

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 127 of 2018

BETWEEN: **SEAPACIFIC LIMITED** a limited liability company having its registered office at WBB Chartered Accountants Ltd. Level 1, 111 Hurstmere Road, Takapuna, Auckland 0622, New Zealand.

APPLICANT

AND: **SEA PACIFIC (FIJI) LIMITED** a limited liability company having its registered office at Suva, Fiji Islands.

RESPONDENT

Plaintiff: Mr Shelvin Singh

Defendant: Ms M. Fong

Date of Hearing: 15.10.2019

Date of Judgment: 18.10.2019

JUDGMENT

Catch words

Derivative Actions- Sections 180, 181, 182, 183 and 185 of Companies Act 2015- grant of leave to file action- Discretionary power- mandatory considerations-

Cases cited in the judgment

1. *Vrij v Boyle* (1995) 6 TCLR 621; [1995] 3 NZLR 763; (1995) 7 NZCLC 260,844
2. *He v Che* [2015] NZAR 437; [2014] NZCA 153
3. *Foss v Harbottle* (1843) 2 Hare 461, 491; 67 ER 189
4. *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221
5. *Swain v Hillman* [2001] 1 All ER 91 at 92

INTRODUCTION

1. This is an application by way of originating summons seeking to institute a derivative action. Applicant is 49% shareholder of Respondent company and thus a minority shareholder. It seeks to file a derivative action against majority shareholder and two other entities including a commercial bank. Applicant is also claiming that 51% majority shares held by Carl Harvie Probert, was in trust. The proposed derivative

action alleges conspiracy, misappropriation, and breach of Director's duty by Carl Harvie Probert through transfer of funds to his company and also payment of his personal debts from money received by Respondent, and also breach of mandate by commercial bank. Though the Respondent is solvent it is not conducting any business at the moment. Respondent is objecting to the derivative action and its majority shareholder Carl Harvie Probert had denied any wrongdoing and had sworn an affidavit. This Application is made in terms of Section 180 of Companies Act 2015 (The Act). Leave of Court is required to file derivative action. Section 180(2) the Act contains non exhaustive mandatory factors to be considered, before granting leave. Having considered the factors stated therein, they all favour granting leave to the Applicant to institute derivative action in the name of Respondent for the relief sought.

FACTS

2. Plaintiff is a company registered in New Zealand (NZ) and has its registered office at the address stated in this originating summons and Respondent is a legal entity registered under laws of Fiji. It was incorporated under a different name but after several changes to its name presently it stands as stated in originating summons.
3. Plaintiff is renowned shipping and barging company in Australia and NZ. In or around 2006 it sought investment in Fiji, and for the area of investment there was requirement to have local shareholding.
4. At the time of incorporation Plaintiff and a local shareholder by the name of David Aidney had equal shareholdings (one share each) of the Respondent. According to the Plaintiff David Aidney held his share of Respondent in trust for Plaintiff.
5. According to the Plaintiff in order to comply with the local regulatory requirement for investment of foreign entity for area of investment, further allotment of 48 shares to the Plaintiff and 50 shares to said David Aidney were made.
6. According to the affidavit in opposition the allotment to said David Aidney was 510 shares and he had transferred the same to Carl Probert, before he was involved with the Respondent and Respondent was aware of the said share transfer and no action was taken to rectify if there was an error.
7. The company minutes that confirmed share transfer of 510 shares to Carl Probert, though there are no documents to support issuance or allotment 510 of shares.
8. Carl Probert, stated that he had admitted in an email that he held the shares of Respondent on trust, but he state that it was for the purpose of mortgage of the two vessels that were registered in Fiji and deny any shares being held in trust and there was no trust deed.

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9. The affidavits submitted at this stage there are disputed facts even to the shareholdings of the Respondent, allotment and also the manner in which those shares held.
10. In the affidavit in opposition it was alleged following financial discrepancies occurred following a financial review of Respondent conducted through WBB Chartered Accountants Limited.
 - a. Apart from that there is a dispute as to a sum of \$131,837.11 which was alleged to have been siphoned by Carl Probert and out of which \$90,000 was termed as Veitau Debt.
 - b. Funds to the tune of \$445,704.23 were also alleged to have been paid to Niu Industries Ltd which is owned by Carl Probert.
 - c. Funds belonging to Respondent totalling \$76,092 were transferred to Niu Industries in breach of mandate by ANZ bank.
11. In the affidavit in opposition details of the above allegations are given and they were all denied by Carl Probert. In the affidavit in opposition at paragraph 23 he further stated profitability of the Respondent was affected due to payment of charter fees, coding of investment as inter company loans and also transfer of barges to fully owned subsidiary of Respondent. These are facts that needs to be proved at hearing. There are no documents annexed in support of these allegations.
12. Carl Probert in his affidavit in opposition also stated that alleged financial transactions continued in paragraph 10 above, were done in the course of business and known to Plaintiff as the accounting documents were with their custody. He also stated that issues between the parties could be solved though face to face meeting. He had also stated that he had the right to reject technology and averse to conduct meeting through video conference.

Law

13. Generally a shareholder and or a Director of company are distinct from the legal entity, hence cannot institute an action on behalf of the legal entity which they own shares or holding position as Director, respectively. Common law position is stated in the case of *Foss v Harbottle* (1843) 2 Hare 461, 491; 67 ER 189, but there were exceptions to this and one is fraud caused to minority shareholders.
14. Derivative actions are actions filed by minority shareholder against oppression or mismanagement of a company. This was recognized later as part of common law. In Fiji this has become part of statutory provision in the Act.

15. Statutory provisions are made for derivative actions and that is found in Sections 180, 181, 182, 183 and 184 of the Act which was quoted earlier. Accordingly a member/shareholder or a Director can bring proceedings on behalf of the company, but for this leave of the court is required.
16. There is general discretion of the court when leave is granted but, there are mandatory considerations before granting leave for a derivative action. The court is statutorily obliged to consider these factors, but these are non exhaustive and further factors can be considered if there is a need in the exercise of discretion regarding leave to proceed with derivative action.
17. Section 180 of the Act 2015 states:

Bringing, or intervening in, proceedings on behalf of a company

180.—(1) Subject to subsection (3), the Court may on the application of a Member or Director of a Company grant leave to that Member or Director to—

(a) bring proceedings in the name and on behalf of the Company or any Related Body Corporate; or

(b) intervene in proceedings to which the Company or any Related Body Corporate is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the Company or Related Body Corporate, as the case may be

(2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the court shall have regard to

(a) the likelihood of the proceedings succeeding;

(b) the costs of the proceedings in relation to the relief likely to be obtained;

(c) any action already taken by the Company or a Related Body Corporate to obtain relief; and

(d) the interests of the company or Related Body Corporate in the proceedings being commenced, continued, defended or discontinued, as the case may be.

*(3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), **only if** the Court is satisfied that either—*

(a) the Company or Related Body Corporate does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or

(b) it is in the interests of the Company or Related Body Corporate that the conduct of the proceedings should not be left to the Directors or to the determination of the Members as a whole.

(4) Notice of the application must be served on the Company or Related Body Corporate.

(5) The Company or Related Body Corporate—

(a) may appear and be heard; and

(b) must inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

(6) Except as provided in this section, a Member is not entitled to bring or intervene in any proceedings in the name of, or on behalf of a Company or a Related Body Corporate.

18. The procedure relating leave to seek derivative action is found in Section 180(4), 180(5), and 180(6) of the Act. Applicant had served a notice of this application to the Respondent and majority shareholder had appeared and also objected to this application.
19. Section 183 of the Act contains general powers in the exercise of discretion and though these are not mandatory consideration they need to be explored in appropriate circumstances. This can be made upon request of the parties or if those additional orders are required to facilitate derivative action. One such consideration without an application of parties is an order for court annexed mediation in terms of Section 183(1)(b). The general powers under Section 183 are as follow;

General powers of the Court

183.—(1) The Court may make any orders, and give any directions, that it considers appropriate in relation to proceedings brought or intervened in with leave, or an application for leave, including-

(a) interim orders;

(b) directions about the conduct of the proceedings, including requiring mediation;

(c) an order directing the Company, or an Officer of the Company, to do, or not to do, any act; and

(d) an order appointing an independent person to investigate, and report to the Court on—

(i) the financial affairs of the Company or Related Body Corporate;

(ii) the facts or circumstances which gave rise to the cause of action the subject of the proceedings; or

(iii) the costs incurred in the proceedings by the parties to the proceedings

and the person granted leave.

(2) A person appointed by the Court under subsection (1)(d) is entitled, on giving reasonable notice to the Company or Related Body Corporate, to inspect any Books of the company or Related Body Corporate for any purpose connected with their appointment

(3) If the Court appoints a person under subsection (1)(d)—

(a) the Court must also make an order stating who is liable for the remuneration and expenses of the person appointed;

(b) the court may vary the order at any time;

(c) the persons who may be made liable under the order, or the order as varied, are—

(i) all or any of the parties to the proceedings or application; and

(ii) the Company or Related Body Corporate; and

(d) if the order, or the order as varied, makes two or more persons liable, the order may also determine the nature and extent of the liability of each of those

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(i) all or any of the parties to the proceedings or application; and

(ii) the Company or Related Body Corporate; and

(d) if the order, or the order as varied, makes two or more persons liable, the order may also determine the nature and extent of the liability of each of those

persons

(4) Subsection (3) does not affect the powers of the court as to costs.

20. At hearing of originating summons no local derivative action where Section 180 of the Act, 2015 was submitted. Fiji's statutory provision regarding derivative action is analogous to NZ Companies Act.
21. NZ Companies Act contains identical provision regarding factors to be considered before granting leave. NZ Court of Appeal in *He v Che* [2015] NZAR 437; [2014] NZCA 153 cited NZ High Court decision of *Vrij v Boyle* (1995) 6 TCLR 621; [1995] 3 NZLR 763; (1995) 7 NZCLC 260,844 and in that case NZ High Court had considered identical four factors in a case dealing with grant of leave to proceed with derivative action.
22. There are further mandatory exclusive considerations contained in Section 180(3) of the Act. This is exclusive since the phrase '*only if*' is used. These are considered after four factors contained in Section 180(2) of the Act are dealt. There is no need to satisfy both mandatory requirements contained in Section 180(2) (a) and (b) of the Act and fulfilment of one of them is sufficient.
23. After consideration of these factors and other factors contained in Section 183 the court is required to consider possibility of ADR through mediation or other directions, as stated in Section 183 (1)(d) of the Act.
24. Once leave is granted, such action should not be discontinued without the leave of the court, in terms of Section 182 of the Act. So in a case of more than one shareholder the court should consider overall interest of all the shareholders, instead of only the party who came before seeking derivative action.
25. Section 181(1) of the Act, states that ratification or approval of the conduct alleged in the derivative action by Applicant does not prevent a derivative action by same party who ratified or approved. So a director or member is not precluded from filing a derivative action, even if such person had ratified or approved the wrongful action, earlier.
26. NZ Court of Appeal in *He v Che* [2015] NZAR 437; [2014] NZCA 153 dealt four factors analogous to section 180 (2) and held,

**This section requires the court to assess each consideration separately. The relative weight each carries will depend on the facts of the case. In assessing each statutory criterion the court should adopt the standard "which would be exercised by a prudent business person in the conduct of his or her own affairs when deciding whether to bring a*

claim.¹ It is very well established by High Court authority, which we endorse, that the prudent business person standard applies to an assessment of s 165(2)(a).² It has also consistently informed the Court's assessment of the remaining three criteria.³ While we emphasise it is the express words of each statutory consideration which the Court must have regard to, we consider it helpful to assess whether each criterion applies to the prudent business person standard.⁴

ANALYSIS

27. The Applicant, Seapacific Limited is a limited liability company registered in New Zealand, and the Respondent, Sea Pacific (Fiji) Limited is a limited liability company having its registered office at Suva.
28. Applicant is a minority shareholder of Respondent, and seeks to file an action in the name of Respondent against Carl Probert, Niu Industries a company owned by Carl Probert and ANZ Bank.
29. The proposed Writ of Summons for which leave is being sought is set out as Annexure 'J' to the Affidavit in Support of Ian Coombridge. It contained several causes of action. Before exercising discretion for leave to proceed is it required to consider four mandatory statutory factors stated in Section 180(2) of the Act.

A. Likelihood of the Proceedings Succeeding.

30. This is not a proper juncture to consider the disputed facts of the case on affidavits and supporting documents. This is analogous to a case of injunction or in an application for strike out or in setting aside of default judgment, where the court is required to assess serious question of law or arguable case or likelihood of success respectively. This assessment is not a final assessment and it is based on conflicting evidence. The likelihood of succeeding is *ex facie* assessment and threshold is more than an arguable case, and not fanciful.
31. Since derivative actions are confined to Company Law, and deals with actions or decisions of the directors who were conducting businesses in commercial environment, it should be considered in the context of the business environment. So *ex facie* assessment, needs to consider whether a prudent business person would institute action, against the proposed parties in the manner that is stated in the intended statement of claim. This test was applied in NZ in *Vrij v Boyle* (1995) 6

¹ *Vrij v Boyle*

² The High Court has adopted this test on at least 30 occasions: see Christopher Hare "Shareholder remedies: personal rights, corporate rights and the derivative action" in Peter Watts, Neil Campbell and Christopher Hare (eds) *Company Law in New Zealand* (LexisNexis, Wellington, 2011) 677 at 736, n 360. See also Lynn Taylor "Derivative Action" in John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) 569 at 575-576, n 43.

³ A sample of cases using the test in such a way appears in Taylor, above n 2, at 576, n 48.

TCLR 621; [1995] 3 NZLR 763; (1995) 7 NZCLC 260,844 and approved by NZ Court of Appeal.

32. This factor is important to prevent any minority shareholder seeking derivative action in frivolous or vexatious manner to the detriment of Respondent or its conduct in the business. Though High Court Order 18 rule 18 allows frivolous action to be struck off, in a derivative action this determination is needed before institution of action. This is to prevent any harmful effect of a frivolous or vexatious action not limiting to bad publicity, diversion of focus or delay in decision making relating to issues of derivation action that can have adverse effects.
33. Applicant included several causes of action in the prospective statement of claim, and first is declaratory relief and that is to state that Carl Probert did not hold 510 shares of \$1 par value as such number was never issued.
34. This is a disputed fact and fact that deponent of the affidavit in support participated in a board meeting that is annexed as G to the affidavit in support should not be considered as a factor to reject such a cause of action in terms of Section 181(1)(a) the Act. This is not an issue to be considered to reject leave for derivative action. Such ratification or approval will only be relevant at the time of assessment of damages in terms of Section 181(1)(b) hence the said objection contained in affidavit in paragraph 12 is non starter.
35. Carl Probert in his affidavit in opposition to this failed to provide evidence of share allotment of 510 to any person or issuance of such number of shares by Respondent or share register to prove that such number was ever issued. Since registered office of Respondent was in Fiji, he should have access to such documents.
36. Though Carl Probert had filed minutes of a meeting Applicant's position was that was an error. These are matters to be tested at hearing and cannot be considered frivolous. Minutes of a Company meeting is not final and conclusive proof of facts stated therein, and even when Applicant had voted and ratified a conduct that will not preclude bringing an action in terms of Section 181 of Companies Act 2015.
37. Second cause of action is restitution and this refers to a sum of \$41,837.11 which is more fully described in schedule to the statement of claim. These are sums allegedly have been obtained through loans and advances. In the affidavit in opposition there are no specific reference to each and every transaction that was described, objection to leave on that ground rejected.
38. Next cause of action is regarding a debt named as Veitua Debt, Carl Probert does not deny it but state that this was due to some bartering that did not go well due to some issues which were beyond his control and not fully detailed with particulars in the

- affidavit in opposition. In any event such claims can only be ascertained through a trial. So this is again not suitable to be considered as having no prospect of success.
39. The cause of action against Niu Industries is again cannot be considered having no prospect considering the disputed facts stated in the affidavits. The amount stated under this cause of action is \$445,704.23 and this was arrived with review of accounts by a professional accounting firm in NZ. So reply given in the affidavit without any documents in opposition needs to be tested at trial.
 40. Breach of Director's duties is another cause of action and particulars are stated in the paragraph 22 of the proposed statement of claim. Breach of duties of Director in terms of the Act is a cause of action for derivative action. Business decisions cannot be considered abstract manner outside the context in which such decisions were taken. Business environment changes with time, and this is again a matter to be decided at the hearing and cannot be considered as having no prospect of succeeding.
 41. Conspiracy is another cause of action and there is claim against commercial bank for breach of contract namely mandate. Carl Probert had denied conspiracy and also claim gains the bank. All the prospective parties contained in the intended statement of claim are not parties to this originating summons. These are all matters to be considered at hearing, when all the parties are before the court with their respective defences.
 42. Having considered all the causes of action contained in the proposed statement of claim annexed 'J' to the affidavit in support and the affidavit evidence before me, it is not my duty to conduct a trial on disputed facts. If there is any doubt that should also favour granting rather than refusing leave for derivative action. What is needed at this juncture is to consider whether proposed causes of action are sufficiently pleaded and they are supported by affidavit evidence presented to the court, and whether there is realistic derivation action.
 43. The likelihood of proceedings succeeding is more than an arguable case but this needs to be assessed on the material before the court and the prudent business person will also take risks for the benefit of the company and, this will apply to Applicant, too. So likelihood of success is a matter that needs careful consideration of facts before the court.
 44. First the pleadings are considered with the facts stated in the affidavits, if admitted facts does not support any cause of action that needs to be struck off at this stage. If the facts are disputed and they indicate a cause of action, that is a factor in favour of the Applicant. If so whether a prudent business person in the circumstances would institute an action against the parties stated, needs consideration. In my judgment both tests are held affirmative in favour of the Applicant for the reasons given earlier.

B. The costs of proceedings in relation to the relief likely to be obtained.

45. This is cost benefit analysis, and this overlaps to a certain amount in 'prudent business person's test. A prudent business person would rarely institute an action for recovery of sum of money if the cost of recovery is greater considering all the factors. The cost of proceedings and relief likely to be obtained needs to be considered. The reliefs contained in the intended statement of claim are substantial in financial terms though there is a declaratory order as well. In the circumstances, there is not issue of cost of this action will not justify leave for a derivative action. So, initially Applicant will be instituting the cause of action in the name of Respondent and costs will be borne by it. In any event considering the substantial claims based on a professional financial report should not be denied from proceeding to hearing on the basis of cost. In my judgment issue of cost will only apply to trivial matters or when the reliefs cannot be assessed in financial terms. This does not arise as the Applicant's proposed claims were substantial, and they were based on professional financial review.
46. The fact that the Respondent is no longer operating does not mean that leave should be refused (see *Charlton v Baber* [2003] NSWSC 745). Even a derivate action is not denied when there is a winding up proceedings.

C. Any Action already taken by the Company or the Related Body Corporate to obtain relief.

47. This is a factor to be considered when there is already an action filed by Respondent. This is to prevent duplication of actions and also to prevent unnecessary applications by minority shareholder when an action had already been taken, by the company.
48. There is no evidence of such action being filed by Respondent regarding any of the claims stated in the proposed statement of claim. It is illegal to think that in the circumstances of this case.

D. The interests of the company or Related Body Corporate in the proceedings being commenced, continued, defended or discontinued, as the case may be.

49. This is an overall interest of the company in the proceedings proposal derivate action. In the affidavit in opposition it was stated that Respondent was not conducting business. The solvency of the Respondent is not a factor to reject leave to proceed in derivative action. Derivative action is filed by an oppressed minority shareholder. If winding up proceedings or liquidity is sole criterion to reject leave for derivative action the purpose of derivative action is lost as any debt above threshold limit in the Act can easily trigger winding up proceedings, thus preventing derivate action.

50. Sometimes, unpaid debtors are result of misappropriation and or fraud or cause of minority oppression. So it is not a reason to refuse leave to file derivative action. The financial status of Respondent is not determinant factor for leave to proceed derivative action.
51. All four separate factors contained in Section 180 (2) of the Act are considered separately with necessary weight and they are all in favour of the Applicant. The relative weight to each and every factor is not determinant factor for Applicant as they all favour grant of leave. This is a case where there were only two shareholders and majority shareholder was a local and minority shareholder was the investor a foreign entity. Likelihood of success is not a fanciful but realistic likelihood of success. Similar approach was accepted in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221, *Swain v Hillman* [2001] 1 All ER 91 at 92 in a different context in dealing with 'prospect of success'.
52. There are further exclusive considerations contained in Section 180(3) of the Act and they are
- (a) the Company or Related Body Corporate does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or*
- (b) it is in the interests of the Company or Related Body Corporate that the conduct of the proceedings should not be left to the Directors or to the determination of the Members as a whole. (emphasis added)*
53. There is no doubt that Respondent had no intention bringing proceedings against any of the parties stated in the proposed statement of claim. It is illogical to think so as proposed two Defendants are majority shareholder and an entity belonging to him.
54. Without prejudiced to above paragraph, I have to consider '*It is in the interests of the Company or Related Body Corporate that the conduct of the proceedings should not be left to the Directors or to the determination of the Members as a whole.*'
55. This is the crux of the derivative action as oppression to minority shareholders by the majority, represented through board members. If they determined the best interest of the company and shareholders value is increased there will not be a reason to institute derivative action. The conduct of any Director is to deny the claims and also to prevent any action proceeding.
56. At the moment Carl Probert is the sole director of Respondent and allegations are made against him. So, there is no prospect of he will take any action against him, or an entity belonging to him.

57. Carl Probert has not consented to proceedings being filed against him by the Respondent. He attempted to avoid this originating summons.
58. There is general discretion granted to court apart from the statutory mandatory requirements. Upon the materials submitted by the parties that discretion is also in favour of the Applicant in granting leave to proceed with derivative action in terms of the proposed statement of claim. On the material presented to me there is no prospect of mediation, and no party request for that.

CONCLUSION

59. Applicant needs to seek leave to file derivative action in terms of the Section 180 (1) of the Act. Section 180(2) indicate the non-exclusive, nevertheless mandatory considerations of four factors. This consideration of four factors are sine qua non. First likelihood of success in the proceeding was considered. For that the proposed statement of claim and facts stated in the three affidavits are considered. Disputed facts and conflicting evidence in relation to such facts are in favour of the Applicant. After that effect of cost was dealt. There are no pending actions regarding proposed cause of action. Interest of Respondent is best served through a derivative action. Once those considered there is exclusive two factors stated in Section 180(3) and one of them should also be in favour of the Applicant. Applicant fulfills both requirements. There is no prospect of mediation. Applicant is granted the leave sought in the originating summons to commence the proceedings in terms of the proposed statement of claim annexed as 'J'. The cost of this action to be borne by the parties.

FINAL ORDERS

- a. Applicant is granted leave to issue proceeding in the name of Sea Pacific (Fiji) Limited against parties stated in the proposed statement of claim annexed as J to the affidavit in support filed on 13.11.2018.
- b. No costs.

Dated at Suva this 18th day of October, 2019.



Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva