Shanghai Shipyard Co Ltd *v* Opus Tiger 1 Pte Ltd and another and other appeals and another matter

[2021] SGCA 109

Case Number	: Civil Appeals Nos 179, 180, 181 and 182 of 2020 and Summons No 81 of 2021
Decision Date	: 24 November 2021
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JCA; Judith Prakash JCA
Counsel Name(s)	: Daniel Chia Hsiung Wen and Wong Ru Ping Jeanette (Morgan Lewis Stamford LLC) for the appellant; Tnee Zixian, Keith (Zheng Zixian) (Tan Kok Quan Partnership) for the first respondents (watching brief); Hing Shan Shan Blossom, Kwek Choon Yeow Julian, Kiu Yan Yu and Tan Yi Yin Amy (Drew & Napier LLC) for the second respondent.
Parties	: — Shanghai Shipyard Co Ltd — Opus Tiger 1 Pte Ltd — Reignwood International Investment (Group) Company Ltd — Opus Tiger 2 Pte Ltd — Opus Tiger 3 Pte Ltd — Opus Tiger 4 Pte Ltd

Civil Procedure – Parties – Joinder

Companies – Statutory derivative action

[LawNet Editorial Note: These were the appeals from the decision of the High Court in [2021] SGHC 133.]

24 November 2021

Judith Prakash JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 The background facts to these four appeals have been set out in detail by the judge below ("the Judge") in his Grounds of Decision ("GD") and we therefore provide only a brief summary. The appellant, Shanghai Shipyard Co Ltd ("SSY"), is a party to shipbuilding contracts ("the Contracts") with the first respondent companies in each of these appeals (collectively, "the OT Companies"). The OT Companies are the subsidiaries of Opus Offshore Ltd ("OOL"), a Bermudan-incorporated company. The second respondent, Reignwood International Investment (Group) Co Ltd ("Reignwood"), is a 70% shareholder and a creditor of OOL. Reignwood provided SSY with a guarantee in respect of certain obligations of two of the respondents, Opus Tiger 1 Pte Ltd ("OT1") and Opus Tiger 2 Pte Ltd ("OT2").

2 Sometime in December 2016, disputes arose under the Contracts. OOL became insolvent in February 2017 and was put into provisional liquidation under Bermudan law (see GD at [15]–16]). SSY served a notice terminating the Contract with OT1 in February 2017, and did the same in respect of the Contracts with the remaining OT Companies in March 2017 (see GD at [20]–[21]). Following an unsuccessful demand in May 2017 on Reignwood on the guarantee given in connection with OT1, SSY commenced proceedings against Reignwood in the English courts in November 2018 to enforce that guarantee.

3 In December 2018, Reignwood applied for leave under s 216A(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") to commence derivative arbitral proceedings ("the Arbitrations") in the names of the OT Companies against SSY in respect of its alleged default under the Contracts ("the

Leave Applications"). The Judge heard the Leave Applications and granted Reignwood leave in May 2019, subject to Reignwood's undertaking to bear the legal costs and expenses incurred by the OT Companies in pursuing the Arbitrations ("the Orders").

4 In October 2019, SSY applied to be joined under O 15 r 6(2)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court") to the Leave Applications ("the Joinder Applications"). By the time the Joinder Applications were heard by the Judge in August 2020, the Arbitrations were already underway. Before the Judge, SSY argued that it ought to be joined on the basis that it was the intended defendant of the Arbitrations.

5 The Judge dismissed the Joinder Applications. He held that, although the court still had the requisite power under O 15 r 6(2)(*b*) to order SSY's joinder notwithstanding that the Leave Applications had been determined and the time for appeal against the Orders had expired, only "insiders" of the company with an interest in its management – namely, its shareholders and directors – can satisfy the non-discretionary requirements for joinder under O 15 r 6(2)(*b*). Therefore, SSY, which was not an insider of the OT Companies, could not be joined by virtue of its status as an intended defendant of the Arbitrations alone. The Judge also considered that, in any event, SSY would not have satisfied the discretionary requirements for joinder under O 15 r 6(2)(*b*), given the ensuing prejudice and inconvenience occasioned to Reignwood if SSY were joined. The Judge also refused to order SSY's joinder pursuant to the court's inherent jurisdiction.

6 The Judge granted SSY leave to appeal against his decision, on the basis that he had decided a general principle of law for the first time – namely, that persons who could be joined under O 15 r 6(2)(*b*) to a s 216A application were limited to the company's insiders. However, before us, SSY no longer seeks to be joined on the ground of it being the intended defendant of the Arbitrations, but by virtue of it being a "proper person" within s 216A(1)(*c*) of the Act ("the Alternative Case"). Sometime before the hearing of these appeals, SSY also filed an application in Summons No 81 of 2021 ("SUM 81") to adduce further evidence on appeal.

7 Four issues were placed before us:

(a) whether SUM 81 should be allowed;

(b) whether the Judge had the requisite power to order SSY's joinder to the Leave Applications notwithstanding that they had already been determined and the time for appeal against the Orders had expired;

(c) whether SSY can satisfy the non-discretionary requirements for joinder in O 15 r 6(2)(*b*) by virtue of its status as the intended defendant of the Arbitrations; and

(d) whether SSY should be permitted to advance the Alternative Case before us.

Our decision

8 Having considered the submissions, both written and those made before us this morning, we have concluded that the Judge did not have the requisite power to order SSY's joinder at the time the Joinder Applications were brought. Therefore, we dismiss these appeals on the basis of this issue. On the issue of SSY's capacity to be joined, however, we agree with the Judge that only a company's insiders can satisfy the non-discretionary requirements for joinder under O 15 r 6(2)(*b*) to a s 216A application. Accordingly, we take the view that SSY cannot be joined, even if the court could still join parties to the Leave Applications. Additionally, we consider that SSY should not be permitted to

advance the Alternative Case in these appeals. As the court had no jurisdiction to entertain the Joinder Applications in the first place, SUM 81 has no foundation and must also be dismissed. We need say no more about SUM 81, but we will explain our reasons for the other decisions we have made.

Whether the court still had the power to order SSY's joinder after the Leave Applications had been determined

9 We now turn to our reasons for deciding that the court had no power to order SSY's joinder to the Leave Applications.

10 Order 15 r 6(2)(*b*) of the Rules of Court provides as follows:

> (2) … at any stage of the proceedings … the Court may … —
>
> …
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

11 Since the court may only order joinder "at any stage of the proceedings", that power will only exist while the underlying proceedings remain afoot. Obviously, such power will exist before judgment. On the other hand, the court has the power to order joinder post-judgment if and only if something "remains to be done" in the matter, such as the assessment of damages (see *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*De La Sala*") at [198], wherein we endorsed *The Duke of Buccleuch* [1892] P 201, which stood for this proposition).

12 In the *De La Sala* case, without deciding the issue, we also expressed our reservations about what appears to be a more liberal standard that was adopted by the English High Court in *C Inc plc v L and another* [2001] 2 Lloyd's Rep 459 ("*C Inc*"). In *C Inc*, the plaintiff sought to add a third-party (the defendant's husband) as an additional defendant so that he would also be bound by a judgment obtained against the defendant who had, post judgment, claimed to be holding her assets on trust for the husband. The issue was whether the court had the power to join a new party when judgment had been obtained against the only existing defendant. This required a consideration of how the word "proceedings" (in the context of r 19.2(2) of the UK Civil Procedure Rules) were to be interpreted (at [82]). Aikens J held that the word "proceedings" was to be interpreted broadly so that it embraced all stages of an action from the time it has been started until it becomes finally complete or moribund, and so even after a judgment has been obtained, if it has not been satisfied so that further action may still be needed to enforce that judgment, proceedings remained afoot (at [83]).

13 The Judge considered that, under the orthodox position in *The Duke of Buccleuch*, he had no power to order SSY's joinder because proceedings conclude and the court's power to order joinder

ceases as soon as the court makes an order or enters judgment which determines with finality the entire *lis* between the parties to the proceedings (see GD at [57] and [60]). However, he held that the liberal standard in *C Inc* should be recognised as good law in Singapore, and on that basis, he had the power to order SSY's joinder until the Orders had been spent and the underlying derivative proceedings (the Arbitrations) had concluded (see GD at [62], [83]–[85] and [90]).

The liberal standard is not part of Singapore law

14 With respect, we disagree with the approach taken by the Judge and we hold that the liberal standard in *C Inc* is not part of Singapore law. This is so for a few reasons. First, the liberal standard has troubling implications for finality in litigation as it adopts a much broader conception of what constitutes a thing that "remains to be done" so that proceedings would be considered ongoing even after a final judgment had been extracted and attempts at enforcement had commenced. Thus, the joinder of new parties would be possible so long as a single cent of judgment debt remained unpaid (see *De La Sala* at [200]–[201]).

15 Second, we disagree with the Judge that it is necessary to adopt the liberal standard to eliminate technical arguments about whether or not proceedings were concluded and interpret the phrase "at any stage of the proceedings" with an inclination towards keeping the court's power under that rule alive, so as to give effect to the purpose of O 15 r 6(2) (see GD at [65]–[67]). Contrary to what the Judge held, under the orthodox position, the fact that a court has made a final judgment or order does not *per se* exclude the court's powers to order joinder under O 15 r 6(2)(*b*), provided that something "remains to be done". As such, whether proceedings remain afoot for the purposes of O 15 r 6(2)(*b*) turns on a substantive consideration of whether something "remains to be done" in the case and not a formalistic assessment of whether a final judgment or order has been made by the court.

16 Indeed, that was the reasoning adopted by Fry LJ in *The Duke of Buccleuch*. In that case, the plaintiff's vessel collided with the defendant's, and the plaintiff commenced an action against the defendant for loss of its vessel, cargo and crew's effects. After the House of Lords had upheld the trial judgment on liability, an application was made for the consignees of the cargo to be substituted as the plaintiff to the action, and an issue arose as to whether the court still had power to join the consignee as a plaintiff to the action by that stage. Both Jeune J (at first instance) and Lord Esher MR (in the Court of Appeal) held that the court had the requisite power to order joinder because damages remained to be assessed and there had been no final judgment (at 208–209 and 211). On the other hand, Fry LJ said (at 212):

> I base my decision upon the words 'at any stage of the proceedings'. It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case. In this case there remains the assessment of damages.

17 Fry LJ therefore concluded that the court had the power to order joinder, not because there had been no final judgment, but because something "[remained] to be done" in that case – namely, the assessment of damages. In our view, to determine whether something "remains to be done", the approach taken must be conditioned on the nature of the underlying action, with especial attention to the nature of the remedy sought by it. Generally, however, where there has been a judgment on the merits conclusively determining parties' rights in the action (for example, a judgment determining both liability and quantum in an ordinary writ action for damages), and the time for appeal against that judgment has expired, then nothing "remains to be done" and the court's power to order joinder ceases on the expiry of the time for appealing.

18 Third, we will add that it does not appear that the liberal standard has found favour in English

law. The English cases subsequent to *C Inc* do not go so far as to say the court may order joinder up to such time as a judgment has been fully satisfied, but only accept the more limited proposition that the court has the power to order joinder of parties after judgment has been given (see *Blackstone's Civil Practice 2013: The Commentary* (Maurice Kay, Stuart Sime and Derek French eds) (Oxford University Press, 2013) at para 14.84; *Dunwoody Sports Marketing v Prescott* [2007] 1 WLR 2343 at [23]). This, as we have considered above, is consistent with the position under *The Duke of Buccleuch* in so far as something "remains to be done" in the matter.

Whether something "remains to be done" after a complainant has been granted or refused leave in a s 216A application

19 We now comment on the proceedings here. The action in a s 216A application is one for leave to commence a derivative action in the name of a company to enforce the company's rights against a third party. The only issue for the court's determination is whether the complainant is entitled (pursuant to s 216A(2) of the Act) to commence derivative proceedings and exercise the company's rights against a putative defendant on its behalf. Once the court determines the s 216A application and makes an order granting or refusing the complainant leave, and the time to appeal against that order has expired, the complainant's entitlement under s 216A(2) of the Act in respect of the proposed derivative proceedings is conclusively determined, and so nothing "remains to be done" and the court's power to order joinder ceases.

20 Even where an order granting the complainant leave to commence a derivative action expressly contains an ancillary order giving the parties liberty to apply, that does not mean, as the Judge has suggested, that something "remains to be done" in the s 216A application until the derivative proceedings themselves are concluded (see GD at [84]). While the liberty to apply order allows the parties to the s 216A application to, if necessary, return to court for directions on implementing the grant of leave, that pertains to the conduct of the derivative proceedings themselves. Those proceedings are altogether separate and distinct from the s 216A application, having as they do different parties, different causes of action and different remedies. This was recognised by the Judge as he accepted that the liberty to apply will not allow the parties to return to court to vary or reverse the order (see GD at [84]). Yet the effect of the Judge's holding that something "remains to be done" until the derivative proceedings themselves have concluded is to achieve that very result as it leaves it open for the court to reconsider and possibly reverse the original order made on the determination of a s 216A application.

21 For the foregoing reasons, we consider that the Judge had no power to order SSY's joinder at the time the Joinder Applications were brought. By then, the time for appeal against the Orders had expired, and Reignwood's entitlement under s 216A(2) of the Act to commence derivative arbitral proceedings in the name of the OT Companies had been conclusively determined, so nothing "remained to be done" and the court had no power to order SSY's joinder.

Whether SSY can satisfy the non-discretionary requirements for joinder in O 15 r 6(2)(b)

22 Our conclusion above disposes of these appeals, but we go on to make some observations about SSY's standing to be joined given that this is the first case before us in which the intended defendant seeking to be joined to a s 216A application is not also an insider of the company.

23 Where the "necessity" limb in O 15 r 6(2)(*b*)(i) is relied on, the party seeking to be joined must show that it is *necessary*, and not merely desirable, for the court to order joinder, and that his nonjoinder prevents the action, as originally drawn, from being effectually and completely determined (*De La Sala* at [203]).

24 We agree with the Judge that the sole issue in a s 216A application is whether the court ought to sanction a deviation from the principle of majority rule by compelling a company to litigate contrary to the will of its shareholders and directors. That issue, which is one concerning the management of the company, is *exclusively* for its insiders. From a legal perspective an intended defendant who is not also an insider of the company can have no interest in the management of the company, even if it is concerned not to be sued by the company. To allow an intended defendant of proposed derivative proceedings to have a say on how the company's claim against *itself* should be managed smacks of the most extreme conflict of interest. Permitting the joinder of such a party to a s 216A application will therefore run contrary to the notion that the affairs of a company should be run in its best interests. One of the main factors that a court hearing a s 216A application has to consider is whether granting the application would be in the company's interests. A prospective defendant, even one who has some basis to believe that the intended claim will fail, can have nothing relevant to say on that point.

25 Since the issues arising in a s 216A application in no way concern an intended defendant who is not also an insider of the company, the nonjoinder of such an intended defendant will not prevent the complete and effectual determination of the s 216A application, and so the non-discretionary requirements for joinder under the "necessity" limb will not be satisfied.

26 Where the "just and convenient" limb in O 15 r 6(2)(*b*)(ii) is relied on, the party seeking to be joined must show that there is a question or issue involving itself which relates to an existing question or issue between the existing parties (*De La Sala* at [204]). While there is no requirement that the question or issue involving the third-party be common with the existing question or issue in the main dispute (*Lim Meng-Eu Judy v RSP Investments (S) Pte Ltd* [1998] 2 SLR(R) 525 at [13]), a mere factual overlap between the two will not suffice and the third-party question or issue must have the "requisite relationship" with the main dispute (*De La Sala* at [204]).

27 Before the Judge, SSY argued that whether the proposed derivative proceedings had merits was one such issue (see GD at [147]). The Judge rejected SSY's argument. He held that the threshold on the merits which a complainant must clear to prove that the proposed derivative proceedings are *prima facie* in the interests of the company was not the converse of the threshold on the merits with which an intended defendant would be concerned on an application to strike out the derivative proceedings once they were commenced (GD at [148]). We agree with the Judge. The issue relating to the merits of the proposed derivative proceedings with which an intended defendant is concerned is hardly one which bears the "requisite relationship" with any of the issues in a s 216A application. At this stage the application is not concerned with the substantive merits of the contemplated derivative proceedings, but only whether those proceedings are legitimate or arguable, and not frivolous, vexatious or bound to be unsuccessful (see *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 at [10] and *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 at [25]).

28 Where the court grants the complainant leave in a s 216A application, it facilitates the initiation of proceedings against the intended defendant, so that it is now engaged in litigation that it otherwise would not have been. In these circumstances, the interest of an intended defendant who is not also an insider of the company in the s 216A application cannot be characterised as anything but a mere commercial interest in its outcome. That, however, will not suffice for the purposes of O 15 r 6(2)(*b*), which requires that a party seeking to be joined must at least have some legal interest that is directly related or connected to the subject matter of the action between the existing parties (see *Singapore Civil Procedure Vol I* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) at para 15/6/9).

29 For the foregoing reasons, we agree with the Judge that an intended defendant who is not also

an insider of the company cannot satisfy the non-discretionary requirements for joinder under both the "necessity" and "just and convenient" limbs of O 15 r 6(2)(*b*). In the circumstances, there is no need for us to consider the discretionary requirements of O 15 r 6(2)(*b*).

30 For completeness, we also make two related observations. First, we endorse the Judge's decision that SSY cannot be joined to the Leave Applications pursuant to the court's inherent jurisdiction (see GD at [205]). The inherent jurisdiction of the court should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. Since SSY cannot even satisfy the non-discretionary requirements for joinder under O 15 r 6(2)(*b*), there can be no circumstances of necessity which justify the court's exercise of its inherent jurisdiction.

31 Second, we also consider that the Judge correctly declined to make a limited order granting SSY leave to be heard on separate applications that were filed by the OT Companies seeking directions on whether the Orders permitted Reignwood to exercise the OT Companies' rights under the Contracts on their behalf in connection with the Arbitrations (see GD at [31]–[34] and [215]–[217]). These applications relate to Reignwood's conduct of the Arbitrations in the name of the OT Companies and can only be a matter for persons who have an interest in their management – namely, the insiders of the company.

The Alternative Case

32 Turning to the Alternative Case, SSY argues that it is a "proper person" within s 216A(1)(*c*) of the Act and so will satisfy the requirements for joinder under O 15 r 6(2)(*b*). This is because, notwithstanding it being the single largest creditor in any liquidation of each of the OT Companies by virtue of its claims under the Contracts, and the general principle that the economic interests of creditors come to the fore when a company is insolvent or near-insolvent, SSY has no power to influence management and so is in a position akin to that of a minority shareholder.

33 We consider that SSY should not be permitted to advance the Alternative Case on appeal. First, the Alternative Case contradicts the case which SSY had relied on before the Judge. By advancing the Alternative Case, SSY seeks to justify its joinder on some ground *other than the fact that it is the intended defendant of the Arbitrations*. In doing so, SSY implicitly accepts that not all intended defendants who are not also insiders of the company may be joined to a s 216A application as of right. That contradicts its case before the Judge that it could be joined by virtue of its status as the intended defendant of the Arbitrations *alone*. The Judge granted SSY leave to appeal on that issue. SSY cannot now be allowed to broaden its scope of arguments on appeal to include an argument which barely featured before the Judge.

34 In their skeletal submissions, SSY stated that the Alternative Case was not a departure from their case before the Judge and they were now merely contending that the Judge's ruling that *an outsider of the company may not be joined to a s 216A application* was erroneous as there were circumstances where an outsider may nevertheless have an interest in the management of the company for the purposes of joinder. SSY has mischaracterised the Judge's decision. While the implication of the Judge's decision – that only the company's insiders can be joined under O 15 r 6(2)(*b*) to a s 216A application – is that outsiders of the company will not come within the category of persons that can be so joined, the Judge did *not* decide, as a general proposition, that outsiders of the company cannot be joined to a s 216A application.

35 Second, by advancing the Alternative Case, which contradicts its case before the Judge, SSY comes close to acting in abuse of the appellate process by discarding the entire basis on which the

Joinder Applications had proceeded before the Judge and seeking to re-argue the Joinder Applications afresh before us. This is precisely what we had cautioned against in *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] 2 SLR 744.

36 In any event, we will add that there are no merits whatsoever in the factual contention underlying the Alternative Case – that SSY is the single largest creditor in any liquidation of each of the OT Companies. As the Judge has pointed out, the claims by SSY against each of the OT Companies under the Contracts remain unadjudicated (see GD at [171]). More critically, SSY's factual contention is fundamentally misplaced because it presupposes that the OT Companies are already insolvent (when they were not yet subject to any formal insolvency proceedings but were only rendered insolvent as a result of the insolvency of OOL, on which they are dependent for funding: see GD at [13]–[14]) and that SSY is in fact the largest creditor of each of the OT Companies. If that were indeed the case, SSY could have simply applied for the winding-up of the OT Companies. Obviously, SSY must have known that it has no basis to do so, but yet it seeks to achieve that same result by attempting to make this argument before us.

37 We note that the Judge has suggested that a "proper person" within s 216A(1)(*c*) of the Act may constitute an "insider" of the company and so will satisfy the non-discretionary requirements under O 15 r 6(2)(*b*) to be joined to a s 216A application (see GD at [111], [114], [146] and [216]). Given that we are not prepared to consider the Alternative Case, we also express no concluded view on this point and reserve it for an appropriate occasion in the future. The only provisional observations we make at this time are the following. First, even if those managing an insolvent company that has not been liquidated have a duty to prioritise the interests of the creditors, that does not mean a creditor can take over managing the company without instituting insolvency proceedings. Second, it seems to us there are legislative provisions designed to deal with this concern, for instance in the prohibition against and remedies available in the event of fraudulent or wrongful trading.

Conclusion

38 In these circumstances, we dismiss these appeals. We reach the same conclusion as the Judge did below, albeit on the more limited ground that he had no power to order SSY's joinder at the time the Joinder Applications were brought. We also dismiss SSY's application in SUM 81.