

BRITISH VIRGIN ISLANDS HIGH COURT (COMMERCIAL DIVISION)

***Andriy Malitskiy and Igor Filipenko -v-
Oledo Petroleum Limited and Oledo
Petroleum Limited v Andriy Grigoryevych
Adamovsky and Stockman Interhold S.A.***
Claim No. BVI HC (Com) 0083 of 2012

DERIVATIVE PROCEEDINGS - PRINCIPLES TO BE APPLIED UNDER SECTION 184C OF THE BVI BUSINESS COMPANIES ACT, 2004 - MEANING OF 'GOOD FAITH' IN SECTION 184C (2)(A) - WHETHER CLAIM UNDER SECTION 184I AN ALTERNATIVE REMEDY FOR THE PURPOSE OF SECTION 184C 2(E)

In this case the Applicants who were shareholders in the subject company, Oledo Petroleum Ltd (the "Company"), sought a provisional order for leave to bring a derivative action. The proposed action was to enable the Company to seek to recover the sum of US\$71.5 million alleged to have been wrongly transferred from its bank account to an account belonging to another company. It is accepted that the Defendant caused the transfer and that the Applicants were entitled to 50% of that sum.

One of the factors which the Court was required to consider in determining whether leave should be granted to bring derivative action under the relevant Section 184C (2)(a) of the BVI Business Companies Act (the "Act") is whether the member was acting in good faith. The Learned Judge was of the view that the requirement of "good faith" was designed to enable the Court, in a proper case, to withhold permission to commence derivative proceedings from a shareholder who wishes to use the procedure otherwise than for the benefit of the company in question, in other words to achieve a collateral purpose. The Learned Judge further found that once it is shown that it is in the interest of the Company for the proposed Claim to be brought, that the claim has a real prospect of success and that the true object of the shareholder in seeking leave to bring it was to seek redress on its behalf for a wrong done to the Company it was not relevant that the shareholder had some improper motive in advancing it. He noted that the fact that the Applicant may be motivated by spite or malice against the proposed Defendant was irrelevant.

Another factor which the Court was required to consider under Section 184C (2)(e) is whether an alternative remedy to the derivative claim is available. On these facts the Applicants had already brought an unfair prejudice Claim under Section 184I. The question for the Court was whether that Claim was truly an alternative claim such that leave to bring a derivative action was not necessary. While noting that it would not be an answer to every application by a member of a company for leave to bring a derivative action to say that it would always be open to him to seek to be bought out under Section 184I, the Judge found that on the particular facts, success in the derivative action would achieve no greater benefit than success in the Section 184I proceedings and that in principle therefore a claim under Section 184I (properly pleaded) afforded to the Applicant a true alternative remedy. Having come to this view, and noting that the claim under Section 184I was commenced first in time, the Judge found that the derivative proceedings were to be treated as not having been commenced in good faith.

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