# Agus Irawan v Toh Tech Chye and Others
# [2002] SGHC 49

**Case Number** : Suit 600868/2001, SIC 602624/2001

**Decision Date** : 15 March 2002

**Tribunal/Court** : High Court

**Coram** : Choo Han Teck JC

**Counsel Name(s)** : Angelina Hing (Engelin The Practice LLC) for the plaintiff; Thio Ying Ying and Andrew Lim Kwee Huat (Kelvin Chia Partnership) for the first and second defendants; Cavinder Bull and Siraj Omar (Drew and Napier LLC) for the company/third defendant

**Parties** : Agus Irawan — Toh Tech Chye

*Companies – Members – Rights – Derivative actions – Plaintiff seeking leave to bring derivative action in company's name against directors for breach of fiduciary duties – Plaintiff claiming company entitled to certain rebates – Whether prima facie in interests of company that action be brought – Whether plaintiff shown prima facie case that company entitled to rebates – Requirement of 'good faith' – Whether burden on applicant to prove good faith – Whether plaintiff acting in good faith – s 216A Companies Act (Cap 50, 1994 Ed)*

## Judgment

### GROUNDS OF DECISION

1. This is an application by the plaintiff for leave to commence a derivative action in the name of the third defendant company against the first and second defendants. The plaintiff as well as the first and second defendants were at the material times, directors of the third defendant. The thrust of the plaintiff's application is founded on breach of fiduciary duties of directors. The subject matter were payments made in 1997 and 1998 by the Australian Wheat Board (later renamed and reconstituted as the Australian Wheat Board Limited) by way of rebates known as "volume rebates" for the purchase of wheat by the third defendant from them. Nothing significant turns on the change of name of the Australian body so it may conveniently be referred to as the Australian Wheat Board. The plaintiff claims that the third defendant company, as the customer of the Australian Wheat Board, was the rightful party entitled to these rebates but it never received them because the Australian Wheat Board gave the rebates to various other parties on the instructions of the first defendant and one Tom Goh, a manager of the third defendant. The third defendant was not a party when the plaintiff took out this application. Counsel for the company asked for leave to make submissions on behalf of the company. Leave was refused since the company was not a party to the proceedings. Consequently, an application was made and the company became the third defendant in these proceedings.

2. Mr. Lim appearing on behalf of the first and second defendants oppose the plaintiff's application on two grounds. First, he says that the third defendant was not entitled to the rebates; and secondly, that the application must fail because the plaintiff himself consented to the rebates being paid to some external parties, and thus he has not acted in good faith when he brought the present proceedings before the court. Mr. Bull, on behalf of the third defendant, made a similar submission in opposing this application. In support of their respective positions, the parties filed numerous and lengthy affidavits. Notwithstanding that, Mr. Lim sought leave to file some more affidavits to refute "serious and wrongful assertions of facts" by the plaintiff. He also submitted that cross-examination of some deponents would be necessary for the court to determine who speaks the truth. I shall address these points shortly, but first, it will be helpful to lay down some relevant details.

3. The plaintiff was a major shareholder of the third defendant and was one of its directors until his removal in August 2000, the reason for which he claims, was to prevent him from making further inquiry into the rebate payments in question. He is presently a 40% shareholder of the third defendant. The first defendant now holds 20% of the shares and a company called Intermilling Hong Kong Limited holds the remaining 40% shares and whose interests are being represented by the second defendant on the board of directors of the third defendant. The plaintiff avers that the third defendant began purchasing wheat from the Australian Wheat Board in 1997 and it was only in late December 1999 that he discovered that rebates were paid to customers and that the third defendant enjoyed rebates of US$1.75 per metric tonne in 1997 and US$2.25 per metric tonne in 1998. However, he learnt from James Dewan, the regional marketing manager of the Australian Wheat Board, that the rebates amounting to US$950,000 were paid to third party bank accounts (one of which was said to be in Hong Kong) on the instructions of the first defendant. Consequently, in June 2000, the plaintiff through his solicitors demanded to inspect the third defendant's accounts. Instead, he was removed as a director on 11 August 2000 and was denied access to the accounts.

4. The first and second defendants initially denied that the third defendant was entitled to any rebate from the Australian Wheat Board. They also deposed that the company purchased wheat for an Indonesian entity known as BULOG (an acronym for *Banda Urusan Logistik*) and that if any rebate was given it would have been rightfully given to BULOG. On my direction, parties obtained the evidence from the Australian Wheat Board. It wrote a letter dated 8 November 2001 to the plaintiff stating that Citra Flour Mill was its customer from 1997 to 1999. The Australian Wheat Board also stated in its 8 November letter that it paid rebates to whichever account as may be instructed by the first defendant or Tom Goh. It also said that the Australian Wheat Board did not know what relationship BULOG had with the third defendant and neither did it have any dealings with BULOG. The said letter suggested that rebates due to Citra Flour Mill in 1997 and 1998 were paid Mitsubishi Australia Limited, and a company called Gismo Investments Limited, a company in which the first defendant was also a director until 21 August 2001. In addition to these rebates, which were known as "volume rebates", the Australian Wheat Board also gave "price rebates" on the price of wheat sold. The plaintiff avers that these price rebates, like the volume rebates, were also paid to unauthorized third party accounts when they ought rightfully be paid to the third defendant. The price rebates came to a sum of US$9,168,083.33 and were paid to a company called Milling Consultants which is owned by the first defendant and his wife.

5. The first and second defendants' version of the story was this. Before the third defendant was created, there was a company called Comfez which acted as the broker in purchasing wheat from the Australian Wheat Board on behalf of BULOG which in turn sold the wheat to Citra Flour Mills Persada (Citra Flour Mills - Citra Flour Mills is now known as PT Panganmas Inti Persada and the plaintiff is its majority shareholder as well as President Director). In the scheme of arrangement, all rebates from the Australian Wheat Board were paid to an account of a company called Wheatrac Limited; and the money in this account went to the individual shareholders of Citra Flour Mills. After the third defendant was incorporated on 7 August 2001 and took over the role previously played by Comfez, the rebates (hitherto paid to Wheatrac) were paid to Gismo Investments Ltd, and presumably, the plaintiff and his father who were its shareholders. No rebates were ever paid to Comfez or the third defendant. And on this account, it was submitted on behalf of all the defendants, that the plaintiff's application must fail because the third defendant was not entitled to any rebate, and secondly, given the role of Gismo Investments Ltd and the plaintiff's shareholding in it, the plaintiff obviously did not act in good faith when he made the application.

6. Miss Hing responded on behalf of the plaintiff by asserting that the bank account of Gismo Investments Ltd was operated solely by the first defendant who did not account to him or his father. This was a strange state of affairs, the how's and why's of which were not adequately explained.

Counsel also referred me to the plaintiff's fourth affidavit which explains the purpose of Gismo Investments Ltd and why the first defendant was employed by that company, namely to provide consultancy services to a company called Citra Flour Mills Nusantara. She also pointed to the apparent weaknesses in a Price Waterhouse Coopers' report of 14 December 2001 which stated in its conclusion that it was BULOG which is entitled to the rebates. The plaintiff also denied any knowledge of payment of rebates into or out of Gismo Investments Ltd's account in his fourth affidavit. Hence, Mr. Lim sought leave to file a further affidavit in response to this, and also to have the plaintiff cross-examined. I do not see any need to expand or broaden the case at this stage. At this stage the court need not and ought not be drawn into an adjudication on the disputed facts. That is what a *prima facie* legitimate or arguable case is all about. Leave to cross-examine in such situations ought to be sparingly granted. I need only consider the grounds and points of challenge raised by the defendants to see if they are sufficient in themselves to destroy the credibility of the plaintiff's propounded case without a full scale hearing to determine who was truthful and who was not.

7. The requirements under s 216A of the Companies Act that the applicant has to satisfy are straightforward and are set out in sub-s 3 of that section. The defendants in this case challenged the application on all three requirements. I shall deal quickly with the shortest one first. Mr. Bull argued that the plaintiff did not give the requisite 14 days notice because he applied to amend the application to include a claim for the price rebate when his application was initiated on the basis of a claim for "volume rebates". In my view, the amendment was in respect of the particulars; the action for which leave was sought concerned a breach of fiduciary duties and I am satisfied that the defendants were in no way prejudiced by the inclusion the additional item especially since the basic position of the defendants is the same in respect of both rebates. Secondly, in respect of the argument that the action cannot be in the interests of the company. Mr. Bull referred to the decision in *Teo Gek Luang v Ng Ai Tiong & Ors* [1999] 1 SLR 434 for his argument that the phrase "*prima facie* in the interests of the company" means that the applicant must show a good arguable case. I set out below the passage relied upon by counsel, for ease and convenience:

> "Although it was and is a piece of remedial legislation enacted to put in place a procedure to protect the interests of minority shareholders, the interpretation of the provisions should be purposive and I entertained some reservation that a 'liberal interpretation in favour of the complainant should be given as stated by the Ontario Court of Appeal in *Richardson Greenshields of Canada Ltd v Kalmacoff* (1955) 123 DLR (4th) 628, 636. Management decisions should generally be left to the Board of Directors. Members generally cannot sue in the name of the company. A minority shareholder could attempt to abuse the new procedure, which would be as undesirable as the tyranny of the majority directors who unreasonably refuse to act. The Canadian appellate court, however, at the same page went on to say that '*(b)efore granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one.*' I agree with this latter formulation and adopted that approach" [Emphasis added]

8. I, in turn, agree entirely with what was said in the above case. The terms "legitimate" and "arguable" must be given no other meaning other than what is the common and natural one, that is, that the claim must have a reasonable semblance of merit; not that it is bound to succeed or likely to succeed, but that if proved the company will stand to gain substantially in money or money's worth. But it is axiomatic that ordinarily, legal action is best left to the decision of the board of directors. It will not be in the interests of a company if all shareholders are at liberty to take it to court on Quixotic crusades. This is obviously more pertinent where there are many diverse groups of shareholders in the company. In the present case, there are admittedly, only three groups of

shareholders divided into two camps, one the majority and the other the minority. Furthermore, in this case, if the plaintiff is right and proves his case, the third defendant stands to gain a large sum of reimbursement from the first and second defendants - much more than the $13,322.58 that the applicant in *Teo Gek Luang* case was granted leave to pursue. These are clearly important considerations. However, the requirements under s 216A must first be satisfied. In this regard, one must not lose sight of what the plaintiff sought to achieve with this application. That was made clear from the beginning, namely, that the first and second defendants were in breach of their fiduciary duties in causing rebates from the Australian Wheat Board to be channeled to a third party. The *prima facie* case that he must show is that the company was entitled to these rebates. The affidavits and documents that were filed in this case, as well as the numerous submissions made by counsel for all parties have at best raised some suspicion that the plaintiff and the first defendant might not have told their stories to court, the full and true. Cutting away the verbiage, dust and smoke, I am satisfied that on the documentary evidence that Mrs. Thio (who took over as counsel for the first and second defendants midway through the proceedings) drew my attention to - in particular, the documents from the Australian Wheat Board - the beneficiary to any rebate from the Australian Wheat Board is the company called Citra Flour Mill and not the third defendant. For this reason alone, the plaintiff's application must fail. I accept that there are some unanswered questions, for example, it is certainly baffling as to why the first defendant was running a personal account for Gismo, the company in which the plaintiff and his father were at all material times the shareholders and through which rebates from the Australian Wheat Board to Citra Flour Mill were paid. Questions such as this, by themselves, are not, however, relevant in an application under s 216A. Whether they may be more relevant in some other cause of action is not necessary for my comment, although it will not have escaped the parties that if the defendants are right, Citra Flour Mill (which I understand was and still is under the control of the plaintiff) is the proper party to claim the rebates. That, of course, is another story. Having perused and considered the documents and submissions here, I am satisfied that there is no necessity to file any further affidavit or for any deponent to be cross-examined. Accordingly, those applications are dismissed.

9. Counsel for the defendants submitted that the application proper ought to be dismissed because the plaintiff did not act in good faith. It is not an important point in view of my finding above, but I will address an argument by Mr. Bull that the burden is on the plaintiff to prove that he acted in good faith. The question of the burden of proof on this specific issue may end up in the great heap of irrelevance, but all that s 216A(3)(b) says is that the court must be satisfied that the applicant acted in good faith. If at all, the burden would be on the opponent to show that the applicant did not act in good faith; for I am entitled, am I not, to assume that every party who comes to court with a reasonable and legitimate claim to be acting in good faith - until proven otherwise. What the term *good faith* actually means in this context has baffled many an academic scholar of the law - see, for example, *Corporate Law In Canada: The Governing Principles* (2nd Ed) by GB Welling, at page 528, and *Minority Shareholders' Rights And Remedies*, M Chew at page 246. It would appear, in my view, that this requirement overlaps in no small way with the requirement that the claim must be in the interests of the company. Beyond that, whether malice or vindictiveness of the applicant ought to be taken into account must be left to the touch and feel of the court in each individual case because, as in most requirements of the law that repose a measure of discretion with the court, there are bound to be matters and factors that defy any or any precise description. Having address my mind thus, I revert to the present case. In this regard, I shall have to reiterate my doubts that the parties have been fully candid. But it must be remembered for the purposes of an application under s 216A, the party whose good faith is put in issue is that of the applicant. In taking the circumstances as set out in the affidavits and gleaned from the documents, regardless of whose burden it was to prove or disprove good faith, I am not satisfied that the plaintiff came before me in good faith. Good faith would have required him to set out the story in full from the beginning but he did not do so. I am not persuaded that he had no idea that the Australian Wheat Board had been giving and paying rebates

through the company Gismo Investments in which he and his father were shareholders and directors. The plain statement that the bank accounts of that company were operated by the first defendant alone is not a sufficient explanation because it raises further questions such as to how and why that was allowed to be so.

10. For these reasons this application fails and is accordingly dismissed. I shall hear the parties as to the question of costs at a later date if they are unable to agree.

Sgd:

Choo Han Teck
Judicial Commissioner