IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 34

Originating Summons No 1027 of 2018
(Summons No 187 of 2019)

In the matter of Ozak Seiko (S) Pte Ltd

And

In the matter of Section 216A of the Companies Act (Cap. 50)

Between

Ozak Seiko Co Ltd

… *Plaintiff*

And

(1) Ozak Seiko (S) Pte Ltd
(2) Tan Hock Seng

… *Defendants*

Originating Summons No 100 of 2019

In the matter of Ozak Seiko (S) Pte Ltd

And

In the matter of Section 216A of the Companies Act (Cap. 50)

Between

Tan Hock Seng

… *Applicant*

And

(1) Ozak Seiko Co Ltd
(2) Ozak Seiko (S) Pte Ltd

… *Respondents*

EX TEMPORE JUDGMENT

[Companies] — [Members] — [Derivative action]
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Tan Siong Thye J
29, 30 January 2019

30 January 2019

Tan Siong Thye J:

Introduction

1 These are derivative actions commenced separately by the two feuding directors of Ozak Seiko (S) Pte Ltd ("the Company").[1] The Company has only two directors, namely, Masakazu Ozaki ("Ozaki") and Tan Hock Seng ("Tan"). The shares in the Company are divided equally between Ozak Seiko Co Ltd ("Ozak") and Tan.[2] Ozak, a company incorporated in Japan, was founded by Ozaki and he acts on behalf of Ozak in these related summonses.

2 It is common knowledge that a company is an inanimate entity with no voice of its own. It acts and expresses itself through its board of directors.

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1 Ozak's Skeletal Submissions for OS 1027/2018 at para 3.

2 Ozak's Skeletal Submissions for OS 1027/2018 at paras 9–10.

Unfortunately, the two directors of the Company in this case are in disagreement. This has manifested itself in the three summonses which are before the court:

(a) Originating Summons No 1027 of 2018 ("OS 1027/2018") – Ozak's application for leave to commence a derivative action under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") against Tan for breach of his director's duties;

(b) Originating Summons No 100 of 2019 ("OS 100/2019") – Tan's application for, *inter alia*, leave to commence a derivative action to defend OS 1027/2018 in the name and on behalf of the Company under s 216A of the CA; and

(c) Summons No 187 of 2019 ("SUM 187/2019") filed under OS 1027/2018 – Ozak's application for, *inter alia*, a declaration that the Company's appointment of PRP Law LLC is defective and void.

Background facts

3 I shall now set out a concise summary of the facts.

4 Ozak is a company registered in Japan that was founded by Ozaki in 1976. It is in the business of wholesale and distribution of high precision system linear motion bearings. Prior to the Company's incorporation in Singapore, Ozak appointed a distributor in Singapore, SLS Bearings Pte Ltd, a firm founded by Tan's elder brother.

5 Sometime in 1993, Tan's elder brother and Ozaki decided to embark on a joint venture. The Company was thus incorporated on 2 October 1993. Ozaki,

along with a nominee appointed by Tan's elder brother, were equal shareholders and the Company's only two directors. The Company has at all material times been involved in the wholesale and distribution of Ozak's linear motion bearings.[3]

6 As Ozaki has been based in Japan since the Company's incorporation, Tan was hired as an employee to oversee the daily operations of the Company in Singapore.[4] There was no written employment contract between Tan and the Company. Tan eventually obtained 50% of the Company's shares in 2010,[5] and was appointed a director on 31 December 2014.[6]

7 At this juncture, it should be highlighted that Tan had incorporated his own company, Shafttech Pte Ltd ("Shafttech"), in 2002. This was after he had been hired as an employee of the Company. Tan claims that his intention in incorporating Shafttech was to support the Company's need for complementary products.[7] Tan's involvement with Shafttech and his allegedly wrongful acts (see [9] below) form the basis of the application in OS 1027/2018. It is not disputed that Shafttech and the Company shared the same premises at least until 2013.[8]

8 Ozaki contends that he did not know of Tan's involvement in Shafttech until early December 2013. Ozaki had purportedly visited Ozak's Malaysian distributor in Kuala Lumpur and chanced upon a Shafttech brochure. This

3 Ozaki's First Affidavit dated 6 August 2018 at paras 5–12.

4 Ozaki's First Affidavit dated 6 August 2018 at paras 13–14.

5 Ozak's Skeletal Submissions for OS 1027/2018 at para 10.

6 Ozak's Skeletal Submissions for OS 1027/2018 at para 30.

7 Tan's First Affidavit dated 16 November 2018 at paras 5 and 25.

8 Tan's Skeletal Submissions for OS 1027/2018 at para 27.

brochure revealed that Shafttech was operating from the same address and used the same contact details as the Company.[9] Ozaki then confronted Tan on 18 November 2014 with a "Correction Document", estimating that Tan had caused the Company to suffer losses of at least $2.7m.[10] However, Tan did not compensate the Company for the alleged losses. In fact, as stated above at [6], Tan was later appointed a director on 31 December 2014. Subsequently, in or around January 2015, Ozak appointed WM Automation Pte Ltd ("WM Automation") as the new distributor for Ozak products in Singapore. The Company ceased operations from February 2015 onwards.[11]

9 In OS 1027/2018, Ozak alleges that Tan has breached his director's duties to the Company by, *inter alia*:

(a) wrongfully using the resources of the Company for the benefit of Shafttech, which is in direct competition with the Company and of which Tan also is a director and 40% shareholder;

(b) wrongfully causing the Company to incur expenses on behalf of Shafttech;

(c) causing Shafttech to be operated from the same premises as the Company;

(d) causing the Company to sell its products to Shafttech at a price below market rates and at a loss; and

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9 Ozak's Skeletal Submissions for OS 1027/2018 at para 25.

10 Company's First Affidavit dated 15 November 2018 at p 187.

11 Tan's Skeletal Submissions for OS 1027/2018 at paras 38–41.

(e) acting in conflict of interest towards the Company by virtue of the acts stated above.[12]

SUM 187/2019

10 Before deciding the respective applications under s 216A of the CA, it is necessary to first deal with SUM 187/2019. Briefly, after Ozak had commenced OS 1027/2018, Tan, purportedly acting on behalf of the Company, appointed PRP Law LLC to represent the Company. It is not disputed that this was a unilateral act on Tan's part. Ozak has thus filed SUM 187/2019 to seek, *inter alia,* a declaration that PRP Law LLC's appointment is defective and void.

Interpretation of Article 100

11 In opposing SUM 187/2019, the Company relies heavily on Article 100 of the Company's Memorandum and Articles of Association ("M&A"). The Company contends that Article 100 confers on Tan the power to appoint PRP Law LLC unilaterally.

12 The relevant portion of Article 100 states as follows:[13]

> 100. A resolution in writing, signed by all the directors present in Singapore shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. …

13 However, Article 100 must be read in context and not literally in order to give effect to this Article and the other provisions of the M&A. Article 100 confers on all the directors present in Singapore the power to pass written resolutions out of expediency. It is unwise to construe this Article to the

[12] Appendix 1 of OS 1027/2018.

[13] Company's First Affidavit dated 15 November 2018 at p 73.

exclusion of the other provisions in the M&A as this approach may render the other provisions, such as Articles 90 and 93, *etc*, otiose or ineffective.

14 The relevant portions of Articles 90 and 93 state as follows:[14]

> 90. Subject to these articles questions arising at any meeting of directors shall be decided by a majority of votes and a determination by a majority of directors shall for all purposes be deemed a determination of the directors. …
>
> …
>
> 93. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two. One director who is also alternate for another director shall not be a quorum.

15 Accordingly, it could not have been within the contemplation of the parties that Tan would be able to invoke Article 100 to make management decisions unilaterally when Ozaki was deeply involved in making management decisions. This interpretation also goes against the requirements of due process and natural justice, especially on the facts of this case where there are only two directors and two equal shareholders. Moreover, Tan did not give notice to Ozaki that he would invoke Article 100.

16 The proper interpretation of Article 100 is that it allows *at least two* directors who are present in Singapore to pass written resolutions in lieu of board meetings, thus saving time and resources. This interpretation is consistent with the quorum requirement of two. Having regard to the M&A as a whole, it is clear that Article 100 does not provide a free-standing power which can be exercised by one director alone.

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[14] Company's First Affidavit dated 15 November 2018 at pp 72–73.

Estoppel and waiver

17 The Company also claims that Ozak is estopped by conduct from alleging that the appointment of PRP Law LLC is defective. In the alternative, the Company claims that Ozak has waived any defect.[15] I should highlight that the references to Ozak's conduct in [17]–[18] refer to that of Ozaki, who acts on behalf of Ozak.

18 I find that a reasonable person apprised of the relevant facts will not interpret Ozak's conduct as amounting to waiver or estoppel. Ozak's conduct was not sufficiently unequivocal. While Ozaki had suspicions about the defective appointment on 25 October 2018, he decided to first go through his own records to check that he had not missed any notice of a meeting to discuss the appointment of PRP Law LLC. After Ozaki confirmed that there was no such notice, Rajah & Tann Singapore LLP ("R&T") requested that PRP Law LLC withdraw from acting for the Company, by way of a letter dated 14 December 2018. In this letter, R&T had also requested for PRP Law LLC's warrant to act for the Company.[16] On 17 December 2018, PRP Law LLC then provided R&T with a director's resolution and a warrant to act that purportedly authorised its appointment as the Company's solicitors. After confirming that the relevant documents were defective, as they were only signed by Tan, Ozak instructed R&T to file SUM 187/2019, which was done on 11 January 2019.[17] Therefore, I do not agree that Ozak is estopped by conduct from alleging that the appointment of PRP Law LLC is defective. Ozak has also not waived any defect.

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15 Company's Written Submissions for SUM 187/2019 at para 24.

16 Ozaki's Fourth Affidavit dated 10 January 2019 at p 31.

17 Ozaki's Fifth Affidavit under the cover of Chan Wei Wen Francis dated 24 January 2019 at para 16.

19 On the above facts, the Company's alleged appointment of PRP Law LLC is defective and void. The director's resolution dated 13 September 2018 authorising PRP Law LLC to represent the Company and PRP Law LLC's warrant to act dated 24 September 2018, which were both signed by Tan purportedly on behalf of the Company, are also defective and void. Therefore, I allow prayers 1 and 2. However, Ozak has also sought to strike out Tan's affidavit filed on behalf of the Company dated 15 November 2018. I find that this affidavit is relevant to the issues in OS 1027/2018. Accordingly, prayer 3 is disallowed.

OS 100/2019

20 OS 100/2019 is Tan's application seeking leave to defend OS 1027/2018 in the name and on behalf of the Company under s 216A of the CA.

Notice under s 216A(3)(a) of the CA

21 I shall first deal with the requirement for the issuance of notice under s 216A(3)(*a*) of the CA. Ozak has pointed out in its skeletal submissions that the notice requirement is strict.[18] In the case of *Lee Seng Eder v Wee Kim Chwee and others* [2014] 2 SLR 56, at [13], the leave application was dismissed solely on the ground that the applicant had failed to provide notice. Tan argues that the notice requirement under s 216A(3)(*a*) of the CA was fulfilled, as notice was given to Ozak through Nair & Co LLC's letter dated 29 August 2018 which was addressed to R&T ("the 29 August 2018 Letter"). In this letter, Tan had sought Ozak's and Ozaki's agreement for PRP Law LLC to be appointed to represent the Company. Paragraph 4 of the 29 August 2018 Letter stated expressly that

[18] Ozak's Skeletal Submissions for SUM 187/2019 and OS 100/2019 at para 49.

Tan would "apply to Court for an order authorising the legal representation of the Company" if Ozak's and Ozaki's consent was not forthcoming.[19]

22 I first observe that the 29 August 2018 Letter and all the other correspondence referred to by Tan's counsel did not make, expressly or impliedly, any reference to the notice requirement in s 216A(3)(*a*) of the CA. Hence, this is a serious procedural defect.

23 Be that as it may, I am prepared to accept that the 29 August 2018 Letter might constitute valid notice if it complies with s 216A(3)(*a*) of the CA in substance. However, it is clear that the 29 August 2018 Letter is substantively defective as well.

24 The 29 August 2018 Letter did not state that Tan intended to apply to court for leave to defend OS 1027/2018 in the name and on behalf of the Company, if the directors did not defend the action themselves. This is the fundamental message that must be conveyed to the directors (and specifically Ozaki), for the purpose of the notice requirement under s 216A(3)(*a*) of the CA. The substance of the notice is stated unambiguously in s 216A(3)(*a*) of the CA itself.

25 Further, Tan did not provide the requisite 14 days' notice under s 216A(3)(*a*) of the CA. Ozak was only given one day to respond to the 29 August 2018 Letter. In any event, if the 29 August 2018 Letter was to constitute a valid notice, it should have been addressed to Ozaki, who is the Company's only other director.

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[19] Tan's Second Affidavit dated 21 January 2019 at p 70.

26 Since Tan has failed to provide proper notice in accordance with s 216A(3)(*a*) of the CA, this alone is a sufficient ground for me to dismiss OS 100/2019.

Other requirements of s 216A(3) of the CA

Good faith

27 In any event, even if Tan had provided proper notice, I also found that Tan did not satisfy the other requirements under s 216A(3) of the CA for leave to be granted. Tan is not acting in good faith in OS 100/2019, as required under s 216A(3)(*b*) of the CA, as he now uses the Company to engage solicitors to essentially further support his case. This can be seen from Tan's affidavit in support of this application. I also notice that OS 100/2019 was filed belatedly after Ozak took out SUM 187/2019.

Prima facie *in the interests of the Company*

28 Further, it is also not *prima facie* in the interests of the Company for OS 100/2019 to be granted. Tan asserts that the Company requires separate legal representation and that the Company will not diligently defend OS 1027/2018. However, Tan, having been joined to OS 1027/2018 as the second defendant, is already able to oppose Ozak's leave application in his personal capacity as a director and shareholder of the Company, and has indeed done so. Tan has not satisfied the court that it is necessary also to grant him leave to defend OS 1027/2018 in the name and on behalf of the Company and in the process to appoint solicitors to represent the Company.

29 Ozak drew my attention to the case of *Tam Tak Chuen v Eden Aesthetics Pte Ltd and another (Khairul bin Abdul Rahman and another, non-parties)*

[2010] 2 SLR 667 ("*Tam Tak Chuen*") at [8]. To be clear, *Tam Tak Chuen* did not expressly consider the issue of whether a company must be legally represented in a leave application under s 216A of the CA. However, *Tam Tak Chuen* is relevant given the factual similarities with this case. In *Tam Tak Chuen*, Dr Tam Tak Chuen ("Dr Tam") and Dr Khairul Bin Abdul Rahman ("Dr Khairul") were equal shareholders and the only two directors of Eden Aesthetics Private Limited ("EA") and Eden Healthcare Pte Ltd ("EH"). EA and EH were deadlocked. Dr Tam applied for leave to commence a derivative action against Dr Khairul for breach of his director's duties. There were no allegations made against EA and EH, just as there are no allegations made against the Company in this case. In deciding the leave application, Judith Prakash J (as she then was) observed at [8] that "[i]n respect of this application, the nominal defendants, EA and EH, were not represented and took no part in this argument". Like Tan, Dr Khairul had filed an affidavit to oppose the leave application initiated by the only other director (although for completeness, it should be noted that Dr Khairul appeared as a non-party, whereas Tan is joined as the second defendant in OS 1027/2018). The Company is in the exact same position as EA and EH were in *Tam Tak Chuen*. Thus, there is no reason why it needs to be legally represented, when Tan is already resisting the leave application in his personal capacity.

30 On the above facts, Tan has failed to satisfy the requirements under s 216A(3) of the CA and I dismiss OS 100/2019.

OS 1027/2018

31 OS 1027/2018 is Ozak's application for leave to bring an action in the name and on behalf of the Company against Tan for breach of his director's duties.

Notice under s 216A(3)(a) of the CA

32 In OS 100/2019, which was Tan's application under s 216A of the CA for leave to defend the Company and thereby appoint PRP Law LLC, Ozak argues that Tan had failed to comply with the requirements under s 216A(3) of the CA. Ozak had emphasised the need for strict compliance with the notice requirement under s 216A(3)(*a*) of the CA. This must apply with equal force in OS 1027/2018 and what is sauce for the goose is sauce for the gander.

33 For the notice requirement, Ozak has relied on R&T's letter of demand dated 27 June 2017.[20] This letter of demand was from Ozak to the Company, Tan and Ozaki. It makes no reference to s 216A of the CA. It is a letter of demand that enumerated Tan's acts of wrongdoing when he was an employee with the Company as well as when Tan was the Company's director. Furthermore, the letter of demand also made an allegation against the Company for "dealing with" Ozak's trade mark without its permission. This is a cause of action that belongs to Ozak, and not the Company. The action for infringement of trade mark against the Company cannot be the basis for an action under s 216A of the CA. Therefore, R&T's letter of demand contains matters other than those relevant to a derivative action on the Company's behalf under s 216A of the CA. Thus, Ozak has not satisfied the requirements of s 216A of the CA and its notice is procedurally defective.

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[20] Ozaki's First Affidavit dated 6 August 2018 at p 55.

34 As I have indicated in OS 100/2019, I am prepared to accept R&T's letter of demand as constituting a valid notice if it is in substance a notice that is in compliance with the spirit and purposes of s 216A(3)(*a*) of the CA. However, it is clear that R&T's letter of demand is substantively defective as well:

(a) Nowhere in the letter of demand is it stated that Ozak intended to apply for leave to bring an action in the name and on behalf of the Company, if the directors did not bring the action themselves.

(b) Furthermore, Ozak had not provided 14 days' notice to the directors of the Company. R&T's letter of demand was dated 27 June 2017. The directors were only given until 4 July 2017 to respond. This is only 7 days' notice.

35 Accordingly, the said letter of demand fails to fulfil the notice requirement under s 216A(3)(*a*) of the CA. As with OS 100/2019, this ground alone is sufficient for me to dismiss OS 1027/2018. Nevertheless, I shall proceed to discuss the other two requirements.

Other requirements of s 216A(3) of the CA

Good faith

36 I shall begin with the good faith requirement under s 216A(3)(*b*) of the CA. Ozak bears the burden of satisfying the court that it is acting in good faith. There is no presumption that an applicant under s 216A of the CA is acting in good faith, even if the action is *prima facie* in the interests of the company. On the facts, I am not satisfied that Ozak is acting in good faith.

37 First, Ozak has not provided a satisfactory explanation with regard to the delay in commencing these proceedings. Ozak alleges that Tan had breached his director's duties. These alleged breaches arose out of the same facts which Ozak would have been aware of, at the latest, between December 2013, when Ozaki discovered the brochure in Kuala Lumpur, and 18 November 2014, when Ozaki confronted Tan with the "Acquisition Proposal", also known as the "Correction Document". OS 1027/2018 was only commenced on 20 August 2018. This is a delay of about four to five years and is a much longer delay compared to Tan's delay in filing OS 100/2019. Tan's delay in commencing OS 100/2019, as pointed out by Ozak, was around half a year.

38 Second, even though Ozak claims to have discovered the alleged wrongful acts of conflict of interest between December 2013 and 18 November 2014, it still agreed to appoint Tan as a director on 31 December 2014. If Ozak was genuinely concerned by Tan's wrongful acts of conflict of interest, *ie*, Tan's involvement in Shafttech, a business competitor of the Company, then it should have acted expediently to correct or remedy the situation and should not have waited until 2018. At the very least, it should not have allowed Tan to be appointed as a director of the Company, especially when Ozak had allegedly caused the Company to suffer significant losses of over $2.7m. Further, shortly after Tan was appointed as a director, Ozak then decided in or around January 2015 to unilaterally appoint WM Automation as a distributor of Ozak's products. As a result, the Company, for all intents and purposes, became a dormant company since February 2015. The motivations of Ozak in commencing these proceedings are, therefore, questionable.

39 Third, Ozak first claimed to only have knowledge of Tan's beneficial interest in Shafttech in November 2014. Later, when confronted with objective

evidence, it then changed its position by stating that it had discovered this information through a Shafttech brochure in Malaysia in December 2013.[21] This change in position regarding this crucial fact occurred after Ozak was presented with documentary evidence which contradicted its initial position. This indicates the lack of candour on the part of Ozak.

Prima facie *in the interests of the Company*

40 The final requirement under s 216A(3)(*c*) of the CA is that the application must appear to be *prima facie* in the interests of the Company.

41 OS 1027/2018 is focused only on Tan's breach of his director's duties and not Tan's wrongdoing as an employee of the Company. Therefore, even if Tan had caused the Company to suffer losses from 2002 to 2014, these losses cannot be recovered through this action as Tan was only an employee then. The court is only able to deal with the matters raised in the prayers in OS 1027/2018. The prayers do not refer to a breach of an employee's duties and in fact expressly refer only to Tan's breach of his director's duties. This is clearly stated in Appendix 1 of OS 1027/2018.

42 Furthermore, I am not satisfied that it is in the practical and commercial interests of the Company to pursue this action, as borne out by the timeline of events.

43 It must be emphasised that Ozak knew about the alleged wrongful acts between December 2013 and 18 November 2014, at the latest. If Ozak had sought leave to bring an action against Tan at that time for breach of a senior

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21 Ozak's Skeletal Submissions for OS 1027/2018 at para 76.

employee's fiduciary duties, it would have had a much stronger case that the action was *prima facie* in the interests of the Company.

44 However, notwithstanding this knowledge, Tan was appointed a director on 31 December 2014. In or around January 2015, Ozak appointed WM Automation as a distributor of Ozak's products in Singapore, thereby replacing the Company. In February 2015, the Company became dormant and inactive very shortly thereafter. In the circumstances, it is difficult to identify precisely what losses, if any, have been caused to the Company, after Tan became the director of the Company which soon became dormant. This period is very short and thus the purported losses sustained, if any, would not be large. Even if there had been losses suffered by the Company because of Tan's failure to disclose his alleged wrongful acts, I emphasise again that Ozak had full knowledge of the breaches that would give rise to these losses and chose not to pursue an action when it had the opportunity to do so.

45 Finally, the relationship between Ozaki and Tan is acrimonious. This has resulted in the Company becoming dormant and there is no viable prospect of the two parties working together again. Both Ozaki and Tan are using the Company to advance their personal objectives and on the pretext that what they are doing is for the best interests of the Company. Hence, I am not satisfied that it is in the best interests of the Company to be embroiled in costly and drawn-out litigation, which will only serve to vindicate one side's position against the other.

46 On the above facts, Ozak has failed to satisfy all three requirements under s 216A(3) of the CA. OS 1027/2018 is thereby dismissed. I shall now hear the parties on costs.

Tan Siong Thye J
Judge

Yuen Djia Chiang Jonathan and Francis Chan Wei Wen (Rajah & Tann Singapore LLP) for the plaintiff in OS 1027/2018 and SUM 187/2019 and for the first respondent in OS 100/2019;
Pillai Pradeep G and Lin Shuling Joycelyn (PRP Law LLC) for the first defendant in OS 1027/2018 and SUM 187/2019 and for the second respondent in OS 100/2019;
Nair Suresh Sukumaran, Tan Tse Hsien, Bryan (Chen Shixian) and Bhatt Chantik Jayesh (Nair & Co LLC) for the second defendant in OS 1027/2018 and SUM 187/2019 and for the applicant in OS 100/2019.
