

Court of Appeal Gives Guidance on Bringing of Shareholder Oppression Actions

The Court of Appeal has set out an analytical framework to provide guidance in the situation where an oppression action features both personal and corporate wrongs: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] SGCA 33.

Our Comments

Unlawful or unfair conduct by directors or officers of companies can give rise to wrongs suffered by a member of a company in its personal capacity ("personal wrongs") or wrongs done to the company ("corporate wrongs").

The Companies Act ("Companies Act") provides separate and distinct remedies for personal and corporate wrongs:

- Section 216 of the Companies Act ("Section 216") provides a remedy for a personal wrong. An action under Section 216 is brought by the member in its own name to protect its interests as a member of the company. No leave of court is needed to bring an action under Section 216.
- In contrast, Section 216A of the Companies Act ("Section 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 corporate wrong is said to have been done to the company and the controlling directors refuse to bring an action to remedy the corporate wrong.

However, oppression claims sometimes feature both personal and corporate wrongs, in that what appears to be a corporate wrong can, to some degree, also constitute a personal wrong. A common example is where a majority shareholder diverts or misappropriates company funds for its own benefit. The majority shareholder would be committing a wrong both against the company and the minority shareholders if the diversion or misappropriation affects the interests of the minority shareholders in an unfairly prejudicial manner.

When such "overlap" cases arise, the key question which arises is this: should the minority shareholder commence an oppression claim under Section 216 or seek leave of court to bring a statutory derivative action under Section 216A?

The Court of Appeal has, in this important decision, provided a practical and helpful analytical framework to assist litigants and lawyers in addressing that vexed question.

This update takes a look at the Court of Appeal's decision.

Background

The key facts relevant to the issues discussed in this update are summarised below.

In 2009, one Ong Siew Kwee ("Ong") proposed to Douglas Foo ("Foo"), the founder and chief executive officer of Sakae Holdings Ltd ("Sakae"), that they come together to acquire more than 90% of the units in Bugis Cube, a shopping mall. The aim was to redevelop Bugis Cube and sell it at a profit.

Griffin Real Estate Investment Holdings Pte Ltd ("Joint Venture Company") was to be the joint venture vehicle through which this aim would be realised.

In September 2010, Sakae acquired a 24.69% stake in the Joint Venture Company. The remaining 75.31% of Joint Venture Company's issued share capital was held by Gryphon Real Estate Investment Corporation Pte Ltd ("Gryphon"), of which Ong was a shareholder. Ong was also a director of Gryphon. At the time of the trial, Gryphon held 43.35% of the Joint Venture Company's issued share capital, ERC Holdings Pte Ltd, another company substantially owned and controlled by Ong, held 29.96%, while Sakae continued to hold 24.69%.

In early 2013, Sakae was informed by an international firm of accountants appointed by Foo that irregular financial transactions had been undertaken in the Joint Venture Company. Foo had appointed the accountants to inspect the Joint Venture Company's accounting records and financial affairs after he noticed certain transactions which diverted substantial amounts of money from the Joint Venture Company to entities directly or indirectly related to Ong.

Sakae subsequently, among other things, commenced Suit No. 1098 of 2013 in the Singapore High Court ("Suit No. 1098") against Ong, his associates and various companies owned and controlled by Ong. In that action, Sakae sought relief under Section 216 on the basis that the defendants had engaged in seven transactions through which substantial amounts of money were misappropriated by the defendants from the Joint Venture Company without Sakae's knowledge, and that this conduct was oppressive to Sakae as a minority shareholder of the Joint Venture Company.

The High Court's Decision

Ruling in favour of Sakae in Suit No. 1098, the High Court judge found that six of the seven impugned transactions were oppressive to Sakae and, among other things, ordered that the Joint Venture Company be wound up and that Ong and his associates pay the Joint Venture Company certain sums diverted from it under those six transactions.

A number of the defendants in Suit No. 1098 appealed to the Court of Appeal against the High Court judge's findings in Suit No. 1098.

The Court of Appeal's Decision

On appeal, the appellants argued, among other things, that Sakae was not entitled to relief under Section 216 on the ground that its claims were based not on personal wrongs suffered by Sakae itself, but on wrongs done to the Joint Venture Company. Their position was that Sakae should have applied for leave under Section 216A to commence a statutory derivative action instead of seeking a remedy under Section 216.

The Court of Appeal affirmed that Section 216 should not be used to vindicate wrongs which are in substance wrongs committed against a company and thus corporate rather than personal in nature. It also articulated an analytical framework to guide the courts in ascertaining whether an oppression claim which contains features of both personal and corporate wrongs and which is being pursued under Section 216 is an abuse of process.

Section 216 is inapplicable to corporate wrongs

Affirming the view which it earlier expressed in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723, the Court of Appeal reiterated that Section 216 should not be used to vindicate corporate wrongs.

The Court of Appeal observed that Sections 216 and 216A are significantly different in terms of both process and the substance of the causes of action:

- In terms of process, leave of the court is required for an action under Section 216A to be commenced. This, however, is unnecessary for an action commenced under Section 216.
- As to the substance of the cause of actions, the statutory derivative action under Section 216A is intended to enable minority shareholders to bring an action *in the company's name* to right the wrong done to the company where those in control of the company are causing harm to the company or are breaching their duties to the company and thus cannot be counted on to cause the company to take steps to protect or advance its interests. In contrast, the oppression action under Section 216 is intended to enable minority shareholders to bring an action *in their own names* to protect themselves from being unfairly prejudiced by majority shareholders who use their dominant power to subject them to commercially unfair treatment.

Despite some similarities between Sections 216 and 216A, the Court of Appeal observed that the two causes of action are intended to have distinct spheres of application. This is to prevent the circumvention of the rule that only the company can sue for loss that it has suffered (the "proper plaintiff" rule) and the principle barring the recovery of reflective loss, i.e. the loss suffered by a shareholder which is merely a reflection of the loss suffered by the company which would be made good if the company were able to, and did, enforce its rights.

When an oppression claim pursued under Section 216 which features both personal and corporate wrongs would be considered an abuse of process

The Court of Appeal first framed the key question to be addressed in "overlap" cases as follows: is a plaintiff who brings an oppression action under Section 216, instead of seeking leave to commence a statutory derivative action under Section 216A, abusing the process?

The Court of Appeal then laid down the following analytical framework to ascertain whether an oppression claim that is being pursued under Section 216 is an abuse of process:

- (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 Section 216?

In line with the approach adopted in a number of other Commonwealth jurisdictions, these questions focus squarely on the essential remedy sought and its relation to the real injury which the plaintiff shareholder complains of.

The Court of Appeal highlighted that:

- The legislature has provided a separate and distinct remedy for corporate wrongs.

As the oppression provisions under Section 216 can be invoked without the court's leave and, if successfully invoked, can result in the grant of a much broader range of remedies than those available in a statutory derivative action under Section 216A, the real concern in "overlap" cases is to ensure that plaintiffs do not (improperly) seek to pursue an oppression action when a remedy under a statutory derivative action is available and more appropriate.

- After all, it is in the remedies that we find one of the key differences between the two types of action since, unlike the position under Section 216, remedies such as a winding-up order or a share buyout order are not available in an action under Section 216A. If the essential remedy sought is one that can only be obtained in an action under Section 216, then that would tend to be a strong indicator that the action brought under that provision is not an abuse of process.
- An oppression action under Section 216 should generally not be permitted where the essential (or, as the case may be, the sole) remedy sought is a remedy for the company, such as a restitutary order in favour of the company. In such a case, the presumptively appropriate remedy would be the statutory derivative action under Section 216A. 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. In contrast, a plaintiff who seeks an essential remedy directed at bringing to an end the oppressive conduct which it has been subjected to as a

shareholder will likely be permitted to pursue its claim by way of an oppression action under Section 216 even if, as part of that essential remedy, it also seeks remedies in favour of the company such as restitutary orders. This would be the case where the remedies sought by the plaintiff, such as a share buyout or a winding-up order, will be affected by suitable restitutary orders in favour of the company.

- In addition, to properly invoke Section 216, the plaintiff would have to identify the real injury which it has suffered and establish that the injury does amount to oppressive conduct against it as a shareholder. In this regard, it will be relevant to examine how the real injury which the plaintiff suffers as a shareholder is distinct from and not merely incidental to the injury which the company suffers. This will also have to be examined in the context of the essential remedy which the plaintiff is seeking and whether that remedy is in fact directed at the real injury which the plaintiff suffers as a shareholder. It follows that the mere fact that an instance of unlawful conduct relied on by the plaintiff could also have formed the basis of a statutory derivative action pursued in the company's name will not in and of itself be a bar to an oppression action under Section 216.
- To address concerns that the rationale underlying the "proper plaintiff" rule and the reflective loss principle might be undermined by the analytical framework, the Court of Appeal clarified that, where an action under Section 216 gives rise to a risk of double recovery or prejudice to the creditors or shareholders of the company, this should be dealt with by crafting the orders made in suitable terms to avoid such a risk.

Applying the analytical framework to the facts of the case, the Court found that Sakae's oppression claims pertained to personal wrongs committed against it as a minority shareholder and hence were claims properly pursued by way of an action under Section 216.

The Court was satisfied that the real injury which Sakae sought to vindicate was the injury to its investment in the joint venture and the breach of its legitimate expectations as to how the Joint Venture Company's affairs generally and its financial investment in the Joint Venture Company would be managed.

Further, the essential remedy sought by Sakae was to exit the joint venture. In its statement of

claim in Suit No. 1098, Sakae sought either a winding up of the Joint Venture Company or a buyout of its shares in the Joint Venture Company.

In the Court's view, either remedy offered the only way in which Sakae could exit the joint venture with as little loss as possible and thereby meaningfully vindicate the real injury that it had suffered, namely, the misuse of its investment in the Joint Venture Company and the breach of its expectations as to how the Joint Venture Company would be managed. These remedies were available only in an oppression action under Section 216, and not under a statutory derivative action under Section 216A.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or the following partner:



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