

Case Note

THE STATUTORY DERIVATIVE ACTION

What of the Notice Requirement?

Teo Seng Ho v IDV Concepts Pte Ltd
[2013] SGHC 269

and

Lee Seng Eder v Wee Kim Chwee
[2014] 2 SLR 56

This case note considers the requirement that a complainant seeking leave under statute to commence a derivative action on behalf of the company give 14 days' prior notice to the directors of the company. The governing statutory provisions do not spell out what is required in such a notice. What, therefore, is required to be included in such a notice? This is to be answered by considering the rationale behind such notice. Two recent High Court decisions touching upon the requirement will be examined to consider the present state of the law and where we stand today in relation to the notice requirement in Singapore.

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I. Introduction

1 Two recent High Court decisions have added to the Singaporean jurisprudence on the notice requirement under s 216A(3)(a) of the Companies Act¹ ("CA"). Section 216A of the CA, which provides for what is known as the statutory derivative action, was enacted in Singapore in November 1993, and allows, *inter alia*, a member of a company to bring an action in the name and on behalf of a company, or intervene in an action to which the company is party,² provided certain

1 Cap 50, 2006 Rev Ed.

2 The language of s 216A(2) of the Companies Act (Cap 50, 2006 Rev Ed) refers to the: ... bring[ing of] an action in the name and on behalf of the company or [the] interven[ing] in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company ... However, for the purposes of this note, "prosecuting the action" is used as shorthand.

statutorily provided requirements are met. The provision, which has stood unamended since its enactment some 20 years ago, reads as follows:

Derivative or representative actions

216A.–(1) In this section and section 216B –

‘company’ means a company other than a company that is listed on the securities exchange in Singapore;

‘complainant’ means –

- (a) any member of a company;
- (b) the Minister, in the case of a declared company under Part IX; or
- (c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.

(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that –

- (a) the complainant has given 14 days’ notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
- (b) the complainant is acting in good faith; and
- (c) it appears to be *prima facie* in the interests of the company that the action be brought, prosecuted, defended or discontinued.

(4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3)(a), the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

...

2 In *Teo Seng Ho v IDV Concepts Pte Ltd*³ (“*IDV Concepts*”) and *Lee Seng Eder v Wee Kim Chwee*⁴ (“*Lee Seng Eder*”), the High Court in two separate occasions explored some of the procedural issues involved

3 [2013] SGHC 269.

4 [2014] 2 SLR 56.

in the making of an application to commence derivative action under s 216A, namely, in respect of the notice requirement as found in s 216A(3)(a). The two decisions also considered the other substantive requirements set out under the statutory provision, *ie*, the requirements under s 216A(3)(b) that the applicant is acting in good faith and s 216A(3)(c) that the action appears to be *prima facie* in the interests of the company. This note is concerned mainly with the former procedural requirement.

II. The decision in *IDV Concepts*

A. *The factual background*

3 The company which formed the subject matter in *IDV Concepts*, IDV Concepts Pte Ltd (“IDV Concepts”), was a company in the business of providing interior design and renovation services, and was run by two main personalities, Teo, the applicant in the leave proceedings, and Chew, the second defendant. After almost a decade and a half in business, the relationship between Teo and Chew deteriorated and became strained. There were talks between Teo and Chew relating to suggestions to liquidate the company. Sometime after this, Chew, together with Jen, his wife, who was the third defendant in the proceeding, set up IDV Concepts Asia Pte Ltd (“IDV Asia”), the fourth defendant. Jen explained that IDV Asia was incorporated in view of an agreement to liquidate IDV Concepts, and that IDV Asia commenced business only after Teo had signed a purported directors’ resolution to put the company into members’ voluntary winding up. Chew subsequently sent an e-mail to potential clients explaining that IDV Asia would be in charge of all new projects while IDV Concepts would remain to complete all ongoing jobs. Teo took exception to all of these, and in a letter from his solicitors on 15 April 2013, demanded that the defendants cease and desist in their wrongful acts. The letter complained that Chew, as director, and Jen, as manager, had breached their duties to IDV Concepts. Several allegations were made in this letter, including the allegations that the use of the name IDV Asia which was similar to IDV Concepts was intentional, that they had instructed the staff in IDV Concepts’ office to change the signature block of their e-mails to that of IDV Asia, that business opportunities were passed to IDV Asia, that they had copied IDV Concepts’ website in its entirety, and that this constituted a passing off, that they had taken over IDV Concepts’ office premises for the use of IDV Asia’s business, as well as its computers, servers, and confidential information, and finally, that they had solicited the staff of IDV Concepts to transfer their employment to IDV Asia. In this vein, four heads of allegations were made, namely, (a) the passing off of the name and goodwill of IDV Concepts; (b) the infringement of copyright and passing off in relation to IDV Concepts’ slogans and

goodwill; (c) the use of IDV Concepts' office premises and equipment without approval or authorisation; and (d) the accessing of IDV Concepts' confidential information without approval or authorisation.

4 When the matter could not be settled amicably, Teo sent IDV Concepts and Chew a notice as required under s 216A(3)(a) of the CA on 10 May 2013. However, in this notice, whereas mention was made of allegations (a) and (b), mention of allegations (c) and (d) was missing. On this footing, it was argued for the defendants that the notice was ineffective.

B. The court's decision

5 Belinda Ang J noted that there was no express requirement under s 216A(3)(a) that the notice list down each and every allegation sought to be made.⁵ Her Honour referred⁶ to the British Columbia Court of Appeal decision in *Re Bellman et al and Western Approaches Ltd*⁷ ("*Re Bellman*"), in which Nemetz CJ stated:⁸

A perusal of the [Notice Letter], when read together with the response ..., leads me to conclude that the directors were reasonably notified of the Bellman group's intention to apply to commence a derivative action. Failure to specify each and every cause of action in a notice does not, in my opinion, invalidate the notice as a whole. [emphasis added by the High Court in *IDV Concepts*]

In this regard, her Honour held that the notice in question was not ineffective: it, despite the omitted allegations, was sufficient to notify Chew and IDV Asia that Teo would be applying to commence an action under s 216A of the CA.⁹ Her Honour also emphasised that Chew did not contend that he would have acted differently had the notice contained the omitted allegations.¹⁰

C. Commentary

6 The decision in *IDV Concepts*, in following the decision in *Re Bellman*, takes a narrow view of the notice requirement. Section 216A of the CA finds its origins in an equivalent Canadian legislation, namely, the Canada Business Corporations Act¹¹ ("Canadian Federal Legislation"), and the requirement of giving notice to the directors under s 216A(3)(a)

5 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [24].

6 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [25].

7 (1981) 130 DLR (3d) 193.

8 *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) at 201.

9 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [27].

10 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [27].

11 RSC 1985, c C-44.

of the CA was modelled after s 239(2)(a) of the Canadian Federal Legislation.

7 But even in Canada, the issue of the sufficiency of such notice is somewhat unsettled. On the one hand, *Re Bellman*, which discussed the predecessor provision to s 239(2)(a) of the Canadian Federal Legislation, and which was relied upon by the court in *IDV Concepts*, lays down a relatively low threshold. It appears from Nemetz CJ's *dictum* that all that is required is that there is notice of an impending *application* under the statutory provision. Whether this is a correct reading of *Re Bellman* will be revisited later, but it suffices to note for now that this is the plain implication from the holding of the court. Next, in the British Columbia Supreme Court decision in *Re Northwest Forest Products Ltd*¹² ("*Re Northwest Forest*"), it was held that s 222(3)(a) of the British Columbia Companies Act,¹³ which requires that the applicant has made "reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the act", was fulfilled by the service of a letter to the company directors containing "no more than would be ... sufficient to found an endorsement on a generally endorsed writ of summons".¹⁴ This threshold requirement laid down in *Re Northwest Forest* was then echoed in the subsequent British Columbia Supreme Court decision in *Re Daon Development Corp*¹⁵ ("*Re Daon Development*"). There, the minimum requirement was described by Wallace J as being "the details of the nature of the claim [the complainant] wishes the directors to prosecute".¹⁶ In these two latter cases, the legislation considered was the British Columbia Companies Act, which, as already apparent above, differed from the Canadian Federal Legislation in that what was required was not the service of a "notice" on the company directors, but the exertion of "reasonable efforts" to cause the directors to take up the action. However, it is evident, perusing the language of s 216A(3)(a) of the CA or s 239(2)(a) of the Canadian Federal Legislation spelling out the requirement of the notice, that for the present purposes, there is no relevant substantive difference between the two – the notice required under statute is in the nature of a demand on the directors to take action. In *Intercontinental Precious Metals Ltd v Cooke*,¹⁷ it was held that the notice requirement under the Canadian Federal Legislation was "to afford the directors a reasonable opportunity to consider their position before the application is heard by the Court". This rationale was confirmed by the High Court in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd*¹⁸ ("*Carolyn*

12 [1975] 4 WWR 724.

13 SBC, 1973, c 18.

14 *Re Northwest Forest Products Ltd* [1975] 4 WWR 724 at 734, *per* Cashman LJ.

15 (1984) 54 BCLR 235.

16 *Re Daon Development Corp* (1984) 54 BCLR 235 at 240.

17 (1994) 88 BCLR (2d) 101.

18 [2011] 3 SLR 980 at [14].

Fong”). The High Court in *Carolyn Fong* also explained the economic efficiency in allowing the directors a chance to consider their response; legal costs need not be wasted in dealing with the leave application if the company was willing to pursue the complaint on its own.¹⁹ To this may be added the fact that it is more economically efficient to expect a company to prosecute its own action than to have a member do so by way of a derivative action – as a starting point, the management of the company is in the best position to decide whether or not to sue as compared to a less qualified “outsider”.

8 If the purpose of the notice requirement is in the nature of a demand on the directors to take up the action, is it sufficient that the notice merely gives notice of the intention to commence proceedings to seek leave under s 216A without specifying the causes of action or heads of allegations the complainant proposes ought to be prosecuted? This cannot be so. It was therefore this rationale which led the courts in *Re Northwest Forest* and *Re Daon Development* to lay down certain minimum standards as to what is required in such notice to the directors. The linking of such minimum standards to that in relation to a general endorsement of a writ of summons reflects the nature of the notice being a demand on the directors to take up the action. In general, a general endorsement on a writ of summons ought to contain the nature of the claim and the relief or remedy required²⁰ and should contain sufficient particulars of the nature of the claim so as to allow the defendant to identify the circumstances alleged by the plaintiff to have resulted in the wrong.²¹ These are precisely the kind of information the directors of the company would need to be able to properly decide whether or not they should take up the action which the complainant wishes the company to do. A bare notice to the directors that the complainant intends to make an application to the court for leave to commence a statutory derivative action under s 216A is quite simply insufficient for such objective. The link between the notice requirement under s 216A(3)(a) and the law in relation to a general endorsement of a writ of summons was further reinforced in Singapore by the High Court in *Agus Irawan v Toh Teck Chye*.²² Choo Han Teck JC (as his Honour then was) dismissed the argument that the notice requirement had not been satisfied because the plaintiff had amended his application to include a claim for breach of fiduciary duties by directors of the company, by taking for themselves “price rebates” the company was rightfully entitled to, when the notice stated the claim as being on the

19 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [14].

20 Rules of Court (Cap 322, R 5, 2006 Rev Ed, currently 2014 Rev Ed) O 6 r 2(1)(a); *Sterman v WE & WJ Moore* [1970] 1 QB 596 at 603.

21 *The Jangmi* [1988] 2 Lloyd’s Rep 463 (HC); [1989] 2 Lloyd’s Rep 1 (CA).

22 [2002] 1 SLR(R) 471, affirmed on appeal to the Court of Appeal, with no written grounds of decision rendered.

basis of “volume rebates”.²³ His Honour held that this was permitted because “the amendment was in respect of the particulars; the action for which leave was sought concerned a breach of fiduciary duties”.²⁴ Such reasoning is reminiscent of and mirrors O 18 r 15(2) of the Rules of Court,²⁵ which provides that a statement of claim may include allegations “which are the same as, or include or form part of, facts giving rise to a cause of action so mentioned” in the writ (*ie*, in the general endorsement).

9 How then should the decision in *Re Bellman* be rationalised? Does *Re Bellman* stand for the proposition that all that is required of a notice under s 239(2)(a) of the Canadian Federal Legislation and s 216A(3)(a) of the CA is to give notice of the intention to bring a derivative action, without stating the precise nature of the claims sought to be pursued thereunder? On a careful consideration of the facts of *Re Bellman*, this cannot be the true *ratio decidendi* of the court. Indeed, in *Re Bellman*, what was missing from the notice to the director was not *all* the heads of relief sought by the complainant, but rather, only *one* of them. It was in such circumstance that Nemetz CJ was reluctant to hold the entire notice as being ineffective. It will be recalled that Nemetz CJ considered that upon a perusal of the notice letter together with the response of the board of directors, the directors were reasonably notified of the complainant’s intention to commence a derivative action.²⁶ The judgment of the court does not set out the contents of the response letter, so it is not altogether evident whether his Lordship was making a finding of fact, on the basis of the response letter, that the directors had in fact knowledge of the complainant’s intention to commence a derivative action in relation to the omitted head of relief sought, notwithstanding its omission from the notice letter. If such a finding had been made, then it could be argued that the “substantive” (the word used here in contradistinction to the “procedural”) requirement had been made out in that the directors had had the opportunity to consider whether or not to take up the action, including in respect of the omitted head of relief sought. In this regard, as a matter of substance, it did not matter that the notice letter was procedurally deficient in that that one head of relief had been omitted. It is more so apparent, from the facts of *IDV Concepts*, that Ang J might have been motivated by similar substantive considerations in following the holding in *Re Bellman*. There, there was a previous letter sent by Teo’s solicitors to Chew and Jen.²⁷ In this previous letter, the allegations that IDV Concepts’ office

23 *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 at [7].

24 *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 at [7].

25 Cap 322, R 5, 2006 Rev Ed, currently 2014 Rev Ed.

26 *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) at 201.

27 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [16], and see para 3 above.

premises and equipment were being used without approval or authorisation and IDV Concepts' confidential information was being wrongfully exploited were in fact expressly made. Therefore, when the notice proper was sent to IDV Concepts and Chew less than one month later, even though it did not mention these omitted allegations, one could reasonably infer that they were in the mind of Chew when he considered and decided, *qua* director, not to prosecute the action. The substantive purpose of the notice therefore had in fact been satisfied.

10 Section 216A(3)(a) of the CA, however, expressly requires such notice to be given to the directors. There is no express statutory exception to the requirement where the directors already know of the action which the complainant wants the directors to prosecute. There is a good plausible reason for this. An express notice stating the nature of the claims sought to be brought, *together with notice of the intention to commence a statutory derivative action* if the directors do not themselves cause the company to prosecute the action, puts the directors in a quite different frame of mind as compared to a demand to take up the action *simpliciter* – the former signifies a more serious intent and may be greater and stronger impetus for the directors to consider taking action where they previously might have been dithering. Therefore, unless the nature of the claim sought to be brought is required to be spelt out in the notice, it may not be apparent to the directors which of the claims previously put forward by the complainant have been abandoned and which are in the mind of the complainant so serious that it is necessary to instigate the further serious step of taking out an application under s 216A.

11 An alternative manner of understanding the conclusion on the facts in *IDV Concepts* is on an application of the holding of Judith Prakash J in *Carolyn Fong* that the notice requirement may in appropriate cases be dispensed with pursuant to s 216A(4);²⁸ sub-s (4) employs the words “it is not expedient to give notice as required in subsection (3)(a)”, while her Honour accepted the touchstone of “impracticability” as endorsed by the learned authors of *Woon’s Corporations Law*.²⁹ In *Carolyn Fong*, the required notice was served on the company’s directors seven days *after* the filing of the leave application under s 216A of the CA. Objection was taken in respect of this. The applicant argued that the reason for not giving the notice 14 days prior to the application was the fear that it would precipitate the destruction, concealment or forgery of evidence by the allegedly

28 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [13].

29 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [13] and [17], citing *Woon’s Corporations Law* (LexisNexis, Looseleaf Ed, 1994, March 2010 release).

wrongdoing directors. Prakash J broadly³⁰ accepted this argument, but further considered that the notice requirement could be dispensed with on the basis of it being futile.³¹ Her Honour considered that when the notice was properly served seven days after the filing of the application, the company's directors pursued no action; this strongly suggested to her Honour that even if the requirement of 14 days' prior notice had been complied with, the response would have been equally lacking.³² In the circumstances, it was held that it was wrong to penalise the applicant for the lack of notice and so the notice requirement was dispensed with pursuant to s 216A(4).³³ It is notable that in coming to her Honour's decision in *IDV Concepts*, Ang J took cognisance of and relied on the fact that "Chew did not contend that he would have acted (or even considered the matter) differently had the [notice] contained the [omitted allegations]".³⁴ Given that a previous letter had been sent by Teo's solicitors to IDV Concepts and Chew stating *all* the allegations, and that no response was then forthcoming from the directors of the company, it appears that one could have inferred, as did Prakash J in *Carolyn Fong*, that the proper inclusion of the omitted allegations in the notice would have been futile. In this vein, the conclusion is that the deficient notice in the sense of the omission of the omitted allegations ought to be excused. The recognition of such a ground for excusing a deficient notice or for dispensing with notice is justified because it could be said that, on the facts, the substantive purpose of the notice, *viz*, to demand the directors to take up the action, has been fulfilled, notwithstanding the procedural deficiency *vis-à-vis* the notice required under the statute.³⁵ It is submitted that if the conclusion in *IDV Concepts* was correct, this may be a more conceptually accurate route of analysis than the straightforward application of the rule purportedly laid down in *Re Bellman*.

30 But not unequivocally; *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [17].

31 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [18].

32 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [18].

33 Note, however, the caution sounded by the learned authors in Dan W Puchniak & Tan Cheng Han, "Company Law" (2011) 12 SAL Ann Rev 143 at 158–159, paras 9.45–9.46, against a misapplication of the rule; the learned authors also warn against an over reliance on the post-application conduct of the directors in refusing to respond to a notice as evidence to establish that the futility exception is made out; in this regard, see also Alan K Koh, "Excusing Notice under Singapore's Statutory Derivative Action" (2013) 14(2) Aust J Asian L 1. To this, it may be added that the court ought also to consider the point made above that a second demand in the form of the s 216A notice which would be additionally coupled with a notice of an intention on the part of a complainant to commence a derivative action may have greater effect than a demand *simpliciter* (see para 10 above) – this ought to be weighed in consideration in coming to a conclusion whether the service of the notice, or a procedurally adequate notice, is indeed futile.

34 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [27].

35 See para 9 above.

12 Alas, however, the High Court decision in *Lee Seng Eder*, which was handed down shortly after the decision in *IDV Concepts*, appears to have put paid to the possibility of the notice requirement being dispensed with or excused.

III. The decision in *Lee Seng Eder*

A. *The factual background*

13 In *Lee Seng Eder*, the complainant Lee's complaint was that the directors of the company, Wee and Tien, had allowed certain other parties to appropriate the company's assets and goodwill. An application was taken out under s 216A of the CA. However, no 14 days' notice was provided to the directors of the company. Counsel for Lee explained that it was "not expedient" to do so because there were reasonable concerns that Wee and Tien would destroy or tamper with the evidence of their conspiracy and so the notice requirement ought to be dispensed with. Reliance was placed on the decision in *Carolyn Fong* to make this argument.

B. *The court's decision*

14 Andrew Ang J dismissed this argument. His Honour held that there was nothing under s 216A(4) of the CA which allowed the court to altogether dispense with the requirement to provide notice under s 216A(3)(a), in this regard disagreeing with the learned author in *Walter Woon on Company Law*.³⁶ His Honour reached such a conclusion on a textual examination of the language of s 216A(4): the provision states that "the Court may make such *interim* order as it thinks fit *pending the complainant giving notice as required*" [emphasis added by the High Court in *Lee Seng Eder*]. This was in contrast to the equivalent of s 216A in the Canadian Federal Legislation, s 239(2), which provides that notice has to be provided 14 days prior, "or as otherwise ordered by the court", and which does not contain an equivalent of s 216A(4) (which his Honour viewed as a fettering provision).³⁷ In his Honour's analysis, the inclusion of the words "or as otherwise ordered by the court" in the language of s 239(2)(a) of the Canadian Federal Legislation and the absence of the equivalent of s 216A(4) allowed the court there discretion to allow less notice or none at all.³⁸ His Honour

36 *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 9.76, making the same observation as in *Woon's Corporation Law* (LexisNexis, Looseleaf Ed, 1994, March 2010 release), see para 11 above.

37 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [11].

38 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [11].

concluded that Lee could have assuaged the fears of the destruction of evidence by applying for an *Anton Piller* order, but did not do so.³⁹

C. Commentary

15 The analysis of the court in *Lee Seng Eder* is one which comports faithfully with the text and language of ss 216A(3)(a) and 216A(4) of the CA; the language does not contemplate the court dispensing with or excusing the notice requirement or prior notice but rather, and in stark contrast, it expressly contemplates the court granting the complainant *interim* relief, this therefore showing that the giving of notice is *always* required. It may be wondered, however, why s 216A of the CA was drafted in such a manner as to stunt or remove the possibility of the dispensation or excusal of the notice requirement. This position is all the more curious if one takes the view that there are situations where justice requires or expects that the notice requirement be dispensed with.⁴⁰ The circumstance identified by Prakash J in *Carolyn Fong* may well be one such circumstance, and there may also be other appropriate circumstances which can be discovered by incremental judicial development of the law through the experience of real cases before the courts.⁴¹

16 Section 216A(4) of the CA was not in the original Companies (Amendment) Bill⁴² which was tabled to the Parliament in 1992. The present text of s 216A(4) was introduced into the amendment Bill only upon the receipt of representations to the Select Committee constituted by a resolution of Parliament to consider the Bill. The particular representation suggested the inclusion of a provision similar to s 246(3) of the Ontario Business Corporations Act⁴³ (“Ontario BCA”), which reads as follows:

39 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [8].

40 These two contrasting positions are known in US jurisprudence as the “universal demand requirement” and, in contrast, the “demand futility exception” trend, the latter being the school within which *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 may be described as falling. See para 11 above.

41 The circumstances under which the notice requirement may be dispensed with has been explored further in the Canadian jurisprudence, but because this is not the subject of this note, it is not proposed that this will be discussed further here; but, for an overview, see Alan K Koh, “Excusing Notice under Singapore’s Statutory Derivative Action” (2013) 14(2) *Aust J Asian L* 1.

42 Bill 33 of 1992.

43 RSO 1990, c B.16.

Derivative actions

246. ...

Application

(3) Where a complainant on an application made without notice can establish to the satisfaction of the court that it is not expedient to give notice as required under subsection (2), the court may make such interim order as it thinks fit pending the complainant giving notice as required.

Section 216A(4) therefore represents an almost wholesale import of s 246(3) of the Ontario BCA.⁴⁴

17 What is interesting, however, is that whereas the Canadian Federal Legislation, by the inclusion of the words “or as otherwise ordered by the court” in the notice provision, envisages the judicial development of the law as to when the notice requirement may be dispensed with or excused, s 246 of the Ontario BCA, like s 216A(3)(a) of the CA, does not. Nevertheless, it must be further noted that s 246 of the Ontario BCA has been further amended in 2006 to include a new sub-s (2.1). Section 246(2.1) of the Ontario BCA reads as follows:

Notice not required

(2.1) A complainant is not required to give the notice referred to in subsection (2) if all of the directors of the corporation or its subsidiary are defendants in the action.

In other words, the Ontario legislature has expressly set down statutorily when the notice requirement may be dispensed with. No such amendment has been made or mooted in respect of s 216A of the CA. On a strict textual interpretation, the position in Singapore therefore is that there is no room for the courts to dispense with the notice requirement. Any possibility of doing so is something which must come by way of legislative action. Notably, s 246(2.1) of the Ontario BCA ostensibly mirrors the underlying rationale to the futility exception in *Carolyn Fong*. If all the directors of the company are defendants in the action sought to be prosecuted, then it could sensibly be said that it would be futile to give the notice. It would be contrary to the directors’

44 The representation originally was for the introduction of a prescribed period in respect of the notice requirement. This was originally not in the draft Bill and it was suggested that the 14 days prescribed in the Ontario Business Corporations Act (RSO 1990, c B.16) be adopted (see the *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993) (“Select Committee Report”) at p A46); this was accepted. In the interview with the representor, it was then further suggested that the equivalent of s 246(3) of the Ontario Business Corporations Act be adopted and this was accepted (see the Select Committee Report at p B96).

self-interest to prosecute the action against themselves and so somewhat unrealistic to expect that they will do so on account of receipt of the notice.

18 Of course, the point was made above that a proper notice of the allegations, which would include notice of intention to escalate the matter by an application to commence a derivative action, could on some accounts be greater impetus to the directors to carefully consider their position.⁴⁵ This could apply even in such cases falling under s 246(2.1) of the Ontario BCA; this may not be a full-blown prosecution of the action against themselves, but may be in the form of reaching some sort of settlement with the complainant, *eg*, to make restitution to the company. Nevertheless, s 246(2.1) of the Ontario BCA represents a bright-line laid down by the Ontario legislature as to when, in its view, justice does not require that the notice be given; this is a policy decision of the Legislature. Perhaps the lack of legislative provision allowing the court to dispense with the notice requirement in Singapore, whether by way of general words allowing judicial development of the exceptions, or by way of a specific provision like s 246(2.1), may be justified if one takes the view that there is a real and substantial effect in a proper notice of the intention to bring a s 216A action. There may be value in expecting the complainant to play a final gambit in the form of a proper notice to the directors. After all, the prescribed time period is a mere 14 days, and it can scarcely be argued that to expect the complainant to wait this short time pending the expiry of the period from the service of a futile notice would cause prejudice in the greater scheme of the litigation process. As noted by Andrew Ang J in *Lee Seng Eder*, the complainant's real rights can be protected in the meanwhile by the grant of interim relief such as a *Mareva* injunction or an *Anton Piller* order,⁴⁶ as is allowed under the language of s 216A(4).

IV. Conclusion

19 The decision and result in *IDV Concepts* on the notice requirement under s 216A(3)(a) are ostensibly correct on the merits of the facts of the case. The director, Chew, can scarcely complain of having been prejudiced. He knew of the allegations and claims of the complainant Teo because of a previous letter of demand sent to him, and in all probability knew when he received the notice less than a month subsequently, that the intention of Teo to apply for leave under s 216A of the CA to commence a derivative action comprised the omitted allegations despite their omission. A chambers judge hearing the application would indeed be extremely reluctant to allow the

⁴⁵ See para 10 above.

⁴⁶ *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [8].

application to fail on the ground of the technical deficiency, and ask that the applicant return to the court only 14 days later to be heard again upon the giving of the proper notice and the expiry of the prescribed time period under the statute. Such pedantry would seemingly be a waste of the complainant and her lawyers' time as well as a waste of judicial resources. The notice requirement is, however, a statutory requirement. If, as noted by the court in *Lee Seng Eder*, Parliament has not opened the door to the judicial development of exceptions to the notice requirement, it does not matter that to insist upon it appears unnecessary. It perhaps must be recalled that the availability under statute to a complainant to commence a derivative action is a derogation from the two basic principles of company law as stated in the seminal decision in *Foss v Harbottle*,⁴⁷ namely, the "proper plaintiff principle"⁴⁸ and the "majority rule principle".⁴⁹ The enactment of s 216A of the CA in Singapore extends the circumstances under which a complainant can commence a derivative action beyond the common law exception that exists where there is a fraud on the minority.⁵⁰ In this regard, Parliament's insistence that "strict conditions must be satisfied"⁵¹ before a complainant is allowed to avail himself of s 216A is not entirely unjustifiable. If the view is taken that the decisions on the facts in *Carolyn Fong* and *IDV Concepts* demonstrate that such strict insistence of the notice requirement is sometimes unwarranted, then perhaps legislative change is called for – whether in the form of specified exceptions as has been adopted under the Ontario BCA,⁵² or by way of a general provision as found in the Canadian Federal Legislation, leaving the development of such exceptions to the courts on an incremental case-by-case basis.

47 (1843) 2 Hare 461.

48 That a company is a separate legal entity from its members and so its members cannot sue to enforce the company's rights.

49 That there is no use having litigation about something which the majority can by general meeting ratify and so bind the reluctant minority.

50 See *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197.

51 See the remarks of then Minister for Finance Dr Richard Hu Tse Tau at the second reading of the Companies (Amendment) Bill (Bill No 33 of 1992), *Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at col 231; cited in *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [10] and by the Court of Appeal in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [21].

52 See para 17 above.