 While the basis of the allegations against Pang was canvassed by the Plaintiff in argument, the primary focus of the controversy between the parties in the present application was on the existence of good faith and conflict of interest. Again, given the action was already on-going, whether or not a legitimate and arguable claim existed would not be live. I did note that the Company in its arguments contended that there was no such claim; I did not

take these to mean that the Company desired at this time to discontinue the action; the arguments were, to my mind, made *ex abundanti cautela* to fend off the application by the Plaintiff.

42 The issue of the existence of a legitimate and arguable claim will thus be addressed only briefly. If I was wrong on the requirement for intervention by the company as I discussed above, the threshold required is low, and the case against Pang only needs be shown to be legitimate and arguable: see *Ang Thiam Swee* at [53]. Only if the allegations were nothing more than suspicions would an application be refused. In the present case, the various allegations about the conduct of Pang and the diversion of business were supported by a private investigator's report hired by the Plaintiff. It may be that there were questions that had to be addressed about the strength of the case as such, as indicated by legal opinions given to the parties, but this did not mean that there was no legitimate and arguable claim. The test is not one of eventual success.

Commercial interests of the Company

43 I also accepted that in the present case, where litigation is already underway, as a matter of practical and commercial interest of the Company, it would be better for the conduct to be left to it. Again, once proceedings are started, it would generally be better, in the absence of any strong countervailing reason, for the conduct to be left in the hands of those who commenced them. The Plaintiff had not shown any such countervailing reason in the present case.

Conclusion

44 The Plaintiff's application was thus dismissed, with costs awarded to the Defendants. Taking into account the novelty, at least in Singapore, of the points

argued, I awarded costs of $10,000 with reasonable disbursements to each set of Defendants.

Aedit Abdullah
Judicial Commissioner

Kelvin Lee (Wnlex LLC) and Lim Seng Siew (instructed counsel) (OTP Law Corporation) for the plaintiff;
Daniel Koh and Genevieve Wong (Eldan Law LLP) for the first defendant;
June Lim (Eden Law Corporation), Choo Zheng Xi and Jason Lee (instructed counsel) (Peter Low LLC) for the second and third defendants.