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Case Update:-

Ho Yew Kong v Sakae Holdings Ltd [2018] SGCA 33

Civil Litigation Practice Series





“Shareholder Minority Oppression Claims”

Ho Yew Kong v Sakae Holdings Ltd [2018] SGCA 33

The Context

In this 2018 Court of Appeal judgment, the apex Court of Singapore had the opportunity to address two main matters (amongst various other issues) of legal significance in relation to shareholder minority oppression claims brought under Section 216 of the Companies Act (Cap. 50):-

- a) First, bearing in mind that a shareholder minority oppression claim can only be brought to vindicate a personal wrong - How does one distinguish between personal wrongs against shareholders of a company and corporate wrongs against the company?
- b) Second, whether a breach of the duty of care, skill and diligence (as opposed to the fiduciary duties) that a director owes a company would suffice to support a finding of commercial unfairness for the purposes of a shareholder minority oppression claim.

Minority Oppression Claims (Section 216) v. Derivative Actions (Section 216A)

At the outset, the Court of Appeal

reiterated that shareholder minority oppression claims and shareholder derivative actions are “intended to have distinct spheres of application.”:-

- “Section 216 provides a remedy for a wrong suffered by a member of a company in its personal capacity. An action thereunder is brought by the member in its own name to protect its interests as a member of the company.”
- “In contrast, s 216A allows a member of a company, with the court’s leave, to bring a derivative action in the name of the company where a wrong is alleged to have been done to the company (that is, a corporate wrong) and the controlling directors refuse to bring an action to remedy that wrong.”
- There is a “need to prevent the improper circumvention of the proper plaintiff rule and the concomitant principle barring the recovery of reflective loss The proper plaintiff rule in *Foss v Harbottle* ... provides that in an action to seek redress for a wrong alleged to have been done to a company, the proper plaintiff is *prima facie* the company ...; in other words, only the company can sue for the loss that it has suffered.”

To distinguish between personal wrongs against shareholders of a company and corporate wrongs against the company

To ensure that an applicant does not claim for a loss suffered by the company vide a shareholder minority oppression claim, the Court of Appeal clarified that the appropriate inquiry ought to be framed as such:-

Is a plaintiff who brings an oppression action under s 216, instead of seeking leave to commence a statutory derivative action under s 216A, abusing the process?

To determine if a plaintiff is indeed “abusing the process”, the Court of Appeal provided the following analytical framework:-

(a) Injury

(i) What is the real injury that the plaintiff seeks to vindicate?

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) Remedy

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

(ii) Is it a remedy that can only be obtained under s 216?

In a nutshell, in assessing such injury suffered by the plaintiff, the crucial question is whether the plaintiff shareholder can demonstrate an injury to it that is distinct from the wrong done to the company.

Whereas in dealing with the remedy sought by the plaintiff, the Court of Appeal explained that if the essential remedy sought is one that can only be obtained in an action under s216, then that would tend to be a strong indicator that the action brought under that provision is not an abuse of process

On that same note, “an oppression action under s216 should generally not be permitted where the essential or sole remedy sought is a remedy for the company. In such a case, it will also be evident that the plaintiff's primary purpose in bringing the action is not to obtain a remedy that brings to an end the situation by which it has been prejudiced or harmed as a shareholder.”

“Personal Wrongs v. Corporate Wrongs”

Can a breach of a director's duty of care, skill and diligence (as opposed to the fiduciary duties) suffice to support a finding of commercial unfairness for the purposes of a shareholder minority oppression claim?

On the facts of this particular case, the Court of Appeal concluded that the director in question was indeed in breach of his duty of care, skill and diligence (negligence in monitoring the management of the company's affairs) but was short of breaching his fiduciary duties to the company.

The question was therefore whether that director's breach of his duty of care, skill and diligence could have supported the plaintiff's oppression claims against him.

As a starting point, the Court of Appeal accepted the general rule that negligent management of a company may amount to oppressive conduct where there is "*serious mismanagement of a company's business*" that unfairly prejudices the interests of minority shareholders.

That said, it is cautioned that "*the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct*".

The aforesaid position was premised on the following considerations:-

First, it was in general not for the court to resolve disagreements arising out of whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or whether a particular proposal relating to the conduct of the company's business was commercially sound.

Second, there should be no finding of unfairness to a shareholder if the quality of a company's management turned out to be poor because a shareholder acquired shares in a company knowing that their value would depend in some measure on the competence of the company's management and so accepted the risk that the company's management might turn out not to be of the highest quality.

In summary, the Court of Appeal noted that it will "*not be easy for a shareholder who bases its oppression action on allegations of mismanagement to meet the requisite threshold for establishing oppression.*"

Indeed, in this particular case, the Court of Appeal concluded that the said director's incompetence and breach of his duty of care, skill and diligence is nothing that takes it over the threshold so as to amount to commercial unfairness to the plaintiff.

"Serious mismanagement tantamount to oppression?"



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