

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
ORIGINATING SUMMONS NO. WA-24NCC-294-06/2021**

**In the matter of Tian An Trading
Sdn Bhd (Company No: 848748-P)**

And

**In the matter Section 347, 348 and
350 of the Companies Act 2016**

And

**In the matter of Order 88 of the
Rules of Court 2012**

BETWEEN

**LOH TECK WAH
(NRIC NO. 731106-14-5267)**

... APPLICANT

AND

**1. LIM PANG KIAM
(NRIC NO. 631208-01-5529)**

**2. YAP CHEE KHENG
(NRIC NO. 730526-14-5285)**



**3. TIAN AN TRADING SDN BHD
(COMPANY NO. 848748-P))**

... RESPONDENTS

JUDGMENT

A. Introduction

[1] The applicant filed an originating summons, seeking leave to commence proceedings in the name of the 3rd respondent, against the 3rd respondent's directors, employees and suppliers.

[2] The proposed action is essentially a claim for the return of monies allegedly paid out improperly by the 3rd respondent to suppliers. The applicant claimed that the price of goods supplied was marked-up, leading to significant payments being improperly paid out of the 3rd respondent's funds.

[3] I found that the applicant failed to show a good cause of action with a reasonable prospect of success, in respect of the proposed action. The applicant did not demonstrate how the arrangements made with suppliers were improper. Further, the probable likelihood is that the applicant is seeking to commence derivative proceedings for a collateral purpose, which is to harm the respondents. As such, my view is that this application for leave is not made in good faith, and the granting of leave is not in the best interest of the 3rd respondent.

[4] With these findings, I dismissed the originating summons.



B. Background Facts

[5] The applicant, the 1st respondent and the 2nd respondent were in business together since 2002. This partnership was referred to as the PNL Group.

[6] Since 2019, there were ongoing discussions on the split of the business. Disagreements arose, leading to the 1st respondent issuing an email dated 10 February 2020, stating his dissatisfaction and distrust with the applicant. In the email, he expressed his desire to end the partnership between them, and for parties to go their separate ways. Following from this, multiple actions were filed by the parties.

[7] The 3rd respondent is a company within the PNL Group. The 3rd respondent's shareholders are the applicant, the 1st respondent and the 2nd respondent, while its directors are the 1st and 2nd respondents. The applicant ceased to be a director of the 3rd respondent on 17 June 2020.

[8] The applicant filed this action seeking leave of court to allow him to commence derivative proceedings in the name of the 3rd respondent against the following parties:

- a. the 1st and 2nd respondents, directors of the 3rd respondent;
- b. Lee San Koon, Kok Yian Hen, She Choy Chen and Lai Pei Yee, employees of the 3rd respondent (collectively, the "Employees"); and



- c. Maxim Code Sdn Bhd (“Maxim Code”) and Union Brother Sdn Bhd (“Union Brother”), suppliers of the 3rd respondent (collectively, the “Suppliers”).

[9] The gist of the applicant’s complaint is that the 1st and 2nd respondents, as directors of the 3rd respondent, had acted in breach of their statutory and fiduciary duties in setting up the Suppliers, and subsequently in making improper payments from the 3rd respondent to the Suppliers. The applicant claimed that purchases from the Suppliers were marked up by an average of 5%, leading to significant payments being improperly paid out of the 3rd respondent’s funds. Thus, the applicant is seeking leave to commence proceedings to recover monies allegedly paid out improperly from the 3rd respondent.

C. Assessment And Findings

Derivative Proceedings

[10] This action is filed under sections 347 and 348 of the Companies Act 2016 (“CA 2016”). Section 347 grants the right to a complainant to initiate derivative proceedings, while section 348 sets out the process to obtain leave to initiate proceedings. The relevant provisions are set out below:

“347 Derivative proceedings

(1) A complainant may, with the leave of the Court initiate, intervene in or defend a proceeding on behalf of the company ...



(2) *Proceedings brought under this section shall be brought in the company's name.*

(3) *The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.*

348 Leave of Court

(1) *An application for leave of the Court under section 347 shall be made to the Court without the need for an appearance to be entered.*

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

(3) *Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.*

(4) In deciding whether or not the leave shall be granted, the Court shall take into account whether –

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave be granted.



(5) *Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court.”*

(emphasis added)

[11] The first issue to be considered is whether the applicant is a “complainant” who has a right to initiate proceedings pursuant to section 347(1) of the CA 2016. The definition of “complainant” in section 345 of the CA 2016 includes a member and director of a company. It is undisputed that the applicant is a member and director of the 3rd respondent, and is a “complainant” as defined under section 345 of the CA 2016. The applicant therefore has the *locus standi* to file this action.

[12] For leave to be granted, requirements in section 348 of the CA 2016 must be met. The first requirement pursuant to section 348(2) is that the complainant must give 30 days’ notice in writing to directors of the company, of his intention to apply for leave. It is not in dispute that the applicant had given notice in writing to the directors of the 3rd respondent of his intention to make this application for leave.

[13] Further, section 348(4) of the CA 2016 provides that in deciding whether or not leave should be granted, the court must be satisfied that:

- a. The complainant is acting in good faith; and
- b. It appears *prima facie* in the best interest of the company that the application for leave is granted.



Is The Applicant Acting In Good Faith?

[14] The test to determine whether an applicant is acting in good faith is set out in ***Swansson v RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583***. ***Swansson*** was referred to in ***Celcom (Malaysia) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636***, where the Court of Appeal held that the onus of proof to show good faith is on the applicant, on a balance of probabilities.

[15] The Court of Appeal went on to state that this requirement will depend on the factual circumstance before the court. The following passage of the judgment of Palmer J in ***Swansson*** was cited:

*“Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in determining whether the good faith requirement of s 237(2)(b) is satisfied. **The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success.** Clearly, whether the applicant honestly holds this belief **would not simply be a matter of bald assertion:** the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. **The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.**”*

(emphasis added)

[16] Based on the above, two factors must be met to satisfy the requirement of good faith:



- a. The first is that the applicant must honestly believe that a good cause of action exists, and has a reasonable prospect of success. This belief cannot be based on a bald assertion.
- b. The second is that the applicant cannot be seeking to bring the derivative action for a collateral purpose, as would amount to an abuse of process.

[17] In this case, I find that the applicant has not proven, on a balance of probabilities, that he is acting in good faith. I came to this finding, as the applicant had not met either of the above factors, to prove good faith. Firstly, he has not shown that a good cause of action and a reasonable prospect of success exists, in respect of the proposed derivate action. Secondly, it is likely that he is seeking to bring the derivate action for a collateral purpose.

[18] In considering the first factor, an understanding of the business of the 3rd respondent with Maxim Code and Union Brother is essential.

[19] The main business of the 3rd respondent is the import of food products and their sale to local customers such as hypermarkets and retail shops. The Suppliers, Maxim Code and Union Brother, source food products from Korea and China respectively, to complement the product range of the 3rd respondent. Maxim Code supplies the Korean Samyang Food products and other Korean food brands, while Union Brother supplies Chinese food products, namely Haidilao, Totole and White Rabbit candies.



[20] Maxim Code is a company wholly-owned by the 2nd respondent, and in which the 2nd respondent is the sole director. The 2nd respondent was also a shareholder and director of Union Brother but he had since sold his shares in the company and resigned as a director. The 2nd respondent had informed the applicant and the 1st respondent of his interests in Maxim Code and Union Brother, and invited them to invest in the companies. They declined.

[21] The main issue raised by the applicant is the 5% mark-up from the price of the products, paid by the 3rd respondent to the Suppliers. The 2nd respondent explained that the 5% mark-up is a fee for the sourcing and arranging of supplies, as the supplies are imported from Korea and China. The applicant and the 1st respondent were informed of this arrangement. Further, the applicant had received documents that provide details of the calculation of the 5% mark-up fee. On these occasions, he did not see it fit to raise any objections to this arrangement. Further, he had approved vouchers for payments in favour of Maxim Code and Union Brother.

[22] Taking into account the applicant's knowledge of the arrangement, his failure to raise any objection to this arrangement and his approval of payment vouchers, I am of the view that the applicant had given tacit approval to the arrangement. In this circumstance, it is unlikely that the applicant would be able to show that he honestly believed there was a good cause of action in respect of the proposed derivative action.

[23] Further, there was no evidence put forward by the applicant that such an arrangement is illegal or irregular. The court finds that on the balance of probabilities, it is more likely that the arrangement between the 3rd respondent and the Suppliers was structured strategically for the



purpose of the import into and sale of products in Malaysia. I am of the view that such an arrangement was unlikely to have been created for a nefarious or improper purpose.

[24] The applicant has also not shown how this arrangement reveals any wrong-doing or improper conduct by the Employees or the Suppliers, so as to give rise to a good cause of action with a reasonable prospect of success against them.

[25] Other factual considerations are also relevant to determine whether the applicant acted in good faith. The affairs of the 3rd respondent had at all times been managed by the 2nd respondent, and the applicant had intended to let go of his stake in the 3rd respondent, in exchange for a stake in other companies in the PNL Group. The applicant did not show any long-term interest in the 3rd respondent. There are also multiple ongoing proceedings filed between the parties as a result of their partnership dispute.

[26] Taking the evidence as a whole, the probable likelihood is that the issues raised by the applicant in relation to this arrangement are afterthoughts, with the collateral intention of causing damage to the 3rd respondent, and harm to the 1st and 2nd respondents.

[27] These factual considerations have led me to the finding that the second factor of good faith, that the applicant cannot be seeking to bring the derivative action for a collateral purpose, would not have been met.

[28] In ***Ang Thiam Swee v Low Hian Chor [2013] 2 SLR 340***, the Singapore Court of Appeal held that the respondent did not act in good faith in applying for leave to commence a derivative action, as the



respondent was actuated by private motives which amounted to a collateral personal purpose. These collateral purposes include seeking additional remuneration from the company and attempting to secure control of the company. There was also obvious ill-will between the parties in relation to financial issues of the company.

[29] Similarly, in this case, there was obvious ill-will. In the proposed commencement of the derivative action, the applicant appears to have been motivated by the desire to cause difficulties and harm to the respondents. This, coupled with the questionable cause of action against the 1st and 2nd respondents, the Employees and the Suppliers, have led me to the finding that the applicant has not demonstrated good faith in filing this application.

Is It Prima Facie In The Best Interest Of The 3rd Respondent That This Application For Leave Is Granted?

[30] The next requirement that the court must be satisfied with is that it is *prima facie* in the best interest of the 3rd respondent to grant this application for leave.

[31] In considering this requirement, the court has to look into the commercial interests of a defendant, to see if the defendant will gain substantially in the proposed derivative action (see ***Eow Fun Siew & Chen Siew Wei v Mutual Life Sdn Bhd [2017] 1 LNS 1259***).

[32] The Australian case of ***Re Gladstone Pacific Nickel Ltd [2011] NSWSC 1235, BC201109246*** explains what constitutes the best interest of a company:



*“[57] The requirement that the court be satisfied that it is in the best interests of the company that the applicant be granted leave raises two questions. One is whether it is in the best interests of the company that the action be brought. The other is whether it is in the best interests of the company that it be brought by the applicant. **The court must consider the interests of the company as a whole.** As Brereton J said in *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859 at [44]:*

***The phrase “best interests” directs attention to the company’s separate and independent welfare.** *Charlton v Baber* (2003) 47 ACSR 31, [52]; *Fiduciary Ltd v Morningstar Research Pty Ltd* [2005] NSWSC 442, [46]. This imports the familiar concept of the **interests of the company as a whole.** ... Whether the “best interests” of the company as a whole reflect those of the shareholders taken together in light of the corporate objects, or those of the creditors which will prevail in the context of insolvency, will be influenced by the status of the company. *Walker v Wimborne* (1976) 137 CLR 1 ; 3 ACLR 529; *Spies v R* (2000) 201 CLR 603 ; 173 ALR 529 ; 35 ACSR 500; *Charlton v Baber* (2004) 47 ACSR 31, [53].*

***In considering what is in the best interests of the company, it is necessary to consider the prospects of success of the action, the likely costs and likely recovery if the action is successful and likely consequences if it is not.** One relevant*



*matter in considering these issues is the nature of any indemnity the applicant has offered to the company if the action is brought and the likelihood that the company will recover under that indemnity. **It is also necessary to consider the resources the company will be required to devote to the action and the resources it has available, together with the effect that the action may have on other aspects of its business.** Finally, it is necessary to consider whether **some other remedy is available to the applicant so as to make the proposed action unnecessary** from its point of view: see **Swansson [2002] NSWSC 583 ; (2002) 42 ACSR 313 at [56]ff.**”*

(emphasis added)

[33] I have found earlier that the applicant had not been able to show that he has a good cause of action and a reasonable prospect of success in the proposed claim by the 3rd respondent against the 1st and 2nd respondents, the Employees and the Suppliers. With this finding, I am unable to see how it would be in the best interest of the 3rd respondent for leave to be granted. The action would be a waste of valuable resources of the 3rd respondent, to further a cause with no reasonable prospect of success.

[34] Commencing proceedings against the Suppliers would affect the commercial arrangements between the 3rd respondent and these companies, thus affecting access to and supplies of products. It is important to also highlight that the collaboration between the 3rd respondent and the Suppliers improved sales and generated profits for the 3rd respondent.



[35] Taking the above into account, I am not satisfied that it is *prima facie* in the best interest of the 3rd respondent for this application for leave to be granted.

D. Decision

[36] Having found that find that the applicant is not acting in good faith in seeking leave to commence a derivative action, and that it would not be *prima facie* in the best interest of the 3rd respondent for leave to be granted, I dismissed the originating summons, with costs.

Dated 28 September 2022

- sgd -

Adlin binti Abdul Majid
Judicial Commissioner
High Court of Malaya
Commercial Division (NCC6)
Kuala Lumpur

Counsel:

Applicant : Mohamed Izzul Faris Mohd Ghani (together with John Wong Tze Yeong) of Messrs. Syed Ibrahim & Co

Respondents : Yap Boon Hau (together with Goh Zhi En of Messrs. Mah-Kamariyah & Philip Koh



Legislation referred to:

Companies Act 2016, sections 347, 348 and 350

Cases referred to:

Ang Thiam Swee v Low Hian Chor [2013] 2 SLR 340

Celcom (Malaysia) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636

Eow Fun Siew & Chen Siew Wei v Mutual Life Sdn Bhd [2017] 1 LNS 1259

Re Gladstone Pacific Nickel Ltd [2011] NSWSC 1235, BC201109246

Swansson v RA Pratt Properties Pty Ltd & Anor [2002] NSWSC 583

