LECTURE 1

INTRODUCTION AND SEPARATE PERSONALITY DOCTRINE

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Introduction and Separate Personality Doctrine

Some of the cases cited below can be found in Sealy & Worthington (ed) Sealy and Worthington’s Cases and Materials in Company Law (10th edn, 2013) (S&W), and David Kershaw Company Law in Context: Text and Materials (2nd edn, 2012)

1. Introduction

To a lay person the company is a form of business organisation, much like a sole proprietorship or partnership. This is of course true of most companies. But unlike a sole proprietorship or partnership, a company can be used for purposes other than a business vehicle, for eg, in education, charity or other fields of human activity. A company is a versatile form of organisation, but for the purposes of this course, we shall focus on the company as a business vehicle.

Company law is one of the most dynamic branches of law. It has seen substantial reforms in various jurisdictions in recent years. For example, UK undertook a mammoth review of its Companies Act which culminated in the enactment of its Companies Act of 2006. Closer home, the Company Legislation and Regulatory Framework Committee (‘CLRFC’) was appointed by the Government in 1999 and submitted its report recommending substantial reforms in 2002. Most of its recommendations have since become law.

But the need to keep Singapore’s company law updated and the Companies Act coherent requires constant effort. It was before long another committee was appointed to review the Companies Act. Called the Steering Committee for Review of the Companies Act and chaired by Professor Walter Woon, it submitted its report (Report of the Steering Committee for Review of the Companies Act) to the Government in April 2011.1 The Report referred to the review conducted by the CLRFC, stating that although several changes came out of that review, ‘no attempt was made to deal with the structural flaws in the Act caused by piecemeal amendment over the years.’ The Steering Committee therefore recommended a rewrite of the Companies Act. It was guided by two main principles; viz, that foreign legislation could not provide an adequate template for Singapore’s needs, and that it would not redraft the Companies Act for the sake of redrafting. Instead, it would retain wording that is well-understood and with which the market is familiar. The main purpose is to streamline and iron out inconsistencies in the Act.

Following a public consultation exercise, the Ministry of Finance announced that it would accept most of the recommendations of the Steering Committee, and has prepared draft bills. If you are interested, you may access the documents at the website of the Accounting and Corporate Regulatory Authority.2 This course will refer to the recommendations where appropriate. Due to the constraints of time, however, it cannot hope to cover all the proposed changes. The above introduction serves to highlight two points.

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1 It may be accessed at http://www.acra.gov.sg/Publications/PublicConsultation/PublicConsultation_on_the_Review_of_the_Companies_Act_and_Regulatory_Framework_for_Foreign_Entities/ (last accessed on 9 June 2014).
2 http://www.acra.gov.sg/Publications/PublicConsultation/PublicConsultation_on_Draft_Companies_Amendment_Bill_2013/ and http://www.acra.gov.sg/Publications/PublicConsultation/PublicConsultation_on_Additional_Proposed_Amendments_to_the_Companies_Act/. (last accessed on 9 June 2014).
First, it is erroneous to think that Singapore’s company law is a carbon copy of English law. The colonial roots of Singapore’s law cannot be denied. However, it has diverged from English law over the years, and the pace of divergence is set to continue.

Secondly, and more generally, for those of you interested in practising corporate law, and in fact for most of you, it is important that you keep yourself informed of the developments in this fast moving branch of law.

### 2 Types of Companies

There are different ways to classify and compare the different types of companies; for eg:

- a public company versus a private company and an exempt private company;
- a limited company versus an unlimited company; and
- a Singapore company versus a foreign company.

### 3. The Incorporation Process

Section 19 CA
See also process stipulated by Accounting & Corporate Regulatory Authority, Singapore: [http://www.acra.gov.sg/Services/Company/](http://www.acra.gov.sg/Services/Company/)

Historically in England companies could only be formed by royal charter or Act of Parliament. This meant that incorporating a company was either a costly affair or available only to those who were well connected. To allow the benefits of incorporation to be made widely available, the simple process of incorporating a company by registration was introduced in England in 1844. This is the process that now applies in Singapore and in many other jurisdictions both common law and civil law, e.g. in China, Indonesia and Vietnam.

### 4. Core Features of Company Law

It is often said that companies/corporations in different jurisdictions have five basic legal characteristics, namely:

- legal personality;
- limited liability;
- transferable shares;
- delegated management; and
- investor ownership.

Through these basic characteristics it is also said that entrepreneurs are able to run their businesses more efficiently using a corporate vehicle. These five characteristics will be covered variably in the course and this part will focus on the characteristics of legal personality and limited liability.
5. Separate Legal Entity

Section 19(5) CA
‘On and from the date of incorporation specified in the notice issued under subsection (4) but subject to this Act, the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.’

Salomon v Salomon & Co Ltd [1897] AC 22 at 51 (Lord Macnaghten)
The company is at law a different person altogether from the subscribers …; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

Macaura v Northern Assurance Co Ltd [1925] AC 619
Lee v Lee’s Air Farming Ltd [1961] AC 12

6. Limited Liability

Limited liability used to be available to a businessman only through incorporating a company. In recent years it is available more widely; it may now be obtained by forming a limited liability partnership or a limited partnership.

The idea of limited liability is that when a company goes into insolvent liquidation, its members (or shareholders) are not required to contribute to the assets of the company provided that they have paid for their shares in the company in full. In other words, their liability is capped.

There are several advantages to limited liability:
- Limited liability facilitates the mobilization of capital. It provides companies with a means of raising finance other than through borrowings.
- It also facilitates the development of capital markets. A stock exchange is not feasible without limited liability.
- Additionally, limited liability more easily allows the professionalization of management as investors will be more prepared to allow the company to be managed by others if they are not made responsible for the consequences of decisions made by management.

But limited liability gives rise to its own problems. It increases the risk of creditors. A substantial part of company law is concerned to ensure that creditors’ interests are protected, whether through legal rules or self-help remedies.

7. Limited Liability and Separate Personality

It is necessary to distinguish between separate personality and limited liability. They are distinct concepts.
- It is possible to have separate personality but not limited liability, as in the case of an unlimited company.
It is also possible for the law to prescribe limited liability but not separate personality, as in limited partnership. In practice, however, separate personality makes it easier for limited liability to operate.

The key concepts associated with separate liability are as follows:

- **Separate liability** means that the assets and liabilities of a company belong to the company, not its members.
- As the company is separate from its members, a creditor of the company cannot sue the members for an unpaid debt incurred by the company.
- When a company is a going concern, this doctrine protects the members (and directors) from creditors. They need not rely on limited liability. It should be noted however that courts may exceptionally lift the corporate veil and hold a member liable. This will be considered under the section ‘lifting of corporate veil’.

Limited liability is only relevant when a company is in winding up, and only for the company’s members (usually the shareholders).

- If the company is insolvent and it is an unlimited company, members are liable to contribute to the company to put it in funds to pay the company’s debts.
- If the company is a limited company, a member holding fully paid shares is not liable to contribute to the company.

8. Piercing the Corporate Veil

The separate personality doctrine is not only a fundamental doctrine in company law. It is part of the general law as well, for example, revenue law, employment law etc. However, it has been said for a long time that in exceptional situations, the law is prepared to disregard or look behind the corporate personality and in a sense, to have regard to the ‘realities’. This is usually called ‘lifting the veil’ or ‘piercing the veil’.

For many years there has been little analysis in the cases or textbooks on what piercing the veil actually means and when it would or should be allowed. In particular, the conflict between the separate personality doctrine and veil piercing has never been addressed squarely. Some progress was made in 1990 when the English Court of Appeal examined the cases more closely in Adams v Cape Industries plc. It was accepted as good law in Singapore in Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd. Unfortunately there was little progress after those cases. Indeed, arguably the Singapore Court of Appeal muddied the waters in TV Media Pte Ltd v De Cruz Andrea Heidi when it pierced the veil of a one-man company without much reasoning and where veil piercing was unnecessary.

In recent years the developments in England and Singapore have arguably diverged. In the former the law was subject to intense scrutiny in several cases, the most important of which were Faiza Ben Hashem v Shayif, VTB Capital plc v Nutritek International Corp, and Prest v Petrodel Resources Ltd. The result is a tightening of the law so that veil piercing may only be resorted to in one clear case, viz, evading...
existing legal obligations and even so only where the desired result could not be reached by recourse to all other rules of law, and as for other cases, perhaps in really rare and exceptional situations.

In Singapore, on the other hand, there has been a proliferation of cases where the argument of veil piercing was raised without much analysis of earlier authorities or reasoning. As a result there are many cases where veil piercing features in the judgment, but usually as one out of many issues or one of the lesser issues. Their precedential value is thus difficult to gauge. You should be extremely careful when you read those cases. It is not safe to take the propositions at face value as most of them must be read and understood within the facts of the particular case where the propositions were made. It is ironic that the Win Line case, which discussed the law most carefully, was not much referred to.

It may be that Singapore law on the piercing of veil will develop differently from English law. Currently, however, it is submitted that doctrinally the state of law is unsatisfactory as the cases conflict and there is a lack of rigorous reasoning.

8.1 Statutory Veil Piercing

Companies are statutory creations. It is clearly open to Parliament to prescribe when a corporate veil is to be pierced. Examples of this can be seen in revenue statutes, group accounting, etc. It is a question of interpretation whether the veil should be pierced. The cases concerned with interpreting statutes are irrelevant to judicial veil piercing, as made clear in Adams v Cape Industries plc.

*Smith, Stone and Knight, Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* [1939] 4 All ER 116
*Re FG (Films) Ltd* [1953] 1 WLR 483
*DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852

*Prest v Petrodel Resources Ltd* [2013] UKSC 34
There was little analysis of statutory veil piercing. Lord Sumption said:

For specific statutory purposes, a company's legal responsibility may be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by "firms", which may include groups of companies conducting the relevant business as an economic unit.

He thought this was not a case of veil piercing, as it was not a true exception to the rule in *Salomon v Salomon & Co Ltd*. It is questionable whether he has gone too far. However, whatever the better view may be, it is clear that cases concerned with interpreting statutes have no relevance to judicial veil piercing.

8.2 Judicial Veil Piercing

8.2.1 Introduction

Until very recently English law on piercing the corporate veil is complex and confused. The recent UK Supreme Court decision in *Prest v Petrodel Resources Ltd* (judgment delivered on 12 June 2013) has imposed some order on the law. In substance, it held that the court would pierce a veil where it is used to evade an existing legal obligation, and that it is only available as a fall-back where more conventional remedies are inadequate. A majority of the court thought that it would be dangerous to rule out veil piercing in other situations, but emphasised that it would happen only in very rare cases.
The Singapore Court of Appeal has yet to discuss and analyse this area of law comprehensively and rigorously. Indeed, no Singapore case has addressed the fundamental questions of whether there is such a doctrine of piercing the corporate veil, and if there is, its basis and content. It remains to be seen whether Singapore courts will follow Petrodel.

8.2.2 Law excluding the Petrodel case

Textbooks have grouped the cases into certain commonly accepted categories. A few of these categories remain good law in Singapore. To help you understand the reasoning in the Petrodel case, and how the law has changed in England, brief comments on how they have been affected by it are included within each category. I have adopted the following classification of the categories:

(a) Evading existing legal obligations
(b) Agency
(c) Single economic unit
(d) Façade or sham that conceals true state of affairs
(e) Alter ego
(f) Interests of justice

After looking at each of the above in turn, we will consider two new local developments:

(a) New ground of alignment of economic interests between controller and company and controller acting unconscionably and in bad faith?
(b) The two justifications put forth in Tjong Very Sumito v Chan Sing En.

(a) Evading existing legal obligations

This ground for piercing the veil was articulated clearly for the first time in Adams v Cape Industries plc. But the cases said to have laid down and applied this rule was two earlier cases, Gilford Motor Co Ltd v Horne, and Jones v Lipman.

*Gilford Motor Co Ltd v Horne* [1933] Ch 935
*Jones v Lipman* [1962] 1 WLR 832

In the *Children’s Media Ltd* case, the High Court pierced the veil on the ground that the company was a façade and/or a sham and was used by Anthony Hollingsworth, the man who owned the companies in the group, to evade his legal obligations. It was affirmed on appeal but on a different ground. Has there been a mix of different rules in the High Court’s reasoning?


In the Petrodel case, this is the only identified ground for piercing the veil, which is referred to as the evasion principle. The underlying basis of this ground is the general principle that the court will not allow a person to keep an advantage which he has obtained by fraud. Therefore, the court will pierce the veil where the use of a company as a means of evading the law is dishonest.

(b) Agency

If the legal relationship of agency exists between two persons, called the principal and the agent, then the principal is responsible for whatever the agent does within the scope of the agent’s authority. This does not involve any piercing of the corporate veil.
However, judges in some early cases have used the agency reasoning, when in fact no agency relationship existed on the facts, to justify piercing the veil. In *Adams v Cape Industries plc*, that reasoning was rejected in favour of some other explanations, for eg, that the case involved the interpretation of a statutory provision which permitted or compelled the piercing of corporate veil.

*Adams v Cape Industries plc* [1990] Ch 433, 545 – 550 (agency)  
*Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98

*Prest v Petrodel Resources Ltd* [2013] UKSC 34  
- The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor.  
- Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose.

(c) Single economic unit  
This was rejected in *Adams v Cape Industries*, and the decision has not been questioned in subsequent cases.

*Adams v Cape Industries plc* [1990] Ch 433  
*Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98

(d) Façade or sham that conceals true state of affairs  
This was endorsed by Lord Keith in the House of Lords in *Woolfson v Strathclyde Regional Council*: “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing true facts.” Though it was only dicta, it was very influential. It was accepted and repeated in many subsequent cases, including the very important case of *Adams v Cape Industries plc*.

*Adams v Cape Industries plc* [1990] Ch 433 (CA) 531 - 544  
*Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98

In Singapore this ground is still good law. It was referred to in some cases and has been used to pierce the veil. In the latter situation it is not clear whether this ground stands alone or is part of a composite reasoning. Exactly what amounted to a sham or façade is not clear. In *NEC Asia*, it seems that using corporate name as cover and not keeping the company’s affairs distinct were regarded as elements supporting the façade ground.

*NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2010] SGHC 359; [2011] 2 SLR 565

In *Petrodel*, Lord Sumption criticised the ‘façade’ or ‘sham’ ground to pierce a veil, as references to a ‘façade’ or ‘sham’ beg too many questions to provide a satisfactory answer. He explained that what is involved in a ‘façade’ or ‘sham’ is the use of the corporate form to conceal the identity of the real actors. It does not involve piercing the veil at all. He termed this the concealment principle. On the facts in *Petrodel*, the husband had treated the companies as his money box. However, although he had ignored the separate personality of the company, Lord Sumption held that the court could not similarly do so and pierce the corporate veil. This cast doubt on earlier cases where the veil was purportedly lifted on the façade ground.
(e) **Alter ego**

Singapore courts have drawn a distinction between the ‘façade’ ground and the ‘alter ego’ ground of piercing the veil. It seems that was first articulated in the NEC Asia case. The question is whether the company is carrying on the business of the controller, and the *Smith, Stone and Knight* case was cited as authority. It should be pointed out that strong arguments can be made that the *Smith, Stone and Knight* case was a case of statutory interpretation and has no relevance to judicial veil piercing (referred to above on statutory veil piercing).

In *Tjong Very Sumito v Chan Sing En*, Steven Chong J said that the ground for veil piercing in the *TV Media* case was on this ground, viz, where the controller uses the company as an extension of himself and makes no distinction between its business and his own. The judge then proceeded to pierce the veil.

The case went on appeal and was reported as *Alwie Handoyo v Tjong Very Sumito*. The Court of Appeal affirmed the judgment of Steven Chong J and said that the key question in an ‘alter ego’ case is whether the company is carrying on the business of its controller.

*TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] SGCA 29, [2004] 3 SLR 543, [141]-[145]

*NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2010] SGHC 359; [2011] 2 SLR 565

*Tjong Very Sumito v Chan Sing En* [2012] SGHC 125; [2012] 3 SLR 953 (note reported judgment does not contain the parts on veil lifting)

*Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308

For a critical comment on the *De Cruz* case, read:

(f) **Interests of justice**

It has sometimes been said that the courts may exercise an equitable discretion to ignore the separate personality of a company if it is just in the circumstances to do so. This was rejected in *Adams v Cape Industries*, but in England some cases on the division of matrimonial property consequent on a divorce endorsed this ground and ordered the transfer of marriage assets vested in companies of which one of the spouses is the sole shareholder. This was decisively rejected in the *Petrodel* case.

*Re a Company* [1985] BCLC 333, 337-338

“[t]he court will use its powers to pierce the corporate veil if it is necessary to achieve justice”

*Adams v Cape Industries plc* [1990] Ch 433, 536

“[s]ave in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon and Co Ltd* merely because it considers that justice so requires.”

### 8.2.3 New local developments

(a) A new ground?

The veil was lifted or pierced in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter*. The factors mentioned by the court were the alignment of economic interests between the controller and company and the controller acting unconscionably and in bad faith. Is this a proper basis for veil piercing? Did the court consider any case? Can it be
reconciled with the separate personality doctrine or early cases? If your answers are no, can the decision nevertheless be justified on another basis?

The facts in this case are quite similar to one of the landmark cases on director’s duties, viz, *Regal (Hastings) Ltd v Gulliver* where the House of Lords came to a different conclusion.

*Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2012] SGCA 62, [2013] 1 SLR 374, [56]-[60]

(b) Seeds of a general local approach?

In *Tjong Very Sumito v Chan Sing En*, Steven Chong J suggested two justifications for piercing the veil:

Courts will, in exceptional cases, be willing to pierce the corporate veil to impose personal liability on the company’s controllers. While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law – first, where the evidence shows that the company is not in fact a separate entity; and second, where the corporate form has been abused to further an improper purpose (*Walter Woon on Company Law* (Tan Cheng Han, SC gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) (“Walter Woon”) at para 2.51 – 2.52, 2.57).

He also said that veil piercing involves difficult policy issues:

The lifting of a company’s veil of incorporation involves difficult policy issues – while it is trite that a company is a separate legal entity from its shareholders and controllers (*Saloman v Saloman* [1897] AC 22), there is also the concern that company directors should not be allowed to escape personal liability for wrongs personally committed simply because those wrongs were perpetrated in their capacity as company directors (*TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 (“TV Media”) at [144]).

*Tjong Very Sumito v Chan Sing En* [2012] SGHC 125; [2012] 3 SLR 953 (note reported judgment does not contain the parts on veil lifting)

### 8.2.4 The Petrodel case

Though it was accepted for many years that there was such a doctrine of lifting of corporate veil, that was the result of assumption rather than critical analysis. It has never been challenged before the highest court in England and Wales that, in truth, there was no such doctrine. This critical step was taken in *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, where the judgments were given in February 2013. Lord Neuberger acknowledged the force of the arguments, but did not rule on them as it was unnecessary to do so.

Hot on the heels of the *VTB* case, the issue arose again in the *Petrodel* case. This time, although it was again unnecessary for the Supreme Court to rule on the matter, as the appeal was unanimously allowed on another ground, an enlarged coram of 7 judges decided it was time to address the issue. Lord Sumption gave the leading judgment. Briefly, he held that the doctrine was part of English law, but restricted its

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7 Lord Walker held that ‘piercing the veil’ is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label to describe the disparate occasions on which some rule of law produces apparent exceptions to the separate personality doctrine.
scope to the *evasion principle* and as a last resort when all other more conventional remedies are of no assistance. Lord Neuberger agreed with him. The other judges, however, preferred to leave open the possibility that the veil might, in very rare cases, be pierced on other grounds.

*Prest v Petrodel Resources Ltd* [2013] UKSC 34
The following is a summary of the most important propositions from Lord Sumption’s judgement.

[The two principles]
- There are two distinct principles behind the terms ‘façade’ or ‘sham’. Much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle.
- The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the “façade”, but only looking behind it to discover the facts which the corporate structure is concealing.
- The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.
- Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

[What amounts to an abuse of separate legal personality to justify veil piercing?]
- These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality.
- It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller’s because it is the company’s. On the contrary, that is what incorporation is all about.
- Thus in a case like *VTB Capital*, where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company’s contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist.

[Statement of principle of veil piercing]
- There is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.
- The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it

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8 Lady Hale (with whom Lord Wilson agreed), Lord Mance, Lord Clarke and Lord Walker.
unnecessary to pierce the corporate veil. If it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. The Court of Appeal in *VTB Capital* was wrong in suggesting otherwise at [79].

- For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is consistent with authority and with long-standing principles of legal policy.
LECTURES 2, 3, 4 & 5

CORPORATE GOVERNANCE / DIRECTORS’ DUTIES

&

SHAREHOLDERS’ REMEDIES

Dr. Dan W. Puchniak

1 Associate Professor, Faculty of Law, National University of Singapore. Special thanks to Samantha Tang for her exceptional research assistance in preparing this handout. Of course, any errors remain my own.
1.0 Materials for lectures 2, 3, 4 & 5

Lectures 2 & 3 will primarily focus on law of directors’ duties in Singapore. All of the relevant information concerning the law of directors’ duties in Singapore is contained in the attached detailed handout entitled “Corporate Governance: The Law on Directors’ Duties in Singapore”. In order to place the law on directors’ duties into its proper context, Lecture 2 will begin with an explanation of the general law governing the board of directors and corporate officers in Singapore. For a more detailed description of the general law governing the board of directors and corporate officers, please refer to Chapter 7 of Walter Woon on Company Law (Revised Third Edition, 2009) (pp. 243-290) (“Woon”). The most important points from Chapter 7 of Woon will be contained in the PowerPoint slides for Lecture 2—which will be distributed after the Lecture.

Lectures 4 & 5 will focus on shareholders’ remedies in Singapore—which will build on your understanding of directors’ duties. All of the relevant information concerning the law of shareholders’ remedies in Singapore is contained in the attached detailed handout entitled “Shareholders’ Remedies in Singapore: The Protection of Minority Shareholders”.


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LECTURES 2 & 3

CORPORATE GOVERNANCE

THE LAW ON DIRECTORS’ DUTIES IN SINGAPORE
I. OBJECTIVES & MATERIALS

1.0 Lecture objectives

The law on directors’ duties is arguably the most complex and challenging area of company law in Singapore, and around the world. Small forests have been sacrificed to dissect the intricate complexities and pontificate on the high theory of this fascinating area of the law. Such a microscopic analysis and examination of high theory, however, is not the goal of this handout or the accompanying lectures.

Rather, the primary goal is to provide a clear, concise and practical understanding of the fundamental aspects of the law of directors’ duties in Singapore. As such, this handout and the accompanying lectures aim to:

- Introduce you to the major legal principles and policies that form the foundation for the law on directors’ duties
- Provide you with a clear understanding of the three major types of duties under Singapore law: (1) fiduciary duties (duty of loyalty); (2) negligence duties (duty of care); and (3) statutory duties under the Companies Act
- Provide you with an analytical framework to determine what these duties entail, the circumstances in which they can be breached, and the consequences of such breaches
- Provide you with a clear understanding of how these three duties overlap and are distinct from each other
- Introduce you to the Steering Committee for Review of the Companies Act’s recommendations for amending Singapore’s directors’ duties, so that you are aware of how the law is likely to evolve in the future

1.1 Materials

- Handout
  - This handout provides a detailed overview of the law of directors’ duties in Singapore, which is the primary focus of lectures 2 & 3. I expect that you will read this handout and briefly consider the short questions contained within before lecture 2 (i.e., before 14 August 2014). I will be asking you to respond to the questions in the lectures

- PowerPoint slides
  - I will be using PowerPoint slides, which will be made electronically available to students following each of the lectures. The PowerPoint slides are not meant to be a substitute for attending the lectures. My hope is that by providing the PowerPoint slides and this detailed handout you will be able to engage in the lectures rather than be consumed by note taking
Textbooks

The main topics examined in Lectures 2 & 3 are generally addressed in Chapters 7 & 8 of Walter Woon on Company Law (Revised Third Edition, 2009) (pp. 243-350) (hereinafter “Woon”). However, the lectures will not cover all of the issues and cases considered in Woon. Instead, the lectures will supplement Woon by providing an overall framework for understanding this area of the law and by highlighting the most important legal principles and cases. In addition, the lectures will consider several critically important court decisions that have been released since Woon was published and which are referred to in this handout.

In addition to Woon, many of the points made in the handout, PowerPoints and lectures have been extracted from or draw upon the following texts:


You are not required to read all of these texts. All of them, however, are exceptional works which will undoubtedly advance your understanding of the law of directors’ duties. The Koh text provides the most concise and straightforward overview of the law of directors’ duties in Singapore and is an excellent entry point for those who may be new to this area of the law. Woon is the most detailed and authoritative text on Singapore company law and is the best resource for more complex and/or detailed questions concerning directors’ duties in Singapore. Kershaw provides exceptionally clear explanations and useful hypotheticals which makes it an excellent resource for understanding the basic principles that govern the law of directors’ duties. In terms of the precise details of the law of directors’ duties in Singapore, however, Kershaw should be treated with caution as it focuses on UK company law—which, especially after the 2006 UK Companies Act reform, differs significantly from the Singapore law. Gower & Davies is perhaps the most thorough and authoritative company law textbook in the common law world but unfortunately, similar to Kershaw, should be treated with caution because of its UK focus.

This handout includes numerous cross-references and citations to Woon, Koh, Kershaw and Gower & Davies to make it more convenient for you to access the relevant portions of these leading texts if you desire more information on certain points in this handout or the lectures.
• Statute and Cases
  ▪ The most relevant portions of the *Companies Act* (hereinafter the “CA”) are attached to this handout (*See*, Section 15 below). Unless indicated otherwise, all statutory references in this handout are to the CA.
  ▪ The law of directors’ duties is at the core of many legal disputes that arise in companies. As such, this area of the law has generated a substantial body of case law. Many of the cases are lengthy and complex. To assist you in digesting this complex body of case law, this handout provides a number of brief case summaries and excerpts from the most important decisions.
  ▪ In addition, where possible, it provides references to relevant case excerpts from Sealy’s text, *Cases and Materials in Company Law* (Ninth Edition, Oxford, 2012). Also, it provides cross-references to portions of *Woon, Koh* and *Kershaw* where their discussions of the case law are particularly helpful.
II. THE PRIMARY GOAL OF DIRECTORS’ DUTIES
CONTROLLING THE COSTS AND ENHANCING BENEFITS OF THE BOARD

2.0 The delegation of management to the board

- Under Singapore law, the power to manage the company is delegated from the shareholders (as owners) to the board of directors
- Specifically, s 157A(1) of the CA prescribes that “the business of a company shall be managed by or under the direction of its directors”
- As explained below, such delegation has many costs and benefits for shareholders and the company as a whole

2.1 The benefits and costs of the delegation of management to the board

- The benefits of shareholders/owners delegating management to the board
  - Boards make the process of decision-making in companies with multiple shareholders/owners more efficient
  - Boards provide a useful mechanism for monitoring the quality of decisions made by executive employees—especially in companies with multiple and changing shareholders
  - Boards provide a well-defined institution which can bind the firm in transactions with third parties and be a target for litigation for corporate stakeholders
  - The above three features combine to facilitate the separation between those who own the company (i.e., the shareholders) from those who control the company (i.e., the managers). Such a separation between ownership and control is one of the reasons why the corporate form has become the dominant legal form for doing business around the world and is credited with enormous wealth creation
- The costs of shareholders/owners delegating management to the board
  - Directors can use their broad managerial powers to cause the company to act in ways that benefit themselves at the expense of the company (and, ultimately, at the expense of shareholders and other stakeholders)
  - Directors may shirk their managerial responsibility or lack the skill to exercise their managerial power effectively, both of which may damage the company (and, ultimately, the shareholders and other stakeholders)
- The primary role of directors’ duties
  - The primary goal of directors’ duties is to establish a body of rules and standards that allow shareholders (and, ultimately, other corporate stakeholders) to reap the benefits of delegating management authority to the board while at the same time minimizing the costs

❖ Question: How does the role of directors’ duties differ (if at all) in companies with a single shareholder, a major controlling shareholder and many small shareholders?
III. TWO TYPES OF DUTIES: RULES VERSUS STANDARDS

3.0 Overview

- A duty is an obligation to conduct yourself in a particular way or not to conduct yourself in a particular way.
- Such obligations or “duties” can take a specific or general form.
- Specific duties are often referred to as “rules”:
  - There are many specific rules/duties in the CA that attempt to govern specific conduct of directors—the most important of which are considered in this handout.
    - An example of a specific rule/duty in the CA is s. 169 which provides that companies cannot improve directors’ emoluments (i.e., the fees and other benefits that directors receive from the company for being directors) without a specific resolution passed by the shareholders at general meeting. This specific rule/duty aims to ensure that directors do not improve their own emoluments by merely passing a resolution themselves at a board of directors’ meeting. It also ensures that shareholders are aware of and approve all increases in the fees and other benefits that directors receive from the company for being directors (See, for more details on s. 169, Section 10.5 below)
- General duties are often referred to as “standards”:
  - Most of the duties regulating directors that have been developed by the courts (i.e., directors’ duties at general law) take the form of general standards/duties—not specific rules/duties.
    - An example of a general standard/duty developed by the courts is the fiduciary duty, which obligates directors to “act bona fide in the best interest of the company” when executing their responsibilities. This general obligation is aimed at preventing directors from acting in their own self-interest (which could take a myriad of forms) and motivating them to execute their various directorial responsibilities in a manner that benefits the company (See, for more details on fiduciary duties, Sections 5.0 & 6.0 below)
- Whether legislatures or courts choose to use specific rules or general standards to regulate director conduct will depend on a number of costs and benefits that are inherent in the nature of specific rules and general standards—which vary depending on the type of behaviour that is the target of regulation. These costs and benefits are discussed in Section 11.4 below.

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3.1 The benefits and costs of regulating directors with specific rules/duties

- The benefits of regulating director behaviour with specific rules/duties
  - Specific rules/duties provide clear *ex ante* instructions for how directors should behave
    - For example, the specific rule/duty in s 169 which requires a shareholders resolution to improve directors’ emoluments makes it clear that directors cannot improve emoluments on their own by merely passing a resolution at a board of directors meeting (i.e., directors must receive a resolution from shareholders at general meeting)
  - Specific rules/duties are relatively easy to police
    - For example, if directors improve their emoluments without a shareholder resolution it is clear they have breached their statutory duty under s 169
  - Specific rules/duties are effective in ensuring that directors take or avoid specific behaviour
    - For example, s 169 is an effective way to ensure that directors get shareholder approval for any improvements to their emoluments and do not improve their emoluments on their own at a meeting of the board of directors

- The costs of regulating director behaviour with specific rules/duties
  - Specific rules/duties can cover only a limited number of circumstances
    - For example, the rule in s 169 requiring a specific shareholder resolution to improve directors’ emoluments only applies to the fees and benefits that directors receive for *their role as a director*. Some directors, however, may also be executives of the company (i.e., work at the company as an executive employee and also sit on the company’s board as a director). Section 169 does not cover (nor does any other specific rule/duty in the CA cover) the fees and benefits of employees). As such, no specific rule in the CA prevents board members, who are also executive employees, from improving their fees and benefits in their role as *executive employees of the company*. This is an example of a gap created by a specific rule/duty in the CA. Fortunately, as explained below, the general law has created more general standards/duties that effectively cover such potentially harmful gaps in specific rules/duties
  - Specific rules/duties are inflexible and may not evolve with the times
    - For example, as we have seen in the example above, there is an obvious gap in the specific rule/duty in s 169 (i.e., it does not require a shareholder resolution for the improvement in the compensation of executives who are also directors). Post global financial crisis, there is a growing consensus that executive compensation has become excessive. Even though such a consensus exists and many experts feel s 169 has an obvious gap, it will take an act of parliament to amend s 169. This is obviously time consuming and costly. As such, a general standard/duty may work better as it can more quickly and cost effectively change with the times as courts can flexibly interpret general standards/duties based on the current business environment
3.2 Costs and benefits of regulating directors through general standards/duties

- The benefits of regulating director behaviour with general standards/duties
  - General standards/duties can cover an infinite number of circumstances
    - As we have seen in the example above there is an obvious gap in the specific rule/duty in s 169 when it comes to the regulation of the compensation of executives who are also directors. If s 169 were the only constraint on directors when setting executive compensation this could result in directors, who are also executives, granting themselves exorbitant executive compensation packages. Fortunately, the courts have developed a more general standard/duty that effectively covers the gap in the specific rule/duty in s 169: directors are bound by their fiduciary duties to act *bona fide* in the interests of the company. Obviously, directors using their management power to grant themselves exorbitant executive compensation packages would breach this general standard/duty
  - General standards/duties are flexible and can effectively evolve with the times
    For example, post global financial crisis, there is an emerging consensus that executive compensation has become excessive. Even if there is a consensus that s 169 should be amended to require a shareholder resolution for improvements to executive employee’s compensation this would take an act of parliament which is time consuming and costly. In this case, however, as described above, the general duty/standard to act *bona fide* in the interests of the company allows the court to address this gap. In addition, if this behaviour continues to be a problem the court can use its broad discretion to strictly punish such behaviour which may cause directors to, on their own, seek shareholder approval to avoid the prospect of punishment

- The costs of regulating director behaviour with general standards/duties
  - General standards/duties do not provide a clear *ex ante* indication of what specific actions directors must take
    - For example, as explained above, the general fiduciary duty to act *bona fide* in the interests of the company covers the gap in the specific rule in s 169. However, the general fiduciary duty to act *bona fide* in the interests of the company does not give any indication of the exact steps that directors must take when setting the compensation of executives who are also directors
  - General standards/duties are expensive to police and enforce
    - For example, it would be expensive to police whether the directors’ approval of a specific salary package for an executive director was an act done *bona fide* in the interests of the company. Paying an executive a large salary may or may not be in the company’s best interest—and determining this would be a difficult and expensive process. In contrast, it is easy to police and enforce whether a shareholders’ resolution was passed for the improvement of directors’ emoluments as required by the specific rule/duty s 169 of the CA
3.3 The use of rules and standards as directors’ duties in Singapore

- Companies are involved in an infinite number of pursuits and their directors undertake an infinite number of acts. In addition, the corporate environment rapidly evolves as the business world constantly changes. As such, company law (especially the general law created by the courts) has tended to rely more heavily on general standards than specific rules for regulating director (mis)conduct.
- Singapore company law is no exception. The core of the law of directors’ duties in Singapore is based on general standards of director conduct that have been developed by the courts (i.e., broad fiduciary duties and negligence duties make up the core of the law of directors’ duties in Singapore) (See, for more details, Sections 3, 5 & 9 below).
- There are, however, certain types of specific director misconduct that we know is likely to cause harm to companies (e.g., directors being able to increase their own emoluments without approval from shareholders). To regulate such deleterious behaviour the Singapore Parliament has supplemented the general standards of directors’ duties with a number of specific rules in the CA (e.g., s 169) which attempt to prevent specific director misconduct.
- Thus, it is necessary to understand both the general standards/duties and specific rules/duties to accurately understand the law of directors’ duties in Singapore company law.
IV. BASIC FRAMEWORK FOR DIRECTORS’ DUTIES

4.0 What are the sources of directors’ duties and what general purpose does each source serve?

There are three broad sources of directors’ duties in Singapore, which each serve different but overlapping purposes:

1. Fiduciary duties (aka, the duty of loyalty)
   - Courts have long been concerned with the risk that directors will use their broad management power over the company to benefit themselves at the company’s expense
   - Generally, fiduciary duties aim to address this risk by requiring directors to be loyal to the company
   - More specifically, the fiduciary duties require directors to exercise their power in a way that promotes the company’s interests (and not their own interests)
   - To ensure that directors are loyal and promote the company’s interests, courts have developed three standards of conduct or “sub-duties” that directors must follow to fulfill their fiduciary duties:
     i. Directors must use their powers to further the company’s interests (i.e., they are bound by the duty to act bona fide in the best interest of the company)
     ii. Directors must not abuse their powers by using them for improper purposes (i.e., they are bound by the duty to act for a proper purpose)
     iii. Directors must not put themselves in a position where their personal interests conflict with the company’s interests (i.e., they are bound by the duty to avoid a conflict of interest)
   - These fiduciary duties are described in detail in Sections 5, 6, 7 & 8 below

2. Negligence duties (aka, duties of care, skill and diligence; or, simply, the duty of care)
   - Another risk that arises from the broad delegation of management power to the directors is that they will either shirk their managerial responsibilities or perform them incompetently
   - As such, the negligence duties aim to prevent directorial shirking and incompetence
   - In a broad sense, the negligence duties achieve this by establishing a standard of appropriate conduct that directors must exercise to avoid potential liability in the course of carrying out their responsibilities as directors
   - The issue in this area of the law that has long been debated is that of the appropriate standard of conduct (or, more precisely, standards of care, skill and diligence) to be required of directors
Historically, to fulfill their negligence duties, directors were required to meet a singular standard of “care” and the standard was lax as it was a purely subjective standard.

- Specifically, directors were required only to meet the standard of care that they personally (subjectively) could achieve—the less qualified and more incompetent the director, the less the law would require of them.

Under the current law, to fulfill their negligence duties directors are required to meet three distinct standards of “care”, “skill” and “diligence”.

- These three standards have become stricter as they are now based on a minimum objective standard.
  - Specifically, directors are now required to act with the level of care, skill and diligence that could be expected of a reasonable director in the position of the actual director—irrespective of what the actual director is capable of achieving.
  - This objective standard is the minimum that is required of a director and more will be required if she has or is purported to have particular expertise (e.g., is a lawyer) or holds a special position in the company (e.g., is the CEO).

These negligence duties are described in detail in Section 9 below.

(3) Statutory duties (aka, statutory duties and limits on directors’ behaviour)

- The CA has a number of statutory duties and limits on directors’ behaviour that supplement the above described fiduciary and negligence duties at general law.

- It is important to understand how these statutory duties overlap with the directors’ duties at general law because both are often engaged by the same directorial misconduct and will, therefore, be relevant in similar cases.

- It is, however, perhaps even more important to be aware of the differences between the general law and statutory provisions for several reasons:
  - The general law duties and statutory duties may generally prohibit similar directorial misconduct but often require directors to take different actions to avoid a breach.
  - Some statutory duties explicitly apply to directors, executive employees and agents of the company whereas directors’ duties at general law apply to directors only (and not executive employees or agents of the company).
  - The consequences of breaching general law and statutory duties are often different—with breaches of statute often including criminal liability.

- The criminal enforcement of the statutory duties is undertaken by the public regulatory authority whereas directors’ duties at general law are normally enforced either directly by the company or indirectly by its members through a derivative action (See, for more detailed information on derivative actions, the Shareholders’ Remedies Handout, Sections 3 & 4)

- These statutory duties are described in detail in Section 10 below.

Chip Thye Enterprises Pte Ltd (in liq) v Phay Gi Mo [2004] 1 SLR 434 (High Court, Singapore)

[Summary: The plaintiff company was a family run company. The first and second defendants were shareholder-directors, and the third and fourth defendants were shareholders. The liquidator of the company alleged that the defendants had brought about six improper transactions when the company was insolvent. The]
liquidator thus sued the defendants for being in breach of their fiduciary duties. The High Court allowed the claim against the first and second defendant directors and dismissed the claim against the third and fourth defendant shareholders.

[Excerpt: In Singapore], the three broad categories of director’s duties are: fiduciary, duties of skill, care and diligence, and statutory duties]

4.1 To whom are directors’ duties owed?³

- **Prima facie** directors’ duties are owed to the company
- Directors’ duties are not normally owed to shareholders, creditors, employees or any other corporate stakeholders
- As such, *prima facie*, when directors breach their duties it is the company (and the company alone) that has the right to sue on the breach
  - If the company decides not to sue, it may be possible for shareholders or creditors to “force” the company to sue if they can convince the court to grant them leave to bring a derivative action on behalf of the company (See, for more detailed information on derivative actions, the Shareholders’ Remedies Handout, Sections 3 & 4)

  ➢ *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 (Court of Appeal, Singapore)

  [Summary: In this case, the liquidators of Jenton sued the appellant, a nominee director, for breach of his fiduciary duties. The Court held the appellant had breached the duty of good faith and the actual conflict of interest rule. See below for more details]

  [Excerpt: It is trite law that a director owes fiduciary duties to his company. However, as Frankfurter J wisely observed in *Securities and Exchange Commission v Chenery Corp* 318 US 80 (1943) at 85-86: [T]o say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry. ... What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?]

- Only in exceptional circumstances, will directors owe duties to shareholders, creditors or other corporate stakeholders. A “special relationship” must be created in the particular case for such an exceptional duty to exist
  - In other words, if no “special relationship” exists there will be no duty owed by directors to shareholders, creditors or any other corporate stakeholders
  - Examples of what may constitute a “special relationship” include where the shareholders authorize the directors to sell their shares on their behalf in a potential takeover bid or where advice is given by directors directly to shareholders in the course of a takeover bid. Such situations may amount to a “special relationship” that give rise to a duty (which shareholders could then directly sue on if breached)


[Excerpt: \(\ldots\) the duties directors owe are owed to the company that they serve. These duties are not owed to shareholders, individually or collectively, or to any other constituency or group that has a relationship with the company]


[Excerpt: However, the precept that director duties are not owed to individual shareholders applies only to those duties which directors are subject to simply by virtue of their appointment and actions as directors. There may well be in a particular case dealings between one or more directors and one or more of the shareholders as a result of which a duty of some sort becomes owed by a director to one or more shareholders. \(\ldots\) The crucial question, therefore, is what sort of dealing needs to take place between director and shareholder in order to trigger a fiduciary or other duty owed to an individual shareholder by the directors. Such a duty will certainly arise where, on the facts, the directors place themselves, as against shareholders individually, in one of the established legal relationships to which fiduciary duties are attached, such as agency. This may arise, for example, where shareholders authorise the directors to sell their shares on their behalf to a potential takeover bidder. If, in the course of such a relationship, the directors come across information which is pertinent to the shareholders’ decision on whether or on what terms to sell the shares, they would normally be obligated to disclose it to the shareholders on whose behalf they are acting. \(\ldots\) Despite the recent significant developments in English law based on a ‘special relationship’ exception to the general proposition that directors do not owe duties directly to the shareholders, the exception is essentially one of significance for family or large companies, and does not substantially reduce, within companies with large shareholder bodies, the significance of the general proposition. The only situation where the expanded notion of directors’ fiduciary duties is likely to apply to a company with substantial numbers of shareholders is where advice is given by directors in the course of a takeover bid]

Percival v Wright [1902] 2 Ch 421 (Chancery Court, England) 4

[Summary: The directors of the company had been negotiating a potential takeover which was ultimately aborted. At the same time, the directors agreed to buy shares in the company from the plaintiff shareholders at a lower price than the takeover price that was being negotiated. The plaintiffs claimed that the directors stood in a fiduciary relationship vis-à-vis them and were thus obliged to disclose the negotiations. The court held that there was no obligation to disclose as the directors did not stand in a fiduciary relationship towards the shareholders]

[Excerpt: I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. I am of opinion that directors are not in that position]

Re Chez Nico (Restaurants) Ltd [1992] BCLC 192 (Chancery Court, England)

[Summary: The respondents were major shareholders in a company and they invited the other shareholders of the company to offer their shares for sale to them at a certain price. The respondents succeeded in acquiring over 90% of the shares and sought to acquire the remaining shares under the UK provisions governing takeovers. The appellant minority shareholders objected to the buyout and made a court application in an attempt to halt the buyout. The court held that the respondents were not entitled to buy the appellant’s shares. While it was unnecessary for the court to decide if the respondents were under a duty to disclose their true position to the shareholders, the court went on to elucidate the principle of law contained in the excerpt]

[Excerpt: In general, directors do not owe fiduciary duties to shareholders but owe them to the company; however, in certain special circumstances fiduciary duties, carrying with them the duty of disclosure, can arise which place directors in a fiduciary capacity vis-à-vis the shareholders]

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4 Referred to in Tai Kim San v Lim Cher Kia [2000] 3 SLR(R) 892 (High Court, Singapore)
[Summary: The RAC Club ("the Club") was owned by ‘RACL’. The Club's motoring services business was run by ‘RACMS’, which was also owned by RACL. When RACMS and RACL were sold, the members of RACL made a substantial amount of money from their respective shares and interests in RACMS. The claimants were former members of the Club and former shareholders of RACL. When the claimants’ membership in the Club ceased, they also ceased to be members of RACL pursuant to its articles of association. Since the claimants’ RACL membership had ceased before the sale of RACL and RACMS, they were not entitled to the proceeds of the sale. The claimants’ alleged that the directors of RACL were in breach of their fiduciary duties because they had failed to inform them about the sale of RACL and RACMS. The court dismissed the claimants’ action against the directors because there was no fiduciary duty between the directors and the claimant’s; directors owe no general fiduciary duty to shareholders]

[Excerpt: I am satisfied, both as a matter of principle and in light of the state of the authorities, that Percival v Wright is good law in the sense that a director of a company has no general fiduciary duty to shareholders. However, I am also satisfied that, in appropriate and specific circumstances, a director can be under a fiduciary duty to a shareholder. It seems to me that as a general proposition a director’s primary fiduciary duty is to the company. To hold that he has some sort of general fiduciary duty to shareholders would involve (a) placing an unfair, unrealistic and uncertain burden on a director and (b) would present him frequently with a position where his two competing duties, namely his undoubted fiduciary duty to the company and his alleged fiduciary duty to shareholders, would be in conflict. … [However], exceptional facts could justify a fiduciary duty of the sort alleged on behalf of the claimants in this case. … So far as the authorities to which I have referred are concerned, the decisions … in which a duty was held to arise were cases where a director with special knowledge was buying shares (either directly or through a company) for his own benefit from shareholders, where the director had special knowledge, which he had obtained in his capacity as a director of the company, and which he did not impart to the shareholders, and where the special knowledge meant that he knew that he was paying a low price]

Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2013] 1 SLR 374 (Court of Appeal, Singapore)

[Summary: Raffles Town Club Pte Ltd ("RTC"), which owned and operated a proprietary social club known as Raffles Town Club ("the Club"), sued its former directors for breaching their duties. The defendant directors were the only shareholders of the company. One of the RTC’s claims was that the former directors had wrongfully caused RTC to pay to themselves excessive directors’ fees, expenses and consultancy/incentive fees amounting to about $15 million. The High Court dismissed this claim. As RTC was solvent and the defendants were the only shareholders of the company, the defendants’ interests and the company’s interests were one and the same. There was no other claim or interests in the assets of RTC that the defendants had to be concerned about. Hence, since the director and consultancy fees were properly approved by the shareholders and the directors, the defendants were not in breach of their duties as directors]

[Excerpt: Dillon LJ, who delivered the other majority judgment, said (at 288): “An individual trader who is solvent is free to make stupid, but honest commercial decisions in the conduct of his own business. He owes no duty of care to future creditors. The same applies to a partnership of individuals. A company, as it seems to me, likewise owes no duty of care to future creditors. The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders. …The shareholders, however, owe no such duty to the company. Indeed, so long as the company is solvent the shareholders are in substance the company, …”]

- It is important to distinguish between the issue of whether directors owe duties to corporate stakeholders (which, as we have seen, prima facie they do not) from the extent to which directors, when fulfilling their duties owed to the company, are required to take into account the interests of corporate stakeholders (See, for more details, Section 6.2 below)

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3 Referred to in Goh Eng Wah v Daikin Industries Ltd [2008] SGHC 190 (High Court, Singapore)
4.2 By whom are directors’ duties owed? 6

- At first blush, this question appears odd. After all, don’t directors owe directors’ duties?
- However, this question is more complex and important than it first appears because a person may owe directors’ duties even if she is not properly appointed as a regular director.
- As such, this question should be considered at the outset of every case.
- At general law, the following people owe directors’ duties:
  - A person who has been properly appointed as a director.
  - A person who is found at law to be a de facto director.
    - A de facto director is a person who is not properly appointed as a director but who acts as though they are a director (See, for more details on de facto directors, this Section below).
  - A person who is found at law to be a shadow director.
    - A shadow director is a person who directs the actions of properly appointed directors—although they themselves are not properly appointed as a director nor do they directly act as a director (See, for more detailed information on shadow directors, this Section below).
  - A person who is an alternate or substitute director.
    - An alternate or substitute director is a person who attends a board meeting on behalf of a properly appointed director (See, for more detailed information on alternate or substitute directors, this Section below).

- The following people do not owe all of the same directors’ duties as the persons described above—but they do have some similar duties at general law and/or under the CA:
  - A person who is an executive employee in a company does not owe directors’ duties at general law unless they are also appointed as a director (i.e., they are an executive director). However, many of the statutory duties that apply to directors in the CA also apply to executive employees. This is because these provisions refer to an “officer” which is defined in s 4 of the CA as including directors and corporate executives (See, for more detailed information, Section 10.2 below).
  - A person who is a former director will continue to be bound by some directors’ duties at general law and under the CA, even after their director’s appointment ends.
    - The most relevant common law duty that continues after a director’s appointment ends is the duty to not take corporate opportunities (See, for more detailed information, Section 7.2 below).
    - The most relevant statutory duty that continues after a director’s appointment ends is s 157(2), which prohibits a past or current officer (which includes directors) from making improper use of any information she acquired as an officer (See, for more detailed information, Section 10.2 below).

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6 See generally, Walter Woon on Company Law, 247 - 250 (Revised 3rd ed, Sweet & Maxwell Asia, 2009)
• A person who is a director of an insolvent company will still owe directors’ duties to the company but the nature of her duties and what is required to satisfy them will be substantially altered post-insolvency
  o Post-insolvency, the powers of the directors are substantially curtailed and the direction of the business passes into the hands of an insolvency practitioner who is appointed to act in the interests of creditors. Thus, the director’s role and legal obligations dramatically change post-insolvency

• When is a person considered to be a de facto director?

• A de facto director is a person who acts as a director although they were never formally or properly appointed as a director
  o Such a person falls under the s 4(1) definition of a director in the CA because it includes “any person occupying the position of director of a corporation by whatever name called”

• As de facto directors fall under the s 4(1) definition they are subject to all of the statutory duties and liabilities of a director, as well as directors’ duties at general law

• In determining whether a person is a de facto director six factors should be considered:
  (1) To establish that a person was a de facto director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director
  (2) It is not a necessary characteristic of a de facto director that he is held out as a director; such “holding out” may, however, be important evidence in support of the conclusion that a person, in fact, acted as a director
  (3) Holding out is not a sufficient condition either. What matters is not what he called herself but what he did
  (4) It is necessary for the person alleged to be a de facto director to have participated in directing the affairs of the company on an equal footing with the other director(s) and not in a subordinate role
  (5) The person in question must be shown to have assumed the status and functions of a company director and to have exercised “real influence” in the corporate governance of the company
  (6) If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt, but the court must be careful not to strain the facts in deference to this observation

➢ Walter Woon on Company Law, 248 (Revised 3rd ed, Sweet & Maxwell Asia, 2009)

[Excerpt: The de facto director is a person who is appointed as a director even though he is never formally appointed as such. For example, the necessary formalities to appoint such a person may not have been observed. Such a person will be a director in fact and will, as such, be subject to the usual duties incumbent on a director, since s 4(1) [of the CA] also defines a director to include ‘any person occupying the position of director of a corporation by whatever named called’. This is perhaps more likely to occur in an informally run private company than in a large listed company]
Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2010] SGHC 163 (High Court, Singapore)

[Summary: Raffles Town Club Pte Ltd ("RTC"), which owned and operated a proprietary social club known as Raffles Town Club ("the Club"), sued its former directors for breaching their duties. RTC alleged that the 1st defendant, Peter Lim, was a de facto and/or shadow director of the company contrary to his official title of "consultant". RTC argued that this was because the 1st defendant was the person in accordance with whose directions or instructions the directors of RTC were accustomed to act; no major decisions as regards to RTC were made without his consent and/or approval. The High Court held that the 1st defendant was a de facto director, but was silent as to whether the 1st defendant was a shadow director. The Court of Appeal was silent on this issue was well]

[Excerpt: Perhaps it is clear enough from the description “de facto” that a de facto director is one who is not formally appointed as a director but in fact acts as a director by exercising the powers and discharging the functions of a director. He is therefore in substance a director. Whether a person is to be regarded as a “de facto” director because he has acted as a director though not formally appointed is, as such, very much a question of fact; and, in any case, previous case law has relied on Millet's formulation in Re Hydrodam where the learned judge defined a de facto director as (at 163): … a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although not validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. From those cases I derive the following propositions material to the facts of this case: (1) To establish that a person was a de facto director of a company, it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director (per Millett J. in Re Hydrodam (Corby) Ltd (in liq.) [1994] BCC 161 at 163). (2) It is not a necessary characteristic of a de facto director that he is held out as a director; such “holding out” may, however, be important evidence in support of the conclusion that a person acted as a director in fact (per Etherton J. in Secretary of State for Trade and Industry v Hollier [2006] EWHC 1804 (Ch); [2007] BCC 11 at [66]). (3) Holding out is not a sufficient condition either. What matters is not whether he called himself but what he did (per Lewison J. in Re Mea Corp Ltd [2006] EWHC 1846 (Ch); [2007] BCC 288). (4) It is necessary for the person alleged to be a de facto director to have participated in directing the affairs of the company (Hollier (above) at [68]) on an equal footing with the other director(s) and not in a subordinate role (above at [68] and [69] explaining dicta of Timothy Lloyd Q.C. in Re Richborough Furniture Ltd [1996] BCC 155 at 169–170). (5) The person in question must be shown to have assumed the status and functions of a company director and to have exercised “real influence” in the corporate governance of the company (per Robert Walker L.J. in Re Kaytech International Plc [1999] BCC 390) (6) If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt (per Timothy Lloyd Q.C. in Re Richborough Furniture Ltd (above)), but the court must be careful not to strain the facts in deference to this observation (per Robert Walker L.J. in Kaytech at 401). Indeed, the test is an objective one: what matters is what he did, not what he called himself….To put it simply, de facto directors are those who “act as directors” and shadow directors are those who “in effect, command the directors how to act”. Control over the company’s affairs may be exercised directly by those who perform that role (de facto or de jure director) or indirectly by controlling those who are nominally in charge (shadow director) (per Chesteman J in Emanuel Management Pty Ltd v Fosters Brewing Group Ltd) [2003] QSC 205). While section 4(1) of the 2006 Act provides for both these scenarios, as a practice note, it would be profitable for lawyers to rely on the definitions as set out in s 4(1) of the 2006 Act, instead of inventive but indeterminate interpretations of “shadow directors” and “de facto directors”]

Re Pelican Engineering Pte Ltd v Lim Wee Chuan [2001] 1 SLR 105 (High Court, Singapore)

[Summary: The plaintiff company had three directors and six shareholders. Two of the shareholders were the wife and brother of the first and second defendants respectively. The company had paid part of the purchase price of TS Engineering (“TS”) shares which the defendants bought. The three directors commenced a lawsuit in the Company’s name against the defendants, alleging that they were the Company’s trustees in respect of the TS shares. The Company further alleged that the defendants were its de facto directors and were in breach of fiduciary duties to the company. The High Court held that the defendants were not de facto directors of the company]
[Excerpts: For someone to be a *de facto* director, he must perform functions that only a director could perform...To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company’s affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level...The functions allegedly performed by the defendants are not those that could properly be discharged only by a director, that is by a member of the board of directors of a company. That aside, the defendants’ explanations must be noted. The name cards describing the defendants as ‘director’ were printed on the instructions of Eng Sook Boon...The defendants however did not use the cards printed for them. In any event, ‘director’ does not necessarily mean a board director. On the salaries allegedly received by the defendants, they were recorded in the Company’s 1989 general ledger as ‘consulting fee’. This is consistent with their claims that they were paid consultants. On the vouchers and invoices, the second defendant’s explanation was that he was required in his capacity as consultant to check the vouchers and invoices before passing them on for signature by a director of the Company. If the vouchers and invoices checked by him were found to be in order, he would sign at the ‘approved’ column leaving space for the director’s signature. The vouchers produced in court supported his explanation. I was therefore of the view that the plaintiffs had not proved their case that the defendants were *de facto* directors of the Company”]

- **Lee Sai Poh v Vejayakumar** [1997] 3 SLR 612 (High Court, Singapore)

[Summary: A person, Vejay, had set up a company for the purpose of a joint venture with three others. Two of the others were appointed as the company’s directors. Vejay, however, was the one who ran and managed the company without reference to the appointed directors. The decisions that he made were typically expected of a director (i.e., he made all of the important decisions for the company). As a result, the court held that Vejay was a *de facto* director]

[Excerpt: The first director made all the arrangements for the third plaintiff’s incorporation. Although the first and second plaintiffs are the registered owners of all the third plaintiff’s issued capital of $1m, they held these shares as nominees of the first defendant. They did not make any payment for these shares and did not know what payment, if any, had been made towards the paid-up capital. Although the first and second plaintiffs are the only registered directors of the third plaintiff they did not manage the third plaintiff. The first defendant did so and was a *de facto* director of the third plaintiff]

- **When is a person considered to be a shadow director?**
  - A shadow director is a person that is not named as a director but falls under the s 4(1) definition because they direct the actions of the named directors behind the scenes
    - They are “a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act” (s 4(1))
  - As a shadow director falls under the s 4(1) definition of director, they are subject to statutory duties and liabilities of a director and subject to all the common law directors’ duties
    - It should be noted that there is some English case law that suggests that *fiduciary duties* may not attach to shadow directors—this position has recently been rejected in Singapore on the basis of differences between the UK and Singapore Companies Acts (See, **Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others** [2010] SGHC 163 (High Court, Singapore), below)
- On a related issue, however, Singapore courts have found that logically some specific (technical) rules in the CA and Articles cannot apply to shadow directors in the same way that they apply to actual directors. However, this logic does not extend to more important and broader general law and statutory duties described in this handout—which clearly applies to shadow directors (See, Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2010] SGHC 163 (High Court, Singapore), below)

- The four part test for establishing that a person is a shadow director is:
  1. To determine who are the directors of the company (whether de facto or de jure)
  2. To establish that the defendant directed those directors how to act in relation to the company
  3. That those directors acted in accordance with such directions; and
  4. That they were accustomed to so act (by “accustomed”, this means that there must be a “pattern of behavior”)

  Walter Woon on Company Law, 249 (Revised 3rd ed, Sweet & Maxwell Asia, 2009)
  
  [Excerpt: Finally, there is the ‘shadow’ director. This rather sinister individual is in actuality a puppeteer. He pulls the strings and his puppets on the board dance. A shadow director is considered to be a director too because s 4(1) of the CA defines the term ‘director’ to include ‘a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act’]

  Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180 (High Court, England) [Sealy, 6.33] [Woon 7.20]7

  [Summary: The liquidator of Hydrodam alleged that the company was a wholly owned indirect subsidiary of the Eagle Trust. The liquidator brought an action for wrongful trading against two directors of the Eagle Trust on the grounds that the directors were shadow directors of Hydrodam. The court held in favour of the defendants and dismissed the plaintiff’s appeal. The court held that the defendants were not shadow directors as they had not done anything at all in relation to the affairs of the company; the plaintiff had failed to provide any evidence to support any allegation that the defendants were at any time shadow directors of the company]

  [Excerpt: A shadow director...does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of the company, it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed to so act]


  [Excerpt: The extended definition of ‘director’ also includes one ‘in accordance which whose directions or instructions the directors of the company are accustomed to act’. Such a person is often referred to as a ‘shadow director’... Shadow directors do not openly act as directors but choose to remain behind the scenes whilst exerting influence over the conduct of the affairs of the company. Hence, a controlling shareholder who is able to exert such influence such that the board is accustomed to complying with his instructions would most likely be classified as a ‘shadow’ director. The purpose of the legislation is to identify those with real influence in the corporate affairs of the company. This suggests that the alleged shadow director should be able to influence at least a majority of the board, and on more than one occasion. It is however, not necessary ... that such influence should be exercised over the entire spectrum of the company’s

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7 Referred to in Heap Huat Rubber Company Sdn Bhd v Kong Choot Siam [2003] SGHC 133 (High Court, Singapore)
activities. Neither is it necessary to demonstrate any degree of compulsion that goes beyond that which is implicit in the customary conduct of the board in following the person’s directions. It is important to realize that, although the epithet ‘shadow director’ does, as Millet J suggested in Re Hydrodam (Corby) Ltd, connote one who ‘lurks in the shadows’, proof of such shadowy behavior is unnecessary. … It should, therefore, be clear that the extended idea of a director is designed to prevent the escape of duty or liability by the easy step of declining formal appointment. An individual who wishes to dabble in the affairs of a company must conduct himself in accordance with a standard that is expected of all company directors. … However, this does not mean that a [shadow director or, by extension, a de facto director] would have to comply with all legal requirements applicable to directors, whether imposed by the Act or by the particular company’s articles of association. Reference to the particular requirement, its rationale and the context in which it applies must be made before a decision can be reached as to whether compliance was necessary.

- Heap Huat Rubber Company v Kong Choot Sian [2004] SGCA 12 (Court of Appeal, Singapore)

[Summary: In this case, the first, second, third, sixth, seventh and eighth defendants are alleged by the plaintiffs to have been de facto or shadow directors of the companies. The fifth, fourth and seventh defendants were directors of the plaintiff companies at the material time. The actions against the first to eighth defendants were founded on the allegation that when they were in control of the plaintiff company, they incorporated and ran the second to fourth plaintiffs for their own benefit. The first to eighth defendants were also accused of selling the company’s land at undervalue, making improper payments in connection with the sales, overpaying themselves for their services, using the companies’ funds to purchase vehicles for their own use, and causing the companies to make improper investments. The High Court dismissed the plaintiff’s claims, but the Court of Appeal allowed part of the plaintiff’s appeal.]

[Excerpt: [The] fact that a party is adjudged to be a ‘shadow director’ does not mean that he is a ‘director’ for the purposes of articles of association which stipulate or set out formal requirements, such as Art 73 (which stipulated that remuneration should be determined by the company in general meeting on the basis that he is a director. Indeed, if the HHR companies’ argument is taken to its logical extreme, this would require all board resolutions passed during the period when the party was a “shadow director” to be signed by him.]

- Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2010] SGHC 163 (High Court, Singapore)

[Summary: Raffles Town Club Pte Ltd (“RTC”), which owned and operated a proprietary social club known as Raffles Town Club (“the Club”), sued its former directors for breaching their duties. The defendant directors were the only shareholders of the company. One of the RTC’s claims was that the former directors had wrongfully caused RTC to pay to themselves excessive directors’ fees, expenses and consultancy/incentive fees amounting to about $15 million. The High Court dismissed this claim. As RTC was solvent and the defendants were the only shareholders of the company, the defendants’ interests and the company’s interests were one and the same. There was no other claim or interests in the assets of RTC that the defendants had to be concerned about. Hence, since the director and consultancy fees were properly approved by the shareholders and the directors, the defendants were not in breach of their duties as directors.]

[Excerpt: It can thus be safely said that a “shadow director” is one “in accordance with whose instructions and directions the directors are accustomed to act”. By “accustomed”, this means that there must be a “pattern of behaviour” (per Lord Millet J in Re Hydrodam (Corby) Ltd [1994] BCC 161 (“Re Hydrodam”) at 163) on the part of the rest of the directors in complying with the shadow director’s directions or instructions. In her article, Pearlie Koh, “Shadow Director, Shadow Director, Who Art Thou?” (1994) 14 C&SLJ 340 (“Pearlie Koh”), the learned author has observed that the word “accustomed” (at p 343): “…suggest[s] some degree of habit. There must be some consistent pattern in the behaviour of compliance. Occasional instances of compliance would not be sufficient to satisfy the definition. Equally, in the converse situation where there is such a pattern of compliance, the occasional exercise of independent judgment by the board should not excuse the alleged shadow director.” I concur with her views. For the directors of a corporation to be “accustomed to act” in accordance to the alleged shadow director’s directions and instructions, a discernable pattern of compliance with the shadow director’s instructions or directions would suffice. Even though there may be occasional departure from this pattern for whatever reason, the essence of shadow directorship may still remain intact. Ultimately, it is a question of fact to be determined by the court.
having regard to all the facts and circumstances in each case.... The test is, thus, simple: is there sufficient evidence showing that the directors of a corporation are accustomed to act on the directions or instructions of that person? If yes, then the status of a shadow director may be imputed to him. Whether the board has exercised its decision independently or otherwise is irrelevant and has to be so: otherwise, the rationale underpinning the “shadow director” concept would be subverted. It follows, therefore, that the shadow director is not necessarily a sinister puppeteer who is manipulating the board from the wings of a stage as our imaginations would have us believe....Before I conclude this section on the concept of the shadow director, I must address the implications of a finding that a person is a shadow director. By virtue of s 4(1) of the 2006 Act, a shadow director would be considered a director and thereby, in my judgment, have the ordinary duties of a director imposed on him. This is unlike the case in the UK where its company legislation (including the UK Companies Act 2006) does not equate a shadow director with a “director” for all statutory purposes. For instance, in Ultraframe (UK) Ltd v Fielding [2006] FSR 17, Lewison J found that the mere fact that a person fell within the statutory definition of “shadow director” was not enough to impose upon him the same fiduciary duties as are owed by a de jure or de facto director, though the learned judge accepted that in a particular factual matrix a shadow director’s actions may extend beyond the exertion of indirect influence and thereby subject him to certain fiduciary duties]

• When is a person considered to be an alternate or substitute director?
  – It is common for the Articles to allow a director to appoint an alternate to attend the meeting on her behalf—when she is unable to do so (e.g., Art. 82 of Table A)
  – The alternate director acts as the absent director’s substitute at board meetings
  – As an alternate falls under the s 4(1) definition of director, they are subject to all of the statutory and common law duties and liabilities of a director when they are acting as an alternate
  – As such, an alternate cannot be regarded as merely an agent of her appointee
  – The Articles can restrict the powers that alternate directors are entitled to exercise

➢ Walter Woon on Company Law, 248 (Revised 3rd ed, Sweet & Maxwell Asia, 2009)

[Excerpt: Generally, a person who fills this niche is only the alter ego of someone else. Alternate directors turn up at meetings only when the principal director is unable to do so. Mr Abel may be a very busy tycoon and not able to attend every board meeting; he may appoint Baker to be his alternate. When Abel is out of town, Baker will turn up on his behalf. An alternate director is the analogue of a proxy at a general meeting. The analogy is not exact however; a proxy is merely an agent of the person who appoints him, whereas an alternate or substitute director is considered to be a full director by the law]

4.3 Do all directors owe the same duties?

• Prima facie the law applies equally to all directors. In other words, the general rule is that the law does not recognize any difference between the duties and liabilities of various types of directors
• However, recent case law suggests that, especially for negligence duties, the standards required to fulfil certain directors’ duties can differ significantly depending upon the type of director
• Specifically, it appears that the standards to discharge the duties of care, skill and diligence will vary significantly depending on whether one is an executive or non-executive director—with stricter standards applying to executive directors (See, for more detailed information, Section 9.2 below)
• As the type of director appears to have a bearing on how directors’ duties apply, it is important at the outset to have a clear understanding of the various types of directors that exist. In addition, it is important to understand the distinction between directors and
executive employees as this distinction (which is explained in Section 4.2 above) may
determine whether directors’ duties apply at all (i.e., prima facie fiduciary and negligence
duties at general law do not apply to executive employees, but do apply to directors)

- Here is a brief summary of the various types of director and executive positions:

  - **Executive (inside) directors**
    - An executive director is a person who works full-time for (or inside) the company
    - In smaller companies all of the directors may be executive directors
    - As directors, prima facie, executive directors are bound by the same common
      law and statutory duties and subject to the same liabilities as all other directors
    - However, in practice, courts have applied a stricter standards of care, skill and
diligence to executive directors—which arguably makes sense as they spend
every working day at the company and non-executive directors only attend a few
board meetings per year

  - **Managing directors**
    - A managing director (“MD”) (often called the President or CEO) is a director
      and the most senior executive employee of the company. She is entrusted with
      the management of the daily affairs of the company
    - The articles of most companies will give power to the board to appoint from
      among themselves the MD (e.g., Art. 91 of Table) and delegate its power to the
      MD subject to the overriding authority of the board (e.g., Art. 93 of Table A)
    - Outsiders to the company generally assume the MD has the authority to act on
      behalf of the company. Therefore, even when the MD has exceeded her actual
      authority, the MD may bind the company as a result of her ostensible authority
    - In some small private companies, the MD is given extensive powers including
      allowing the MD to hold office for life and being able to remove and appoint
      other directors
    - In larger companies, the MD is often seen as the crucial link between the board
      and management
    - As directors, prima facie, MDs are bound by the same common law and statutory
      duties and subject to the same liabilities as all other directors
    - However, in practice courts have applied a stricter standards of care, skill and
diligence to MDs—which arguably makes sense as they spend every working
day at the company, and essentially run it, whereas non-executive directors
attend only a few board meetings per year

  - **Non-executive (outside) directors**
    - A non-executive director (“NED”) is a director who is not an executive or
      employee of the company—they are “outsiders” to the company
    - NEDs normally sit on the board to offer objectivity, prestige, outside experience
      and/or independent judgment of the company’s management
As directors, NEDs are *prima facie* bound by the same general duties and subject to the same liabilities as all other directors. However, in practice courts have applied a more relaxed standards of care, skill and diligence to NEDs—which arguably makes sense as they attend only a few board meetings per year whereas executive directors spend every working day at the company.

**Independent directors**
- An independent director is a NED who does not have any material relationship with the company or management which would interfere with the exercise of her independent judgement.
- Section 201B of the CA requires every listed company to have an audit committee, the majority of which must be composed of NED independent directors.
- As directors, non-executive independent directors are *prima facie* bound by the same duties and subject to the same liabilities as all other directors.
- However, in practice courts have applied a more relaxed standards of care, skill and diligence to independent directors—which arguably makes sense as they only attend a few board meetings per year whereas executive directors spend every working day at the company.

**Nominee directors**
- A nominee director is an NED who is nominated by a major stakeholder (most often a large shareholder or major creditor) to keep a close eye on the managers and executive directors in order to safeguard the stakeholder’s investments.
- The right of the stakeholder to make such an appointment is often contained in the company’s constitutional documents or under contract.
- As directors, *prima facie* nominee directors are bound by the same general duties and subject to the same liabilities as all other directors.
- However, in practice, courts have applied a more relaxed standards of care, skill and diligence to nominee NEDs—which arguably makes sense as they only attend a few board meetings per year whereas executive directors spend every working day at the company.
- An issue that often arises with nominee directors is whether they can make their decisions on the board in the interests of their nominator (especially when they conflict with the company’s interests) and whether they can disclose information to their nominator (*See, for more detailed information, Section 7.1 below*).

**Chairman of the Board**
- The articles normally provide that the directors can choose one of their members (either an executive director or NED) to be the chairman who chairs the directors’ meetings and signs the minutes of the meetings. This person will also typically chair the meetings of the members.
Article 80 of Table A, provides that the chairman has a casting vote in the event of a deadlock.

As directors, the chairman is *prima facie* bound by the same general duties and subject to the same liabilities as all other directors.

However, in practice courts will apply either stricter or more relaxed standards of care, skill and diligence to the chairman depending on whether she is an executive director or NED (*See above*).

- **Non-director managers**
  - Non-director managers are senior executives in the company (who are not directors) who are employed to put into effect the decisions of the board.
  - They are considered officers under s 4(1). As such, certain sections of the CA which create statutory duties on officers (which according to s 4(1) includes both directors and executive managers) will apply to them (*See, for more details, Section 4.1 above*).
  - However, they are not *prima facie* bound by fiduciary and negligence duties at general law (*See, for more details, Section 4.2 above*).

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8 For further details on the liabilities of company officers according to the Companies Act, please see the last chart in Section 12 below.
5.0 Overview

- **Fiduciary duties** (aka, the duty of loyalty)
  - Courts have long been concerned with the risk that directors will use their broad management power over the company to benefit themselves at the company’s expense.
  - Generally, fiduciary duties aim to address this risk by requiring directors to be loyal to the company.
  - More specifically, they require directors to exercise their powers in a way that promotes the company’s interests (and not their own interests).
  - To ensure that directors are loyal and promote the company’s interests, courts have developed three general standards or “sub-duties” that directors must follow to fulfill their fiduciary duties:
    1. Directors must use their powers to further the company’s interests (i.e., they are bound by the duty to act bona fide in the best interest of the company).
    2. Directors must not abuse their powers by using them for improper purposes (i.e., they are bound by the duty to act for a proper purpose).
    3. Directors must not put themselves in a position where their personal interests conflict with the company’s interests (i.e., they are bound by the duty to avoid a conflict of interest).
  - These fiduciary duties are described in detail below.

[Excerpt: In this section, we consider complaints that directors or officers breached their duty of loyalty [i.e., fiduciary duties] - in other words, they were greedy and put their own financial interests ahead of the corporation and their shareholders.]

[Excerpt: The main concern of the law with regard to directors is the issue of managerial accountability. Directors form the most important component of the management of the company. With the wide powers conferred on them, directors stand in a position of trust and responsibility vis-à-vis the company. By virtue of this relationship, the law regards directors as fiduciaries. … [A] person who is in a fiduciary relationship with another is bound to exercise any rights and powers conferred on him in good faith for the benefit of the other person … At general law, the fiduciary relationship between the directors and the company is the main source of the duties imposed on directors. In addition, directors owe a general law duty of care to the company as well as duties imposed by the Companies Act.]

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VI. DUTY TO ACT BONA FIDE IN THE BEST INTERESTS OF THE COMPANY

FIDUCIARY DUTY (1)

6.0 The duty to act bona fide in the best interests of the company

- The case law appears to effectively divide the duty to act bona fide in the best interests of the company into two parts:
  - To act bona fide
  - To act in the best interests of the company

6.1 To act bona fide (i.e., in good faith)

- To act bona fide requires a director to have a subjective honest belief that she is acting in the interests of the company
  - In exercising their powers, directors must act honestly in what they subjectively believe (and not what the court may consider) to be in the interests of the company
  - This subjective test protects decisions of directors from being second guessed by the court, which is cautious of relying on hindsight bias to substitute its own decisions for the honestly held business judgments of directors
  - The fact that a director’s alleged belief appears to the court to be objectively unreasonable may suggest that it was not in fact honestly held at the time of the alleged breach—but a breach will not be established unless the court finds as a fact that the director acted with a lack of bona fides (i.e., without a subjective honest belief)
  - However, recent case law suggests that with respect to group companies (and perhaps in general) an objective test (as opposed to the historical subjective test) may be applied to determine whether the duty has been breached
    - Specifically, the test in the case of group companies is whether “an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the actions were in the interests of the company”
  - The difference between an objective and subjective test is more important in theory than in practice. This is due to the fact that, as explained above, the court can draw an inference about a director’s subjective belief based on evidence of what a reasonable director would have objectively believed—which, from an evidentiary perspective, may be difficult for a subjectively honest director to rebut

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Cheong Kim Hock v Lin Securities [1992] 2 SLR 349 (Court of Appeal, Singapore) [Woon 8.87]

[Summary: The appellant (“Cheong”) was at the material time the managing director of Cultural & Entertainment Holidays Pte Ltd (“C & E”). Cheong, acting on behalf of C & E, agreed to sell 3 shop units to Lin. Lin and Cheong then sold the shop units to Lin Securities. Lin Securities’ purchase of the shop units was eventually approved by a board resolution at which all the directors voted in favour of the purchase, with Lin abstaining. Subsequently, Lin Securities was liquidated and the liquidators rescinded the sale agreement. Cheong and Lin were required to pay $3 million to Lin Securities. Not receiving any payment, Lin Securities commenced proceedings against Lin and Cheong on the grounds that Lin had exercised undue influence over Lin Securities when he had induced Lin Securities to enter in to the sale agreement. The trial judge found the defendants liable for undue influence. The High Court upheld the ruling on the grounds that as Lin was a director, he stood in a fiduciary relationship vis-à-vis the company. There was thus a presumption that he had exercised undue influence over the company]

Extrasure Travel Insurances v Scattergood [2003] 1 BCLC 598 (High Court, England) [Kershaw at 340]

[Summary: The first and second defendants were directors of Extrasure. They signed a fax from Extrasure to its bank that instructed the bank to transfer £200,000 out of Extrasure’s bank account. Extrasure sued the two former directors on the grounds that the decision to transfer of £200,000 out of Extrasure's bank account, and the instruction to the bank, represented a breach by the defendants of their fiduciary duties]

Vita Health Laboratories Pte Ltd v Pang Seng Meng [2004] 4 SLR 162 (High Court, Singapore)

[Summary: The defendant, Pang Seng Meng, was the director and the operating and controlling mind of the Vita Health Group of Companies at the material times. From 1997 to 1999, he procured substantial investments in Vita Corporation Pte Ltd and created a share sale agreement between Vita Life Sciences and VHGC. After the defendant was forced to step down from all management positions in March 2002, Vita Health Laboratories sued the defendant on the grounds that the defendant had breached his fiduciary duties by misstating the company’s accounts and abusing his position. The court held that the defendant was liable for failing to uphold his fiduciary duties]

[Excerpt: A director owes a fiduciary duty to the company. In Regal (Hastings) Ltd v Gulliver & Ors Lord Porter said (at p 395): ‘Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form.’ As directors, they are bound to exercise their power bona fide in the interest of the company. Lord Green MR in Re Smith and Fawcett Ltd said, at p 306: ‘They (referring to directors) must exercise their discretion bona fide in what they consider — not what a court may consider — is in the interests of the company and not for any collateral purpose …’]
entails legal liability. A company provides a vehicle for limited liability and facilitates the assumption and distribution of commercial risk. Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship]

- **Cheam Tat Pang v PP** [1996] 1 SLR 541 (High Court, Singapore)\(^{12}\)

  [Summary: The appellants were former directors of a company (“the Company”). They were charged and convicted in the District Court on three charges of having conspired with each other to commit criminal breach of trust as agents of the Company in breach of s 405 of the Penal Code (Cap 224, 1985 Rev Ed)—which required that there be a violation of any “direction of law” prescribing the mode in which the entrusted property was to be discharged. The direction of law allegedly violated by the appellants was s 157(1) of the Companies Act which provided that “[a] director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office”. The district judge, applying the settled judicial test for “acting honestly”, found that the Appellants had failed to act in the company’s best interests, having taken dishonest risks with the company’s funds to make a wrongful gain for themselves, and convicted them. The Appellants appealed against conviction and their appeal was granted by the High Court]

- **Intraco Ltd v Multi-Pak Singapore Pte Ltd** [1995] 1 SLR 313 (Court of Appeal, Singapore) [Woon 8.21]

  [Summary: Intraco was a creditor of City Carton and its subsidiary Box Pak. City Carton and Box Pak were controlled by a group of individuals who also controlled another company named Multi-Pak. Neither City Carton nor Box Pak could pay Intraco. There was a complex transaction in which Multi-Pak purchased Intraco’s City Carton debt for $2.3 million and in return Intraco subscribed for $2,000,000 worth of shares in Multi-Pak and lent Multi-Pak $371,000 (debt-equity swap). Despite the deal, both City Carton and Multi-Pak went bankrupt. The receivers of Multi-Pak argued that the directors of Multi-Pak breached their duty to act *bona fide* in the best interests of the company in agreeing to purchase the City Carton debt from Intraco for $2.3 million when it was clear that the debts were worth only a fraction of that sum. The trial judge found in Multi-Pak’s favor holding that the Multi-Pak directors breached their fiduciary duties. The Court of Appeal reversed the decision finding that the Multi-Pak directors had not breached their duty. The Court of Appeal reasoned that Multi-Pak benefited from the deal in that it formed a strategic alliance with Intraco (which was a government linked company) that allowed it access to marketing and supply links]

  [Excerpt: As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr Goulding contended that in the absence of separate consideration, they must, *ipso facto*, be treated as having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, i.e. unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be *ultra vires* and void, notwithstanding that the transaction might be beneficial to the company. Mr Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally, I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an honest and intelligent man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company]

\(^{12}\)Referred to in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 (Singapore, Court of Appeal).
- **Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others** [2010] SGHC 163 (High Court, Singapore)

[Summary: Raffles Town Club Pte Ltd ("RTC"), which owned and operated a proprietary social club known as Raffles Town Club ("the Club"), sued its former directors for breaching their duties. The defendant directors were the only shareholders of the company. One of the RTC’s claims was that the former directors had failed to act *bona fide* in the interest of the company when they allowed RTC’s membership to reach 19,000; this allegedly damaged the club’s reputation as an elite club and resulted in overcrowding. The High Court held that the former directors had not breached their duty to act *bona fide* in the best interest of the company when they accepted the 19,000 members. The Court of Appeal upheld this finding.]

[Excerpt: In Kala Anandarajah, *Corporate Governance: Practice and Issues* (Academy Publishing, 2010) ("Corporate Governance"), the author notes at para 06.023 that: “It is a clear principle of law that where a director is required to act *bona fide* in the interest of the company, he must act according to what he considers, not what a court may consider, is in the interest of the company. In other words, the director is to act in a manner which he thinks is best suited for the company. This makes commercial sense in that it is the directors who know the business of the company best, and so should be the ones to determine in a reasonable manner what is best for the company. The duty is evidently subjective, in that the court will not consider it broken merely because in the court’s opinion, the particular exercise was not in the company’s interest. In the words of the court in *Pergamon Press Ltd v Maxwell* [1970] 1 WLR 1167, the court will not take it upon itself to order that a particular power vested in the directors should be exercised in a particular way. In *Idamene v Symion Health* [[2007] 64 ACSR 680 at [114]] Lindgren J held that there “is a well-known line of authority to the general effect that it is the province of directors, not the courts, to identify where the interest of a company lie, and that the courts do not exercise a supervisory function over the business judgments of directors” ....Actions taken by directors with a view to maximising net profits for RTC both in the long run and short run cannot *prima facie* be said to be taken in bad faith, even though events may subsequently show that a different decision should have been taken. The relevant factors for evaluating whether the directors’ duties towards the company have been fulfilled at the time the business decisions were made should not be considered with the full benefit of hindsight” .... In *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 at [29], the court held that the test for whether a director had acted *bona fide* was whether an honest and intelligent man in the position of the directors, taking an objective view, could have reasonably concluded that the transactions were in the interests of the company. In that case, the management decision taken by the directors turned out on hindsight, to be a poor decision but nonetheless *bona fide*....There was no reason at that point in time for the Defendants to contemplate litigation.... In my view, it is all too easy for the Plaintiff, with the full benefit of hindsight, to pontificate on what the Defendants should have done. The law is clear that commercial decisions will not be lightly interfered with by the court unless the directors had acted unreasonably or not *bona fide*....]

- **Question:** In practice, how might a director prove that she had a *subjective* honest belief that she was acting in the interests of the company?

### 6.2 In the best “interest of the company”

- The “interest of the company” requirement *varies depending on the state of the company*

- In a company that is solvent and not on the brink of insolvency
  - When considering the interests of a solvent company the directors are normally required to consider the interests of the shareholders (both present and future) as a general body. In most cases, this amounts to considering if the transaction benefits the company as a commercial entity

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13 This was upheld on appeal, see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2013] 1 SLR 374 (Court of Appeal, Singapore) at para 18.
Although directors may consider the interest of other stakeholders and engage in conduct that may not produce an immediate commercial gain (e.g., philanthropy) the fundamental litmus test in a solvent company is normally whether the act was done *bona fide* for the benefit of the company (i.e., for shareholders as a general body) and to promote its (or their) ultimate prosperity.

It is worth noting that Section 159 of the CA provides that “the matters to which the directors of a company are entitled to have regard in exercising their powers shall include…the interests of the company’s employees generally.”


  [Excerpt: What then constitutes the interests of the company? A company is essentially a vehicle for the conduct of business, its main aim being to maximize profit through the pooling of resources for the ultimate benefit of the owners or shareholders. Accordingly, when considering the interests of the company, the directors are required to consider the interests of the shareholders as a general body. This makes sense since the shareholder have risked their capital in the hope of ultimate gain. The view that the directors must take of the interests of the shareholders involves consideration not only of the interests of the present shareholders but also of the interests of future shareholders.]

- *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2013] 1 SLR 374 (Court of Appeal, Singapore)

  [Summary: The Court of Appeal upheld the High Court’s decision that the director’s and consultancy fees paid to the former directors were not unreasonable or excessive and therefore did not amount to a breach of director duties. See above for more details.]

  [Excerpt: Again, having reviewed the evidence before the Judge, we are unable to disagree with his finding that the directors’ and consultancy fees paid to the Former Directors were not excessive or unreasonable or that they amounted to an illegal taking of money out of RTC. We would agree that these were matters for the Former Directors - as directors and ultimately also shareholders - to decide. At all material times, RTC was a profitable company because of the nature of the business it was engaged in and the prowess of the Former Directors in recruiting so many members for the Club. Whether they had misled the members of the Club was a matter between the members and RTC. But as far as RTC and the Former Directors were concerned, RTC's interest in its assets as a separate legal entity and the Former Directors' interests in RTC's assets as shareholders were aligned. They were, in fact, the same as there was no other claim to or interest in the assets of RTC that the Former Directors as directors had to be concerned about or protect.]

- *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2010] SGHC 163 (High Court, Singapore)

  [Summary: The Court of Appeal upheld the High Court’s decision that the director’s and consultancy fees paid to the former directors were not unreasonable or excessive and therefore did not amount to a breach of director duties. See above for more details.]

  [Excerpt: It is trite law that the Defendants, as directors, owe a duty as fiduciaries to the company to act honestly and in the best interests of the company. The first question I asked myself was, “Whose interests are the company’s interests?” In *Walter Woon on Company Law* (Tan Cheng Han SC, gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) (“Walter Woon”), the learned authors write at para 8.23: A company is not a monolith consisting of bland interchangeable digits. Rather, it is an entity with many stakeholders. The interests of these stakeholders, while to some degree are aligned, are often at variance between themselves. There are the members, whose personal interests are not subsumed within the corporate structure. There are employees, whose interests are tied up with the prosperity of the company. Then there are the creditors of the company, who generally can look only to the company for the payment of the sums due to them. Certainly, one of the tests used when considering the validity of a commercial transaction is whether the transaction benefited the company as a commercial entity. Thus, when a decision is made to plough profits back into the company rather than pay them out as dividends or bonuses, it reflects a decision to prefer the interests of the company as a commercial entity over the interests of the shareholders and employees as}
individuals. It does not mean, however, that this is the only possible interest that a company might have. In a capitalist environment which encourages entrepreneurship such as ours, the Court should not view every transaction which does not positively result in profitable returns to the company as a commercial entity with suspicion. Thus, the learned authors of *Walter Woon* recognised at para 8.25 that the “collective interests of the members of the company can also be equated with the interests of the company …” It was never in dispute that RTC was solvent at all material times. … Thus, the Plaintiff’s interests here should be equated with the interests of its shareholders since the Plaintiff has neither shown that the company was at all near becoming insolvent, nor that there are other creditors in the picture whose interests have to be protected in the event that the company becomes insolvent.²¹

➢ *Re W & M Roith Ltd* [1967] 1 All ER 427 (High Court, England) [Woon 8.16]

[Summary: Roith was the controlling sprit of what is commonly referred to as a “one man company”. He owned the majority of the company’s shares and ran the company’s business. He was a director and general manager of the company. For many years he worked without a service agreement. To make provisions for his wife after his death, Roith entered into a contract with the company, under which his wife would be paid a pension if he died. There was no problem in having this agreement adopted by the company, as he controlled it. After Roith died, his executors put in a claim for the widow’s pension. The liquidator of the company rejected the claim. The court held that the liquidator was right to do so. The court reasoned that when the directors of the company agreed to make the contract they were not considering the interests of the company. The court found that the service agreement in question was not reasonably incidental to the business of the company. Importantly, it was not entered into *bona fide* for the benefit of the company and to promote its prosperity]

[Excerpt: … In light of those facts, the inference was that the real object of this scheme was not to benefit the company but was simply to provide for Mr Roith’s widow without leaving her his shares in the company … the entering into the said agreement by the company was not reasonably incidental to the carrying on of the company’s business and was not *bona fide* for the benefit and to promote the prosperity of the company]

- **In a company that is deeply divided among shareholder factions**
  - When there is a distinct difference in the interest between various shareholder factions in a solvent company the test is not a question of the interests of the company as a whole, but a question of what is fair as between different factions of shareholders

➢ *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] SGHC 65 (High Court, Singapore)²²

[Summary: This dispute was about the sole distributorship rights to a brand of analgesic plasters known as Tokuhon. The plaintiffs were a joint outfit created by three companies with the aim of distributing the plasters. The plaintiff’s Board of Directors was composed of representatives from the three companies. Subsequently, Tokuhon cancelled the distributorship agreement with the plaintiff and the defendant directors resigned. The plaintiff brought a claim against the defendants for an alleged breach of director duties. The plaintiffs alleged that it was through the acts of the first two defendants (viz. a series of letters written by one of the defendants to China Merchants making false allegations about the company) that caused the loss of the distributorship agreement. Further, they alleged that the first two defendants had procured the said distributorship for themselves through the third defendants (a company incorporated by the first two defendants on 4 February 2000 with a view to sell cosmetics and beauty products initially) without disclosure to the plaintiffs. The High Court dismissed the plaintiff’s claims]

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²¹ This was upheld on appeal, see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2013] 1 SLR 374 (Court of Appeal, Singapore) at paras 30-31.

²² This was upheld on appeal, see *Tokuhon (Pte) Ltd v Seow Kang Hong (No 2)* [2003] 4 SLR 414 (Court of Appeal, Singapore) at para. 56.
The three groups in the case before me, had been, consistently over the years, conducting themselves as though they were three separate units and the incorporation of the plaintiffs was nothing but a vehicle of convenience. In my view, the issue concerning the breach of any fiduciary duty...would have to be approached in reference to what should be considered fair between the contending factions of directors. This approach was not a novel one; it was formulated by the by the High Court of Australia in Mills v Mills (1937-38) 60 CLR 150, (quoted with approval by Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] 1 All ER 1126 at 1134C) where Latham CJ observed at 164, that:

"[t]he question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between different classes of shareholders. Where such a case arises some other test than that of the "interests of the company" must be applied..."

Tokuhon (Pte) Ltd v Seow Kang Hong (No 2) [2003] 4 SLR 414 (Court of Appeal, Singapore)

In our judgment, the test of ‘the interest of the company’ would not be the appropriate test to be applied in the present case....What we should be looking at is whether Mrs Seow had obtained any unfair advantage vis-à-vis the other two partners. We could see none.

In a company that is insolvent or on the brink of insolvency

- In this case, the interests of the company become tantamount to the interests of the present and future creditors (and not the shareholders as a general body)
- However, directors do not owe a duty directly to creditors. Therefore, creditors have no direct right to sue directors for breaching their duties (i.e., they must sue indirectly by using a derivative action)
- It should be noted that previously some case law in Singapore suggested that directors may owe a duty to creditors. This was at variance with most other common law countries, questioned by Singapore company law scholars and recently rejected in obiter by the Court of Appeal in Raffles Town Club Pte Ltd v Lim Eng Hock Peter

Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd [2010] 4 SLR 1089 (Court of Appeal, Singapore)\(^{16}\)

[Summary: This was an appeal brought by the liquidators of Progen Engineering (“PEPL”) to set aside ten transactions between PEPL and the respondent, Progen Holdings. Progen Holdings was the sole shareholder and holding company of PEPL. According to the liquidator of PEPL, these transactions were the result of undue preference on the part of Progen Holdings. This included the transfer of $10 million from PEPL to Progen Holdings. This amount was used to finance Progen Holding’s capital distribution and special dividend pay-out. This transaction involved the repayment of a loan granted by Progen Holdings to PEPL. The directors of PEPL made two false assurances with regards to the payment of the loan; they stated that the amount owed by PEPL to Progen Holdings was not expected to be repaid within the next 12 months, and that Progen Holdings would provide adequate funds to PEPL for it to meet its liabilities, and that the respondent would subordinate the amounts owing (by PEPL) to it and to PEPL’s related companies for the prior payment of other liabilities. The Court of Appeal allowed the appeal and held that PEPL’s directors had clearly breached their directors’ duties to consider the interests of PEPL’s creditors. Ultimately, the transactions were to be set aside]

\(^{16}\) See also, Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (No 2) [1998] 1 WLR 294; and more recently, Re Pantone 485 Ltd, Miller v Bain [2002] 1 BCLC 266.
[Excerpt: As such, it is only right that directors ought to be accountable to creditors for the decisions they make when the company is, or perilously close to being, insolvent. We add, parenthetically, that this fiduciary duty is strictly speaking owed to the company; there is no duty owed directly to creditors. In other words, individual creditors cannot, without the assistance of liquidators, directly recover from the directors for such breaches of duty]

➢ **Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2013] 1 SLR 374 (Court of Appeal, Singapore)**

[Summary: The Court of Appeal upheld the High Court’s decision that the directors and consultancy fees paid to the former directors were not unreasonable or excessive and therefore did not amount to a breach of directors’ duties. As RTC was solvent and the defendants were the only shareholders of the company, the defendants’ interests and the company’s interests were one and the same. There was no other claim or interests in the assets of RTC that the defendants had to be concerned about. Hence, since the director and consultancy fees were properly approved by the shareholders and the directors, the defendants were not in breach of their duties as directors. See above for more details.]

[Excerpt: Dillon LJ, who delivered the other majority judgment, said (at 288): “An individual trader who is solvent is free to make stupid, but honest commercial decisions in the conduct of his own business. He owes no duty of care to future creditors. The same applies to a partnership of individuals. A company, as it seems to me, likewise owes no duty of care to future creditors. The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders. …The shareholders, however, owe no such duty to the company. Indeed, so long as the company is solvent the shareholders are in substance the company. …”]

➢ **Chip Thye Enterprises Pte Ltd (in liq) v Phay Gi Mo [2004] 1 SLR 434 (High Court, Singapore)**

[Summary: The liquidator of Chip Thye brought an action for breach of duties against the company’s directors for taking the following actions when the company was insolvent: (1) writing-off debts owed by one of the directors and to related parties; (2) payment of sums to two of the directors; (3) investing a sum of money in another company and pulling out of the investment within a month without taking any steps to recover the amount invested; and,(4) paying out dividends to themselves as shareholders. The court found that the payments above were not in the interests of the creditors and held the directors liable for breach of their duty to act in the best interest of the company]

[Excerpt: Street CJ said: ‘In a solvent company the propriety interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company’s assets. It is in a practical sense their assets and not the shareholder’s assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.’ The duty is owed to creditors present or future]

➢ **Federal Express Pacific Inc v Meqlis Airfreight Pte Ltd [1998] SGHC 417 (High Court, Singapore)**

[Summary: In this case, the plaintiffs were claiming against the fourth and sixth defendants on the grounds that the defendants were in breach of their duties as directors. The plaintiffs alleged that when the fourth to sixth defendants were directors of the plaintiff, the directors caused the plaintiff to enter into an agreement to sell substantial assets at an undervalue, resulting in a net loss of over $600,000. The issue before the court was whether the fourth to sixth defendants were fiduciaries of the plaintiff; the High Court held that the defendants were fiduciaries]

[Excerpt: The crucial question which arises is: who is ‘the company’? Does it include creditors? Directors’ duties are owed primarily to and enforceable by, the company and not to individual shareholders. …The more contentious issue is whether directors owe fiduciary duties to the company’s creditors. There is a dearth of local judicial authority in this area. In both Australia and New Zealand, the courts have taken the robust view that directors are to take into consideration the creditors’ interests when the company is ailing or
insolvent (Walker v Wimborne [1976] 50 ALJR 446, Kinsela v Russell Kinsela [1986] ACLR 395, Nicolson v Permakraft [1985] 1 NZLR 242). In the United Kingdom, the court initially took a more conservative approach and held that directors owed duties to the company and the company alone. In Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd [1983] Ch 258, Dillon LJ opined that directors owed no duty to creditors, present or future. In recent years, the courts have adopted a more flexible and commercially pragmatic view and have held time and again that in certain situations, in particular, when the company is nearing insolvency or is insolvent, the creditors’ interests should be taken into account. As early as the beginning of the eighties, in the case of Lonrho v Shell [1980] 1 WLR 627, Lord Diplock remarked that the interest of the company may include the creditors’ interests. In Winkworth v Edward Baron [1987] 1 All ER 114, Lord Templeman in the House of Lords, pronounced that the directors’ duty towards creditors was to ensure that the company’s affairs were properly administered and that property was not dissipated or exploited for the directors’ benefit to the prejudice of creditors. His Lordship talked of a duty owed:… by the directors to the company and to the creditors of the company to keep its property inviolate and available for the repayment of its debts. Following this significant pronouncement from the highest authority, in West Mercia Safetywear Ltd (In liq) v Dodd [1988] BCLC 250, Dillon LJ qualified his statement in the Multinational Gas case by stating that it applied only when the company was solvent. In Brady v Brady [1988] 2 All ER 617, the notion of the directors’ duties owed to creditors appeared to be somewhat extended when Nourse LJ regarded the interests of the company as synonymous with the creditors’ interest when the company was insolvent or doubtfully solvent. Whatever is the scope of the directors’ fiduciary duties towards creditors, it is clear from the authorities above that they do owe such duties to the company’s creditors when the company, through their actions, is insolvent, potentially insolvent or put in a situation where its creditors will be prejudiced and the company is or likely to be unable to satisfy its debts with these creditors.

- **In a company that is part of a legally defined larger group**
  - A director of one company or multiple companies in the group may consider the interest of the group as a whole when making decisions as long as she does not sacrifice the interest of the company or companies on whose board she sits

  ➢ Golden Village Multiplex Pte Ltd v Phoon Chiong Kit [2006] 2 SLR(R) 307 (High Court, Singapore)

  [Summary: The plaintiff company sued the defendant director for breach of his director’s duties arising out of his conduct in an earlier suit in which the plaintiff company sued two parties (“GHFD” and “GHE”) for breach of an agreement for a lease that had been assigned to the plaintiff company (“the earlier suit”). The defendant was a director of the plaintiff company as well as of GHFD. The plaintiff company alleged that the defendant’s conduct in relation to the earlier suit demonstrated his total partiality towards GHFD and that he preferred to further its interests over those of the plaintiff company, thereby acting against the plaintiff company’s interests in breach of his fiduciary duties as a director of the plaintiff company. The High Court granted the plaintiff company’s application to restrain the defendant director from (a) acting against the interests or to the detriment and/or prejudice of the plaintiff company, including in, but not limited to, all matters arising in or relating to the earlier suit; (b) exploiting or otherwise using any confidential information belonging to the plaintiff company against the interests or to the detriment and/or prejudice of the plaintiff company; and (c) affirming and/or filing any further or other affidavits on behalf of GHFD in the earlier suit]

  [Excerpt: Where a director of a company was also a director of other companies within a group, each company in the group was a separate legal entity and a director was not entitled to sacrifice the interest of a particular company. The test was whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company]

- **Ultimately, as “subjective honesty” and “interests of the company” are highly malleable concepts, if directors act within the scope of their powers and give due consideration to all of the relevant factors, the court is unlikely to conclude that there has been a breach of duty to act *bona fide* in the interests of the company**
• The duty to act *bona fide* in the best interests of the company and the duty under s 157(1) to “act honestly in the discharge of his duties as a director” are equivalent (i.e., the same test applies to both and, therefore, when one is breached the other will be breached).

• However, it should be noted that breaching the duty under s 157(1) may attract criminal and civil liability while breaching the common law duty will only attract civil liability (See sections 10.1 & 10.2 below for a more detailed discussion of the interaction between the duties at general law and statutory duties under the CA)

- *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 (Singapore, Court of Appeal)

[Summary: Normandy loaned $2m to the Newman Group, with assets from Newman being used as security. In the Newman Group, NQF was the subsidiary of Jenton and Jenton was the subsidiary of NGH. Subsequently, Normandy discovered the security agreement was defective; the Newman Group also refused to pay back the loan. Normandy then appointed receivers for NGH, who removed all of Jenton’s directors, excluding the appellant. The appellant was then appointed as Jenton’s representative for NQF. The appellant unilaterally passed shareholder resolutions to remove all other NQF directors and transfer $2m to Normandy. The liquidators of Jenton then sued the appellant for breach of his fiduciary duties as a director of Jenton in causing NQF to pay the $2m to Normandy. The court held the appellant had breached the duty of good faith and the actual conflict of interest rule. The appellant not only placed himself in a position where Normandy’s and Jenton’s interests were clearly and directly in conflict, he consciously and unequivocally preferred Normandy’s interests over those of Jenton]

[Excerpt: In our view, the appellant’s duty of honesty [s 157(1)] and duty to act *bona fide* may be regarded as a composite obligation. The appellant’s duty of honesty, which is said to require him to ‘act honestly in the discharge of his duties as a director’, appears to be a reference to the statutory duty imposed on directors under s 157(1) of the CA. This duty is the statutory equivalent of the duty to act *bona fide* which exists at common law...These two duties impose a unitary obligation to act *bona fide* in the interests of the company in the performance of the functions attaching to the office of director]

- **Question:** What is the policy rationale supporting the rule that the “interests of the company” become the “interests of the present and future creditors” (and not the shareholders as a general body) on the brink of insolvency?
VII. DUTY TO AVOID CONFLICTS OF INTEREST
FIDUCIARY DUTY (2)

7.0 The duty to avoid conflicts of interest (aka, the duty to disclose)

- As fiduciaries, directors have a duty to not put themselves in a position where their interests are in conflict with the interests of the company.
- The broad fiduciary duty to avoid a conflict of interest can be divided into three sub-rules (which often overlap):
  - No conflict rule
  - No secret profit and corporate opportunities rule
  - No misappropriation of corporate assets rule

7.1 The ‘no conflict’ rule (duty to avoid conflicts of interest)

- A director, as a fiduciary, cannot place herself in a position where her duty to the company and her personal interests conflict.
  - The most common example is when a director (or her relatives, associates or business) enters into a contract with the company.
  - Another common example is when a director holds a directorship or has an interest in a competing company.
- In cases where a director enters into a contract with the company, a clear conflict of interest exists. In other cases, however, whether a conflict exists may not be clear (e.g., where the other company that the director has an interest in is not a direct competitor of the company).
- The test for determining whether a conflict exists is objective.
- In Singapore, however, the law is unsettled in terms of the precise objective test that should be used to determine whether a conflict exists. Currently there are two possible objective tests:
  - Whether a reasonable person looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict.
  - Whether a reasonable person looking at the relevant facts and circumstances of the particular case would think that there was a mere possibility of conflict.
- Note that the no conflict rule is strict as a director will breach it merely by placing herself in a position of conflict—even if she does not make a profit, acts bona fide and causes no harm to the company.

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Boardman v Phipps [1967] 2 AC 46 (House of Lords, England)\(^{18}\)

[Summary: A trust was created by Phipps where the trustees were his widow, daughter and professional trustee. One of the assets of the trust was a 27% shareholding in a private company (the “Company”). Boardman (the solicitor to the trust and Phipps family) and one of the beneficiaries (Thomas Phipps) were unhappy with the way that the Company was managed and decided that the only way to protect the trust asset was to acquire a controlling interest in the Company. They made various inquiries on behalf of the trust, and in that capacity obtained confidential information about the Company. They obtained control of the Company by purchasing the remainder of the Company’s shares, and carried out the desired sales and reorganisation. The transaction was highly profitable. Boardman had informed the beneficiaries and the 2 active trustees (the widow was senile and taking no part in the affairs of the trust) about the transaction, and he had asked them if they had any objection to his taking a personal interest, bearing in mind that his initial inquiry had been on behalf of the trust. The House of Lords held by a 3-2 majority that Boardman was in breach of his duties as a fiduciary]

[Excerpts: The appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability by saying that they were acting for themselves and not as agents of the trustees. Whether or not the trust or the beneficiaries in their stead could have taken advantage of the possibility that Mr Boardman would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied.\(^ {19}\) The phrase ‘possibly may conflict’ requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict]\(^ {20}\)

Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) [2009] 3 SLR(R) 109 (Court of Appeal, Singapore)

[Summary: In 2005, a Sale Committee was created to manage the en-bloc sale of Horizon Towers. In 2007, Hotel Properties Limited made a verbal bid for the property. The subsidiary proprietors (i.e., the unit owners) did not know that two members of the Sale Committee had a vested interest in Hotel Properties Limited. The subsidiary proprietors (the respondents) that consented to the sale brought an application for the sale of Horizon Towers. The objecting subsidiary proprietors (the appellants) tried to block this application by claiming that the two members of the Sale Committee were in a position of conflict and had breached their fiduciary duties to the subsidiary proprietors. Additionally, the appellants claimed that the sale was not made in good faith and that the price offered was too low. The Court of Appeal did not rule on whether the members of the Sale Committee had breached their fiduciary duties, but it did make some suggestions in obiter with regards to the appropriate test for conflicts of interest]

[Excerpt: In recent times, Lord Upjohn’s “real sensible possibility” test appears to have found some favour in the lower English courts (see, for example, Re Bhullar Bros Ltd [2003] BCC 711 and Kingsley IT Consulting Ltd v McIntosh [2006] BCC 875), although the test of mere possibility favoured by the majority is still recognised as the prevailing view (see, for example, Robert Pearce & John Stevens, The Law of Trusts and Equitable Obligations (Oxford University Press, 4th Ed, 2006) (“Pearce & Stevens”) at p 802). The position is not yet settled in Singapore. In the present appeals, it does not in the ultimate analysis matter which test is applied. The point is that the Horizon Board had applied the wrong test by looking for proof of actual conflict (see [200] below). It is therefore not necessary for us to decide this issue although we accept

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\(^{18}\) Referred to in Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal [2009] 3 SLR(R) 109 (Court of Appeal, Singapore).

\(^{19}\) This excerpt is from Lord Hodson’s majority judgment, and is the mere possibility of conflict’ test referred to in Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal [2009] 3 SLR(R) 109 (Court of Appeal, Singapore).

\(^{20}\) This excerpt is from Lord Upjohn’s minority judgment, and is the “real sensible conflict test” referred to in Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal [2009] 3 SLR(R) 109 (Court of Appeal, Singapore).

\(^{21}\) For a detailed explanation of the “mere possibility of conflict” and the “real sensible conflict” tests used in Boardman v Phipps, please see David Kershaw, Company Law in Context: Text and Materials, 534-536 (2nd ed, Oxford University Press, 2012).
that it is certainly arguable that the stricter approach taken by the majority in Boardman v Phipps is preferable for three reasons. The first is the need to extinguish all possibility of temptation and to deter fiduciaries who may be tempted to abuse their positions. In an article, Matthew Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452, the author describes the fiduciary duty of loyalty as a "prophylactic" duty (at 453, 468-469) and states (at 464): The policy underlying the fiduciary conflict principle is to discourage fiduciaries from acting in situations that carry a heightened risk of breach of non-fiduciary duties. [Emphasis added] Similarly, in Guinness Plc v Saunders [1990] 2 AC 663 at 701, Lord Goff of Chieveley emphasised that the court must not act in a manner which would provide any encouragement to trustees to put themselves in a position where their duties would conflict with their personal interests. Another reason is the difficulty of inquiring into a person's state of mind or motives, and therefore of ascertaining whether an actual conflict of interest has occurred. Pearce & Stevens persuasively suggests (at p 784): If a trustee does act in circumstances where it could be suggested that he had abused his position to gain a personal benefit, it may be impossible to weigh his true motives: ie whether he was in fact allowing his own interests to prevail over those of the beneficiaries. As Lord Eldon LC observed in Ex p James [(1803) 8 Ves 337 at 345; 32 ER 385 at 388], 'no court is equal to the examination and ascertaining' of these facts. Because of the practical impossibility of discovering a fiduciary's true motives, equity has taken the very strict view that a fiduciary is liable to account for any profits he makes whenever there was an objective possibility of a conflict between his interests and his duty. [Emphasis added] And later (at p 802): “[It] has already been noted that it is impossible to conduct an inquiry into the subjective motives which influenced a fiduciary's conduct to determine whether a genuine conflict of interest occurred. The court can only look to the objective reality of external appearances, and the mere possibility of such a conflict triggers a remedial response in favour of the principal. This ensures that a situation can never arise where the fiduciary does in fact profit from a breach of his duty.” The third reason is similar but subtly different. It is the difficulty of detecting actual conflicts of interest given the ease with which fiduciaries may conceal them. As Prof Robert Flannigan rather aptly puts it in "The Strict Character of Fiduciary Liability" [2006] NZ Law Rev 209 at 210-211: “Even given monitoring and market controls, fiduciaries invariably are in a position to manipulate the appearance of relations and transactions. Particularly where they are sophisticated, fiduciaries are able to structure and document intentions, events, and opportunities so as to erect a façade of regularity. Where they do so effectively, ex ante or ex post, others will not perceive or comprehend the operation of their self-interest. We know that opportunistic motive can be disguised as dedication, sacrifice, or fidelity. We know that circumstances of limited access may be shaped to imply virtue where in truth there is avarice and duplicity. We know that fiduciaries can arrange to receive benefits remotely or tacitly. We know, in other words, that corrupt motive can be made undetectable. That is the particular facility of fiduciaries. The nature of their functional limited access provides both the opportunity and the means to covertly engage their self-interest. It is that capacity for fabrication and colouration that drives consensus to a strict liability. In a real sense, we are prey to fiduciary appetites for unauthorised gain. To a duplicitous fiduciary, the grant of access amounts to an invitation to mould a personal benefit. We have concluded that we will not entertain or accept apologia for a conflict or a benefit because we recognise that the difficulty of detecting actual conflicts of interest given the ease with which fiduciaries may conceal them is so great that it is no longer realistic to rely on a remedial response in favour of the principal. This ensures that a situation can never arise where the fiduciary does in fact profit from a breach of his duty.” [Emphasis in original]

- Chua Boon Chin v JM McCormack [1979] 2 MLJ 156 (High Court, Singapore)

[Summary: The plaintiff applied for the removal of the defendants as the liquidators of Cycle & Carriage Co (Realty) Ltd (the “Listed Company”) and that they be replaced by different people. The plaintiff was a shareholder of the Company. The first defendant was a director and the other two defendants were accountants practicing in partnership with the first defendant. Before 1974, the Company’s investments included 9,064,664 shares of $1 each fully paid up in the Listed Company. Of this amount, 6,043,110 shares were in CCR Holdings Ltd, whose entire assets consisted of an equivalent number of shares in the Listed Company. In 1974, the Company directors transferred 6,043,110 shares of the 9,064,664 shares the company held in the Listed Company in exchange for an equivalent number of shares in CCR Holdings. This was done without the plaintiff’s knowledge. In 1975, the Company was wound up and the defendants were appointed liquidators of the company. The plaintiff alleged that this was done purely for the benefit of the Company’s directors, and not for the benefit of the Company. As a shareholder of the Company, the plaintiff requested for his entitlement of shares in the Listed Company from the liquidators. The liquidators gave him 94,079 shares in CCR Holdings instead. The plaintiff claimed that the CCR shares were worth considerably less than his entitlement of shares in the Listed Company. The plaintiff alleged that this was a breach of the fiduciary duties which the directors of the Company owed the members of the company. The court held that the company directors were in breach of their duties and that the defendants were to be removed as liquidators of the Company]
[Excerpt: Directors of a company stand *vis-a-vis* in a fiduciary position to the company. Their duties being to exercise their powers for the benefit of the company as a whole and not to put themselves in a position in which their duties and their personal interest may conflict. It is an inflexible rule of the court of equity that a person in a fiduciary position is not allowed to put himself in a position where his interest and duty conflict. This rule is based on the consideration that human nature being what it is, there is danger of a person holding a fiduciary position being swayed by interest rather than by duty and thereby prejudicing those whom he was bound to protect.]

- Due to the economic damage that would be caused by a strict application of the no conflict rule the law has carved out *two exceptions* when:
  - *Ex ante* the director has:
    - Disclosed the potential conflict to the company (which at general law is considered to be the shareholders in general meeting); and
    - The company has given its fully-informed consent
  - *Ex ante* the company has not consented to the conflict but it nevertheless *ex post* decides to affirm/adopt the contract (as breaching the duty makes the contract voidable (not void) at the option of the company)

  *North-West Transportation Co. v Beatty* (1887) 12 App. Cas. 589 (Privy Council, on appeal from the Supreme Court of Canada) [Sealy 4.33]

  [Summary: The main issue in the case was whether a shareholder in a company is entitled to vote at a meeting of the company on a question in which he is personally interested. One of the directors of the North-West Transportation Company had a boat which he wished to sell to the company; he was also the majority shareholder of the company. The board of directors passed a by-law authorizing the purchase of the boat, and the by-law was approved in a subsequent shareholder meeting. The director and majority shareholder voted during the meeting. Without his vote, the resolution could not have been passed as he owned about 50% of the company’s shares, and there was only a majority of seventeen in favour of the resolution. The plaintiff, Henry Beatty, was one of the shareholders of the company who voted against the resolution to confirm the by-law. The plaintiff applied on behalf of himself and the other dissentient shareholders to have the sale of the said boat to the company set aside. The Privy Council dismissed the plaintiff’s application on the grounds that a vendor was entitled to exercise his voting power as a shareholder in general meeting to ratify such contract; his doing so could not be deemed oppressive by reason of his individually possessing a majority of votes, acquired in a manner authorized by the constitution of the company. The Privy Council then went on to hold that the shareholders of a company could affirm a contract made in breach of the no conflict rule provided that the approval was not obtained by unfair or improper means]

[Excerpt: It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means. The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been what was intended to be done by the resolution passed on the 7th of February.]
Section 156(1) of the CA supplements the general law no conflict duty by requiring a director to disclose to the board when:

- The director is in any way, whether directly or indirectly, interested in any transaction or proposed transaction with the company
  - The disclosure obligation under s 156(1) does not apply when the director is only a member or creditor of a corporation which is interested in the transaction with the company AND the interests of the director is not a material interest (s 156(2))
  - In most instances, a controlling interest in a company will be considered a “material interest” for the purposes of s 156(1) & (2). In addition, if a shareholder does not have a controlling interest but has a large enough interest to influence the company’s decision she will be considered to have a material interest
- Disclosure under s 156(1) must be made to the board as soon as practicable after the relevant facts have come to the director’s knowledge
  - Note that this requirement is different than under the general law which prima facie requires disclosure to the shareholders at general meeting and where ex post disclosure is possible

Yeo Geok Seng v PP [2000] 1 SLR 195 (High Court, Singapore) [Woon 7.129]

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[Summary: The appellant (“Yeo”) was the managing director of a company (“MFED”), director of another company (“XMS”), and director, manager and 50% shareholder of yet another company (“Triple Star”). MFED was awarded a building contract (“the TWCC contract”). On behalf of MFED, Yeo then contracted with XMS to award the TWCC contract to XMS, with a provision that consultation fees were payable to MFED by XMS. Yeo did not declare any interest in this contract to the directors of XMS. In addition, there was a building materials supplies agreement between XMS and Triple Star (“the supplies agreement”). However, no documentary evidence of this agreement existed and Yeo also did not declare to the directors of XMS any interest in this agreement. Yeo was charged under ss 156(1) and 156(5) of the Companies Act (Cap 50, 1994 Rev Ed) (“the Act”) for failing to declare his interests in the two contracts. He was convicted and fined $5,000 on each charge. On appeal, Yeo contended that he did not have any personal interest in the contracts and that the sentence was manifestly excessive. The High Court dismissed the appeal]

[Excerpt: It appeared to me that the amount of shareholding which constitutes a material interest under s 156(2) of the Act may vary according to the facts of each case. In most instances, a controlling interest in a company would be a material interest and would require disclosure. In this case, even if the appellant’s 50% shareholding in Triple Star was not a controlling interest, it was clearly a substantial shareholding by which he could influence the decisions of the company and thus constituted a material interest under s 156(2). The appellant, therefore, could not avail himself of the exception in s 156(2)]

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Section 156(5) of the CA supplements the general law no conflict duty by requiring a director to disclose to the board if she holds any office or possesses any property which directly or indirectly creates duties or interests in conflict with her directorial duties

- Disclosure under s 156(5) must be made to the board upon becoming a director or (if already a director) after she commenced to hold the office or possess the property
  - Note that this requirement is different than under the general law which prima facie requires disclosure to the shareholders at general meeting and where ex post disclosure is possible
- **Yeo Geek Seng v PP** [2000] 1 SLR 195 (High Court, Singapore) [Woon 7.129]

  [Summary: The appellant (“Yeo”) was the managing director of a company. The company subsequently entered into contracts with two other companies that the appellant had an interest in. The appellant failed to declare these interests to the company. See above for more details]

  [Excerpt: The wording of s 156(5) is clear and wide enough to impose a duty of disclosure on a director who holds a directorship in another company, even if he does not have a personal interest, as long as there is a potential conflict of duty arising from his office as a director in both companies. Section 156(5) does not require the director to have a personal interest that in fact gives rise to a conflict. In such case of multiple directorship, the question is whether, by virtue of being a director of two or more companies, a conflict of duty might potentially arise. If so, the director is required to declare the conflict under s 156(5). It may not be in very case of multiple directorship that the duty under s 156(5) would arise but whether such duty arises would depend on relevant circumstances, including the relationship between the companies of which the same person is a director]

  - Note that in practice, the Articles in most companies include a provision, which has been upheld by the courts, that allows directors to discharge both their no conflict duty at general law and obligations under s 156 by disclosing to the board only (and not to the shareholders in general meeting as is *prima facie* required at general law)
    - To be clear, however, if such a provision is not inserted into the Articles then the conflict duty at general law requires disclosure to the shareholders at general meeting (i.e., the default Articles for companies contained in Table A of the CA do not include such a provision)

- **Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik** [2004] 4 SLR 318 (High Court, Singapore)

  [Summary: The plaintiff, Dayco Products Singapore Pte Ltd, a company in voluntary liquidation, was a trading company engaged in the business of supplying aftermarket automotive belts and hoses in Asia. The defendant, Ong Cheng Aik, was the managing director of the plaintiff. The issues before the court were whether the defendant failed to disclose his personal interest in several transactions involving the sale of the plaintiff’s property and if so, whether he was liable to account to the plaintiff for the unauthorised profits made by him. The alternative issue was whether the failure to disclose his interest rendered him liable to compensate the plaintiff in damages. The High Court held that the defendant was liable for having breached his fiduciary duty to avoid a conflict of interest]

  [Excerpt: The English Court of Appeal in *Gwembe Valley Development Co Ltd v Koshy*...said: ‘The requirement of the general law is that, although disclosure does not have to be made formally to the board, a company director must make full disclosure to all the shareholders of all the material facts. The shareholders in the company, to which he owes the fiduciary duty not to make an unauthorised profit from his position, must approve of, or acquiesce in, his profit. Disclosure requirements are not confined to the nature of the director’s interest: they extend to disclosure of its extent, including the source and scale of the profit made from his position, so as to ensure that the shareholders are ‘fully informed of the real state of things’. Separately, s 156(1) and sometimes the articles of a company, permit a director who is interested in a proposed transaction to take the benefit of the transaction if he discloses his interest to the board and takes no part in the decision of the board on the transaction. If the director makes that disclosure and abstains from taking part in the decision, the validity of the transaction is not impaired. A failure to adequately disclose will render the director accountable to the company for the profits made from the transaction]

- **Hely-Hutchison v Brayhead Ltd** [1968] 1 QB 549 (Court of Appeal, England) [Woon 7.133]22

  [Summary: The plaintiff, R, was the chairman of the defendant company (the “Company”). R acted as the Company’s *de facto* managing director. He was the chief executive who made the final decision on any

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22 Followed in *Banque Nationale de Paris v Tan Nancy* [2001] 3 SLR(R) 726 (Court of Appeal, Singapore).
matters concerning finance. He often committed the Company to contracts without the knowledge of the board and reported the matter afterwards. The board knew of and acquiesced in R using the Company’s resources to provide financial assistance to P, a company in financial difficulties. To this end, R signed 2 letters on behalf of the Company such that Company would indemnify P for $50,000 and lend P $45,000. The ailing company subsequently went into liquidation and R was called on to honour his guarantee. He paid the bankers £50,000 and claimed that sum and the £45,000 lent to P from the Company. The Company denied liability contending that R had no authority to sign the letters, alternatively, that since R had not disclosed his interest in the contracts as required by the Company’s articles of association and the 1948 Companies Act, the contracts were unenforceable. The Court of Appeal held that R had actual authority to sign the letters and that the contracts were binding. Accordingly, the Company was liable for the sum lent to P.

Excerpt: [If the statutory disclosure is made, then a director’s contracts with a company are exempt from the normal consequences which would follow under the general law where one person who is in a fiduciary position enters into a contract with a person to whom he owes the fiduciary duty…All that it does is to relieve a contracting director from the consequences which would attach under the general law]

- A failure to comply with the disclosure requirements under s 156 is a criminal offence subject to a fine and/or imprisonment (s 156 (10))
- As section 156 of the CA exists for the benefit and protection of the company its scope will be interpreted widely by the court

  Yeo Geok Seng v PP [2000] 1 SLR 195 (High Court, Singapore) [Woon 7.129]

  [Summary: The appellant (“Yeo”) was the managing director of a company. The company subsequently entered into contracts with two other companies that the appellant had an interest in. The appellant failed to declare these interests to the company. See above for more details]

  [Excerpt: Section 156 of the Act exists for the benefit and protection of the company so that its board of directors may make informed decisions in the light of declarations of interest by individual directors. A wide interpretation of s 156 is therefore necessary to give effect to its purpose]

- Nominee directors and the no conflict duty
  - Under the general law directors can hold multiple directorships or act as nominee directors assuming they disclose this conflict and receive the consent of the company (i.e., prima facie shareholders in general meeting)
  - Under 156(5), nominee directors must disclose their conflict at the time they join the board or become a nominee
  - However, even after disclosure, a nominee director is never entitled to sacrifice the interests of the company on which board she serves as it would breach her duty to act bona fide in the best interest of the company
  - Section 158 provides a mechanism by which a nominee director may disclose to her principal information obtained by reason of her position as a director. Three conditions must be met:
    o The director must declare at a meeting of the directors of the company the name and office or position held by the person to whom the information is to be disclosed and the particulars of such information
    o The director must receive prior authorization by the board of directors to make disclosure
    o The disclosure cannot be likely to prejudice the company
- If the conflict of a nominee director is intractable between her “two masters” then she should resign

- **Oversea-Chinese Banking Corp Ltd v Justlogin Pte Ltd [2004] 2 SLR 675 (Court of Appeal, Singapore)**

[Summary: The appellants and the respondents entered a contract which obliged the parties to procure the execution of an assets sale agreement (“ASA”) between JLI, the first respondent, and iProp, the appellant’s subsidiary. The JLI deed also contained a confidentiality clause and provided for time to be of the essence. The ASA was never entered into. The appellants also failed to draw iProp’s attention to the deal as they claimed that two of iProp’s directors were the appellants’ nominees and their duties to iProp would be compromised if the ASA were disclosed. The appellant’s position was that the board of iProp should be allowed to make an independent assessment of the deal without the appellants’ influence. The respondents lodged a claim against the appellants on the ground that the appellants breached their obligation to procure iProp to execute the ASA with JLI. The Court of Appeal upheld the trial judge’s ruling that the appellants were in breach of their obligation and dismissed the appeal]

[Excerpt: We agree it is settled law that every director owes the same responsibility to the company as a whole. It is no different where a director is the nominee of a group of shareholders or creditors. He should not regard himself as a ‘watchdog’ for those who put him on the board. A nominee director should exercise his judgment in the best interest of the company and should not be bound to act in accordance with the direction or instruction of his appointor... He must not put the appointor’s interests before those of the company...But that is not to say that a nominee director must act against the interest of his appointor. A nominee director may take into account the interest of his appointor if such interest does not conflict with the interest of the company. The court will only interfere if it is of the view that no reasonable director would consider the action taken to be in the interest of the company]

- **Question:** Why does the general law and CA allow for wide exceptions to the no conflict rule in the case of disclosure?

- **Question:** Why does the CA and general law in some circumstances allow for disclosure to the board (i.e., why does the law not always require disclosure to the general meeting of shareholders in all circumstances)?

### 7.2 The “no taking secret profits or corporate opportunities” rule

- A director of a company, being a fiduciary, is not allowed to profit from his position unless:
  - She provides full disclosure;
  - Obtains the informed consent of the company (which at general law, *prima facie*, means the shareholders at general meeting); *and*
  - The profit is not made through misappropriation (unless it is properly ratified by *all* of the shareholders)

- The director will be liable to account for secret profits even when the profits were obtained honestly, the company suffered no damages and the company itself could not have qualified to receive the profit


  [Excerpt: As a general rule, a director of a company, being in a fiduciary position, is not allowed to profit from his position unless he has the company’s fully informed consent. If he does so, he is liable to account for any profit derived by paying the profits over to the company. Thus, a director who is paid commission by a supplier}
of goods with whom he has placed orders for goods on the company’s behalf is liable to account to the company for the commission, unless the company was fully informed and had properly approved the director’s receipt of the commission. This is a strict rule and the liability to account arises from the mere fact of the profit having being made. It is irrelevant that the director had acted honestly throughout or that the company had not suffered any damage, or even that the company itself would not have qualified for the payment.


[Excerpt: By virtue of the fiduciary obligations imposed on a director or senior manager, they may not obtain a profit in connection with their position without the informed consent of the company. Where a director or senior manager has placed himself in a position where his duty to the company may conflict with his personal interests and has made a profit in the process, the company may seek disgorgement of such profit from the director or senior manager. However, as the obligation is owed to the company, the company can release the director or senior manager from such obligation. The release can be prospective or retrospective, provided the decision to release is a fully informed one. It therefore behooves the fiduciary to disclose his interest fully to the company when seeking its consent to take advantage of an opportunity (or to forgive an earlier breach of duty) that has come to the fiduciary’s attention as a result of the fiduciary’s position. In Lim Suat Hua v Singapore HealthPartners Pte Ltd [2012] 2 SLR 805, Andrew Ang J held that the company and shareholders had released the plaintiff director from her inadequate disclosure of two contracts that she had an interest in. There was no release, however, for a third contract as this contract was not referred to in the settlement agreement to which all the shareholders were parties.

- Furs Ltd v Tomkies (1935) 54 CLR 583 (High Court, Australia) [Woon 8.45]

[Summary: T, while managing director of the appellant company, was authorized by the directors to negotiate for the sale of the tanning, dressing and dyeing part of its business. After having arranged the sale, T discovered that the buyer was interested in hiring him to run the tanning business. T informed the chairman of the board of directors of the appellant company. The chairman, after consultation with some of the other directors, advised T to make the best arrangement for himself that he could with the purchaser. Before the terms of sale were agreed upon, T arranged a contract between himself and the company to be formed in which it was agreed that he should serve that company and in that service disclose all his knowledge and information about the processes of the tanning, dressing and dyeing, including the appellant’s secret tanning formulae, and should receive shares in the company and £4,000, in addition to an annual salary. This transaction was not disclosed to the appellant company, even though it would have made the appellant company’s secret tanning formulae worthless. The High Court held that T while acting for the appellant company in a fiduciary capacity had derived undisclosed benefits for himself for which he was accountable to the appellant.]

[Excerpt: “[N]o director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves of his doing so, or all shareholders acquiesce. An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. If, when it is his duty to safeguard and further the interests of the company, he uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self-interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation.]

- A director is not allowed to take advantage of an opportunity that came to the director’s knowledge in her capacity as a director—even if the company is, in fact, itself unable to exploit the business opportunity.

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23 Referred to in *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 (High Court, Singapore).
- *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162 (High Court, England) [Woon 8.60]24

[Summary: The company attempted to enter into a contract with a third party. However, the third party refused to enter into the contract with the company. The third party approached a director (Cooley) of the company to enter into the same contract that the company was refused. Cooley resigned from the company without disclosing to the company that the third party had offered him the contract. The court found Cooley liable for breaching his fiduciary duty to avoid a conflict of interest and Cooley to account for the profit made on the contract even though the company could not have made the profit]

[Excerpt:] The remarkable position then arises that if one applies the equitable doctrine upon which the plaintiffs rely to oblige the defendant to account, they will receive a benefit which … it is unlikely they would have got for themselves had the defendant complied with his duty to them. On the other hand, if the defendant is not required to account, he will have made a large profit, as a result of having put himself into a position in which his duty to the plaintiffs who were employing him and his personal interests conflicted. … When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained by the breach of trust has always been treated as irrelevant. … I think Mr. Brown was right when he said that it is the basic principle which matters. It is an over-riding principle of equity that a man must not be allowed to put himself in a position in which his fiduciary duty and his interests conflicted. … I think that, although perhaps the expression is not entirely precise, Mr. Brown put the point well when he said that what the defendant did in May, June and July was to substitute himself as an individual for the company of which he was managing director and to which he owed a fiduciary duty. It is upon the ground I have stated that I rest my conclusion in this case. Perhaps it is permissible to say I have less reluctance in reaching that conclusion on the application of this basic principle of equity since I know that what happened was enabled to happen because a release was obtained by the defendant from a binding contractual obligation by the dishonest and untrue misrepresentations which were made to Mr. Hicks on June 16]

- *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (House of Lords) [Sealy 6.16] [Woon 8.54]25

[Summary: Regal owned a cinema and had 20 shareholders and 5 directors. The defendant directors decided to incorporate a subsidiary of Regal (called Hastings) to acquire leases of two other cinemas. The owner of the two cinemas required that the paid-up capital of Hastings had to be at least 5000 pounds. Regal had invested 2000 pounds in Hastings and could not afford more. Four of the defendant directors therefore subscribed for 500 pounds in shares each—with the remainder being taken up by Regal’s lawyer and some outsiders. Three weeks after the directors subscribed for the Hastings shares, all of the shares of Regal and Hastings were sold to a new owner. The directors made a huge profit on their Hastings shares. The directors of Regal were replaced by directors representing the new owners and the new directors had Regal sue the old Regal directors (one of which was Gulliver). The claim was that the old Regal directors had breached their duty and the profit that they made on their Hastings shares belonged to Regal. The court held that the defendant directors were all acting honestly and that Regal did not have the money to invest in Hastings. However, the directors breached their duty to avoid conflicts of interest as the opportunity had come to them in their capacity as fiduciaries and they therefore could not take a secret profit or corporate opportunity. Lord Russell in *obiter* opined that if the defendant directors had wished to protect themselves they could have ratified the breach by a vote at the general meeting]

[Excerpt: The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his actions. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account]

- There is case law (*Peso Silver Mines v Cropper*) suggesting that after the board rejects a corporate opportunity, a director, without disclosure to (or consent from) the company, may seize the rejected opportunity. However, the strict “no profit rule” and language of

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24 Followed in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 (Court of Appeal, Singapore).
25 Referred to in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others* [2013] 1 SLR 374 (Court of Appeal, Singapore).
the court in *Regal (Hastings)* and *Industrial Development Consultants Ltd (See, above)* suggest that this may be impermissible. As there is no Singapore case on this point, both views can be argued

- *Peso-Silver Mines Ltd v Cropper* (1966) 58 DLR (2d) 1 (Supreme Court, Canada) [Sealy 6.24][Woon 8.63]

  [Summary: The court found that the decision of Peso’s board to reject the corporate opportunity had been taken in good faith and for sound business reasons in the interests of Peso. The rejected opportunity thus ceased to be a corporate opportunity as such and cannot be said then to have come to the director (Cropper) by reason of his position as a director. It was, therefore, open to Cropper to take up the rejected opportunity for himself as a member of the public]

  [Excerpt: I now turn to the question of whether or not the acquisition by the respondent of the Cross Bow and Mayo shares in the one transaction and the Dayton shares in the other, fall within the first principle that no one who has fiduciary duties must be allowed to retain a profit from an engagement where his personal interest conflicts or may conflict with those of the principal to whom the duties are owed. There is no question whatsoever that the respondent as managing director of the appellant was in a fiduciary relationship to it. Also, there is no doubt that the respondent acted in the best of faith in both transactions and that there was no thought or intent on his part to profit himself at the expense of the appellant. The appellant had no interest in those of the Peso claims offered to it by Dickson before such offer was made, and, in fact, there is no evidence as to whether or not it knew the claims even existed. It did have a very definite interest in the properties while it was considering whether it could or would purchase them, but that interest ceased to exist when, by admittedly *bona fide* decision of its full board of directors made after professional advice was received, the offer was rejected by the appellant. It was only after this temporary interest of the appellant had ceased and after “it had been out of his mind,” did the respondent participate in the impugned transaction. If the transaction had taken place when and as it did, but without the offer of these contiguous properties being before the appellant's directors for decision or during the time the appellant was considering the matter, the situation would have been entirely different, and the respondent might well have had to account to the appellant for his participation. But that is not the case here, and I cannot conclude that because offers of properties are continuously put before a mining company and rejected, henceforth any personal dealing with any of them by a director raises a conflict of personal interests with the interests of the company. On the contrary, it would seem that an out-and-out *bona fide* rejection by the company would be the best evidence that any later dealings with the property by anyone would not be against its interests]

- An ex-director is precluded from exploiting a corporate opportunity where her resignation was prompted by a desire to make use of that opportunity herself or where it was her position as a director of the company that led her to the opportunity. Otherwise, directors might be tempted to simply resign in order to take up such opportunities

  - *Canadian Aero Service Ltd v O’Malley* (1973) 40 DLR (3d) 371 (Supreme Court, Canada) [Woon 8.59]

    [Summary: The defendants, who were senior officers in the company, were conducting negotiations on behalf of the company and resigned while these negotiations were ongoing. The defendants subsequently bid for and obtained the contract in the name of their own company. The SCC found the defendants in breach of their fiduciary duty]

    [Excerpt: An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired]
Poon Huat Seng v Goh Cheng Chua [1994] SGHC 74 (High Court, Singapore)

[Summary: The defendant was a shareholder and director of the second plaintiff. He subsequently agreed to sell his entire shareholdings in the second plaintiff to the first plaintiff. The share sale agreement contained a clause that the defendant “will not enter any competitive trade with Welmark International Ltd (i.e. the second plaintiffs) for a period of two years”. The plaintiffs alleged that the defendant had entered into competitive trade against the second plaintiffs when he, after the agreement, dealt or traded with three named parties with whom the second plaintiffs had been conducting business and was thus in breach of his fiduciary duties as a director. The High Court held that the plaintiffs had no claims whatsoever against the defendant and dismissed the plaintiff’s appeal]

[Excerpt: In equity, the fiduciary duties of a former director have been carefully and strictly defined. They cannot be too wide because excessively extensive fiduciary duties would not only inhibit and impede free competition but could conceivably unfairly restrain trade or the pursuit of one’s profession or the legitimate exercise of one's skills to earn a living. Central to this subject is the consideration that a fiduciary's duty continues and must not exploit any opportunity or confidential information he had learned during his relationship or association with his principal. He cannot be a predatory interloper. Typically, former directors are not permitted to divert maturing business opportunities to themselves or their nominees. … Nor can they be permitted to exploit confidential information acquired during his office as a director]

- Where the director is an employee, case law suggests that it is not a breach to take preparatory steps to set up a competing business so long as she does not actually compete against the company before resignation

Universal Westech (s) Pte Ltd v Ng Thiam Kiat [1997] 2 SLR 139 (Court of Appeal, Singapore)

[Summary: The plaintiff, a company, sued the first and second defendants, their former employees, for breach of their contracts of employment and breach of their duties as employees and ex-employees. The third defendant, a company owned by the first and second defendants who were also its directors, was subsequently added to the proceedings. The Court of Appeal dismissed the appeal brought by the plaintiff against the first and second defendants. The court held that the plaintiff’s allegations against the first defendant were largely unsubstantiated and the evidence was largely hearsay or without any evidential basis or support. While the second defendant became a director of the third defendant whilst he was in the service of the plaintiff and had committed a breach of his duty of fidelity to the plaintiff, he did not take part in the management or operation of the third defendant’s business. Hence, the harm or damage caused to the plaintiff was minimal]

[Excerpt: A common feature in these cases is that the employees took steps to prepare to compete with their employers, but did not compete with them before they left. The present defendants had progressed beyond the preparatory stage. They crossed the divide when they competed against the plaintiff to represent the same principals]

- A company at general meeting may permit a director who has taken secret profits or a corporate opportunity to retain gains made from her position—assuming the director makes full disclosure and there is no misappropriation of corporate assets (i.e., the profit or opportunity was not taken from the company)

Question: From a policy perspective, what are the risks and benefits of the Supreme Court of Canada’s decision in Peso Silver Mines v Cropper and should it be followed in Singapore?
7.3 The “no misappropriation of corporate assets (or opportunities)” rule

- A director cannot use company property or take a corporate opportunity for her own personal advantage or for the benefit of any third party
- It is not open to the company at general meeting to ratify the misdeed and excuse the director from liability where the director has misappropriated corporate assets or opportunities from the company
- This distinguishes “secret profit” from “misappropriation” cases
- However, a recent Court of Appeal decision (Raffles Town Club Pte Ltd v Lim Eng Hock Peter) suggests that if company property is taken by the directors for their personal benefit (i.e., misappropriated) and all of the shareholders ratify the act, then the breach will be excused
  - This is subject to the caveat that the ratification, even if by all of the shareholders, will be invalid if the act was unlawful, ultra vires, prejudiced the company’s creditors or amounted to a fraud on the minority (See, for more details, Section 11.4 below)
  - This substantially reduces (if not eliminates) the distinction between conflict of interest cases involving “secret profit” (See, above) from those involving “misappropriation”. Perhaps, the only remaining difference is that in the former, the directors’ acts may be ratified with a regular shareholder resolution (i.e., 50%) while the latter case may need to be ratified by a unanimous shareholder resolution


  [Excerpt: A director is not allowed to apply company property for his own personal advantage or for the benefit of any third person without the authority of the company...Where company property has been misappropriated or misapplied, the company may claim any damage it suffers as a result of the wrongdoing from the director. In these situations, it is not open to the company in general meeting to ratify the misdeed and excuse the errant director from liability. This is the essential difference between cases classified as secret profit cases and those classified as misappropriation cases]

- Cook v Deeks [1916] 1 AC 554 (Privy Council on Appeal from Ontario) [Sealy 6.15] [Woon 8.58]

  [Summary: The company had four shareholders, all of whom were directors. The three defendant shareholders decided to break relations with the plaintiff. They diverted contracts that were meant for the company to another company which they had set up. The plaintiff sued to make the defendants account for their profits to the company on the ground that they may have breached their duty as directors. The question arose whether the defendants as majority shareholders could ratify the transaction and so defeat the plaintiff’s action. It was held that the shareholders could not ratify the transaction and the plaintiff was allowed to sue on behalf of the company]

  [Excerpt: If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of North-West Transportation Co. v. Beatty and Burland v. Earle have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be

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26 Referred to in *Swiss Butchery Pte Ltd v Huber Ernst* [2010] 3 SLR 813 (High Court, Singapore)
disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of Menier v. Hooper’s Telegraph Works]

- Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2013] 1 SLR 374 (Court of Appeal, Singapore)

[Summary: The Court of Appeal upheld the High Court’s decision that the expenses paid to the former directors did not amount to a breach of director duties. The court held that the director defendants had not breached their duties with respect to the expenses that were reasonably incidental to RTC’s business. The court found that the directors had breached their duty to act in the company’s best interests with regards to the other expenses that had not been reasonably incidental to RTC’s business. However, as these breaches of duty had been properly ratified by the shareholders, the defendant directors were not liable. See above for more details]

[Excerpt: With respect to some of the expenses which he found not to have been incurred by the Former Directors for the benefit of RTC or not reasonably incidental to the business of RTC, the Judge held that “the [Former Directors], acting in their capacity as shareholders of [RTC] and collectively embodying the interests of the company, had authorised and ratified the charging of these expenses to the company via the private accounts” (see the Judgment at [182]). We find no reason to disturb the Judge’s findings of fact and we agree with his ruling on the law.... In the circumstances, we see no reason in principle why the shareholders of RTC may not waive the recovery of the Profits from the Former Directors by the exercise of their shareholding powers. They could not be said to have been negligent in waiving RTC’s claim, nor could they be said to have acted fraudulently vis-à-vis RTC or any creditor (as RTC was solvent) in not causing RTC to take steps to commence proceedings against themselves. In deciding as shareholders to waive RTC’s rights to recover the Profits, the Former Directors were not trustees for RTC or for one another (see Peters’ American Delicacy Company Limited v Heath (1939) 61 CLR 457). They were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of RTC or other shareholders..... 45 In our view, in the absence of any factor that would disqualify shareholders from ratifying unauthorised or unlawful acts of directors, we see no reason why a company may not waive any claims it may have against its directors for any kind of liability where the company is solvent]27

- Question: Why would the law not make sense if the general meeting could ratify acts of misappropriation?
- Question: What is the primary lesson to take away from the cases on the no conflict duty?

7.4 Specific duties in the CA and the duty to avoid conflicts of interest

- In addition to s 156 (See, above), the CA reinforces the common law duty to avoid conflicts of interest by banning specific actions of companies/directors that are particularly susceptible to self-dealing as a result of inherent conflicts of interest
- See sections 10.3, 10.4 & 10.5 below for a more detailed analysis of these statutory duties on conflicts of interest

  - Section 157(2) makes it a criminal offence for directors to improperly use information acquired by virtue of their director’s position to gain an advantage for herself or any other person or to cause detriment to the company

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27 This was upheld on appeal, see Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others [2013] 1 SLR 374 (Court of Appeal, Singapore) at paras 30-31.
- Sections 162 & 163 places a general restriction (with exceptions) on companies making loans to their directors, directors of related companies, relatives of directors or companies which directors or their associates have an interest

- Section 168 makes it unlawful for a company to pay a director compensation for loss of office without approval of the shareholders at general meetings

- Section 169 requires companies that wish to improve emoluments (i.e., fee and other benefits) for their directors to get approval from the shareholders at general meeting
VIII. THE DUTY TO ACT FOR THE PROPER PURPOSE
FIDUCIARY DUTY (3)

8.0 The duty to act for the proper purpose

- The Articles and CA grant directors broad general management powers and more specific powers such as the power to issue shares and refuse the registration of share transfers.
- Directors are obligated to exercise these powers and to use the company’s assets for the purpose they were intended (i.e., they are bound by the duty to act for the proper purpose).
- It is no defence for a director to assert that she acted bona fide in the interests of the company or was ignorant of the law if her actions were for “an improper purpose”.

> Walter Woon on Company Law, 324 (Revised 3rd ed, Sweet & Maxwell Asia, 2009)

[Excerpt: A director might be acting honestly in what he considers to be the company’s interests and yet still be in breach of his fiduciary duty. This would occur if he uses the powers he is delegated for the wrong purpose, or if he misapplies the company’s assets. Certain powers are conferred on director for certain purposes. If the director uses the powers to prosecute objectives outside the scope of the purpose for which the powers are conferred, the use of such power may be restrained]

- The court normally uses a two-part objective test to determine whether the proper purpose duty has been breached:

  1. It determines the objective limits within which the directorial power in question can be exercised.
  2. It decides whether the substantial purpose for which the directorial power in question was actually exercised fell within those limits.

  - In considering the purpose (or limits of the power), credit may be given to the bona fide opinion of the directors concerning what the purpose of the power is—but ultimately the test is objective.
  - Where there are two or more competing purposes underlying the exercise of a power, there will be a breach of duty if the impermissible purpose was causative in the sense that, but for its presence, the power would not have been exercised.

- Historically, the duty to act for a proper purpose has been most relevant in the context of hostile takeovers—where directors attempt to use their broad authority to issue shares (to friendly shareholders) to prevent a hostile takeover. The proper purpose duty, however, is not limited to hostile takeover situations.

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28 See generally, (Walter Woon on Company Law, 324 - 327 (Revised 3rd ed, Sweet & Maxwell Asia, 2009); Pearlie Koh, Company Law, 126 - 129 (2nd ed, LexisNexis, 2008)).
Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (Privy Council, on Appeal from New South Wales) [Sealy 6.08] [Woon 8.34]

[Summary: The directors of a target company allotted shares to one interested party which doomed a takeover plan of another. The directors testified that their individual purpose in voting for the issue of shares was to raise capital for the company. Although the company did in fact need capital for a construction project, the trial judge rejected the directors’ evidence in light of overwhelming evidence that other factors were driving the directors’ actions. The factors that tilted the court against the directors claim were: (1) events leading up to the board meeting in question that demonstrated the directors concern about the takeover; (2) the urgency with which the board meeting was called and the shares were allotted; (3) the lack of information given to the board about the capital needs of the company; (4) the board’s failure to consider the tax consequences of a share issue versus a loan; and (5) the absence of a reason for why the rights issue was made to a particular party rather than all shareholders if the purpose was to raise capital. The evidence suggested that the directors had an honest belief that control by the party whose shares were allotted was in the company’s best interests. However, acting in the best interests of the company is no defense to a claim based on improper purpose. The court accordingly held that the directors were liable for failing to uphold their duty to act for proper purposes]

[Excerpt: Further it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected … But it does not follow from this, as the appellants assert, that the absence of any element of self-interest is enough to make an issue valid. Self-interest is only one, though no doubt the commonest, instance of improper motive; and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made … it is necessary to start with a consideration of the power whose exercise is in question … Having ascertained, on a fair view, the nature of this power, and having defined it as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion on whether that purpose was proper or not. In doing so it will necessarily give credit as to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls]

- In practice, the proper purpose duty has played an extremely minimal role in Singapore company law in comparison to the duty to act bona fide in the best interests of the company and to avoid conflicts of interest
- The almost complete lack of any reported case law applying the proper purpose duty suggests its impact is limited. However, its importance in the UK and other common law countries suggests that it cannot be ignored

Towning Henry George v Jenton Overseas Investment Pte Ltd (in liquidation) [2007] 2 SLR 597 (Court of Appeal, Singapore)

[Summary: In this case, the liquidators of Jenton sued the appellant, a nominee director, for breach of his fiduciary duties. The court held the appellant had breached the duty of good faith and the actual conflict of interest rule. This is one of the few cases in Singapore which discusses the duty to act for proper purposes; however, it quickly dismisses it in the excerpt below. See above for more details]

[Excerpt: That leaves the other three duties for consideration. In our view, it is probable that the appellant's proper purpose duty vis-à-vis Jenton did not apply to his wrongful payment of the Relevant Sum to Normandy. The appellant paid the money in the exercise of his powers as a director of NQF and not of Jenton. Hence, the question of proper purpose did not arise]
IX. NEGLIGENCE DUTIES 29

9.0 Overview

- The negligence duties are designed to ensure that directors do not act incompetently or shirk their responsibilities (i.e., they aim to prevent directorial negligence)
- In a broad sense, the negligence duties achieve this by establishing a standard of appropriate conduct that directors must exercise to avoid potential liability in the course of carrying out their responsibilities as directors
- The issue in this area of the law that has long been debated is that of the appropriate standard of conduct (or now, more precisely, *standards of care, skill and diligence*) to be required of directors

    
    [Excerpt: We [begin now with] cases in which the complaint is that directors or officers breached their duty of care - in other words, that they were lazy or dumb]

    
    [Excerpt: A duty of care, whether it is in the law of torts or in the law of director duties, sets out a standard or a benchmark of care which the person in question, whether a driver or a director, is expected to take. … when thinking about the design of a standard of care for directors we need to remind ourselves that a duty provides two functions; first, it sets an expectation of behavior for the directors: how we ideally would like to see them behave; and secondly, it provides a liability standard according to which directors may be personally liable to the company if the directors breach this standard. … If we set the standard too high in order to set out high care expectations then directors who are fearful of being held liable may either refuse to serve on boards or prefer low risk decisions if they do so. High care standards may chill risk-taking or deter board service if directors worry that decisions that turn out badly – even though they actually complied with the standard of care – will be viewed by judges to be non-compliant because the judges’ knowledge of the failed outcome distorts their assessment of whether care was taken. But if we set the standard too low to take account of these concerns the standard of expectation may actually encourage directors to take insufficient care]

9.1 Comparing the traditional and modern standard for the negligence duties

- *Historically*, to fulfill their negligence duties directors were required to meet a *singular standard* of “care” and the standard was lax as it was a *purely subjective* standard
  - Specifically, directors were only required to meet the standard of care that they *personally* could achieve—the less qualified and more incompetent the director the less the law would require of them


[Excerpt: Neville J’s judgment in *In re Brazilian Rubber Plantations* is well known first, for its statement that you can be a director of a rubber company without knowing anything about rubber, and second, that you can accept office as a director of a company but you do not have to turn up for board meetings. This position perhaps reflected the view held by many that during this period that shareholders appointed directors and, therefore, that they themselves must take responsibility if they employed that ignorant or the incapable, as well as the view that being a non-executive director of a company was an honour bestowed on people and which in practice need not involve any substantial obligations]

*Re Cardiff Savings Bank* [1892] 2 Ch 100 (Chancery Court, England)

[Summary: The Marquis of Bute was held not to have fallen below the required standard of care even though he had attended only one board meeting of the company in his whole life. However, the bank appointed the Marquis president of the bank when he was a mere six months old—suggesting the bank wanted a mere figurehead not a corporate watchdog or strategist]

[Excerpt: To hold that the Marquis was guilty of neglect or omission in respect of this duty, in the absence of any knowledge or notice that it was not duly performed, would, in my opinion, be to fix him with liability for the neglect and omission of others rather than his own]

*Re City Equitable Fire Insurance Co Ltd.* [1925] Ch 407 (High Court, England); affirmed by the Court of Appeal: [1925] Ch 501 [Sealy 6.13]

[Summary: During the winding up of a company, an investigation of the company’s affairs revealed that the company had suffered losses amounting to $1,200,000. These losses were in part due to depreciations in investments, but were largely due to the managing director’s actions and deliberate fraud, which he had been convicted for and sentenced. The liquidator went on to make a claim against the respondent directors for negligence in respect of the losses suffered by the company. Admittedly, all of the respondent directors (except the managing director) had acted honestly through their stay with the company. The High Court and the Court of Appeal held that the respondent directors were not liable]

[Excerpt: A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience...]

- At present, the negligence duties are:
  - Normally treated as comprising three distinct duties: care, skill and diligence
  - Based on *minimum objective standards*—which may be made more stringent/raised (but not lowered) based on a director’s particular expertise and/or position in the company
  - Specifically, directors are required to act with the level of care, skill and diligence that would be expected of a reasonable director in the position of the actual director—irrespective of what the actual director is capable of achieving
  - This objective standard is the minimum that is required of a director and more will be required if they have or purport to have particular expertise or a special position in the company
  - A reflection of the fact that non-executive directors have come to be seen as critical monitors of management and most boards now have directors who are also the company’s senior managers/strategists

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30 In *Chip Thye Enterprises Pte Ltd (in liq) v Phay Gi Mo* [2004] 1 SLR 434 the Singapore High Court held that “The three broad categories of director’s duties are: fiduciary, duties of skill, care and diligence, and statutory duties”.

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Daniels v Anderson [1995] 16 ACSR 607 (Court of Appeal, New South Wales)\(^{31}\)

[Summary: AWA Ltd manufactured electronic products and faced problems because they bought components in Japanese yen and sold the finished products in Australian dollars. To manage their exposure, they set up an FX operation which was run by a single person (“Koval”) who combined the functions of trading, recording and settlement. Koval was effectively unsupervised and ran up massive liabilities. The board was concerned about the FX operations. In response to these concerns, the board was assured by management and by the auditor that all was well. It turned out that Koval was in fact losing money and concealing this fact from his supervisors. His activities caused substantial losses to AWA. The company sued its auditor for negligence. The auditor pleaded that the company had been contributorily negligent. At trial, the Court held that the non-executive directors had not been negligent under the circumstances but that the chairman/CEO was negligent. The Chairman/CEO lost control of his subordinates and left them to their own devices. This finding was upheld by the Court of Appeal]

Lim Weng Kee v PP [2002] 4 SLR 327 (High Court, Singapore) [Woon 8.13]\(^{32}\)

[Summary: The appellant (“Lim”) was the managing director of three pawnshops, and had been in the business for 20 years. A lady had pawned $4m worth of jewellery at the pawnshops as pledges for loans. However, the jewellery did not belong to her. When she was asked to settle the outstanding interest due to the pawnshops, she expressed her intention to redeem the jewellery. The cheque was later dishonoured. The pawnshops and their shareholders suffered substantial losses. Lim was charged under s 157(1) of the CA for failing to use reasonable diligence as managing director of the pawnshops in the discharge of his duties. The judge found Lim had breached his duties as director, and convicted and fined him $4,000 on each of the three charges. Lim appealed against his conviction and sentence, but the High Court dismissed the appeal]

9.2 The standard of skill

- The standard of skill requires all directors, at a minimum, to have a level of skillfulness to be capable of understanding the company’s affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity
- This is a minimum objective standard which will not be lowered to accommodate any inadequacies in the director’s abilities, knowledge or experience
- However, this minimum objective standard of skillfulness is raised for executive directors who are required to have a level of skillfulness possessed by those in the same calling

\(^{31}\) Followed in Lim Weng Kee v PP [2002] 4 SLR 327 (High Court, Singapore).
\(^{32}\) Referred to in Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation) [2007] 2 SLR 597 (Singapore, Court of Appeal).
• For example, an executive director who is the managing director of a major international bank would be expected to possess the level of skill of what would reasonably be expected of a managing director of a major international bank

• Note that although the standard of skilfulness is objective, it may vary considerably depending on the type of company (as the minimum level of skill required to be capable of understanding the company’s affairs will vary depending on the type and size of the company) and the type of director (executive directors will be required to have a level of skilfulness possessed by those in the same calling which will vary depending on their calling)


[Excerpt: Directors are subject to general law duties to exhibit a minimum standard of care, skill and diligence in the discharge of their directorship duties (in the functional sense)]

➢ *Commonwealth Bank of Australia v Frierich* (1991) 5 ACSR 115, 9 ACLC 946 (Supreme Court, Victoria)

[Summary: A bank that was owed $97m by a company in liquidation claimed under s 556 of the Companies (Vic) Code against 10 officers of the company. After the trial commenced a compromise was reached with all but one director of the company. The evidence showed that the directors had signed the 1986 and 1987 accounts as showing a true and fair view of the company’s financial affairs. Reports by the auditors on both sets of accounts were qualified. The directors had not been provided with the qualified auditor’s reports, and had not properly considered the accounts. The court found the one director with whom a compromise had not been reached liable for the entire sum. The directors had failed to uphold their duties as directors]

[Excerpt: As the complexity of commerce has gradually intensified (for better or for worse) the community has of necessity come to expect more than formerly from directors whose task it is to govern the affairs of companies to which large sums of money are committed by way of equity capital or loan. In response, the parliaments and the courts have found it necessary in legislation and litigation to refer to the demands made on directors in more exacting terms than formerly; and the standard of capability required of them has correspondingly increased. In particular, the stage has been reached when a director is expected to be capable of understanding his company’s affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity…I think it follows that he is required by law to be capable of keeping abreast of the company’s affairs, and sufficiently abreast of them to act appropriately…]


[Excerpt: First, although directors, executive and non-executive, are subject to a uniform and objective duty of care, what the discharge of that duty requires in particular cases will not be uniform. As the statutory formulation itself recognizes, what is required of the director will depend on the functions carried out by the director, so that there will be variations, not only between executive and non-executive director (and equally of non-executives) and between different types and sizes of company]

### 9.3 The standard of care

• There is a *minimum objective standard* of carefulness that applies to all directors (i.e., whether the director has exercised the same degree of care as a reasonable director found in his position)

• This *minimum* standard will not be lowered to accommodate any inadequacies in the individual director’s abilities, knowledge or experience
A director must make an effort to have a basic understanding of her rights and obligations under the articles and law. This may require the director to seek legal advice but does not require her to be a legal expert.

The standard of care will be increased (but not lowered) if the director holds herself out to possess or, in fact, possesses some special knowledge or experience.


  [Excerpt:] The modern approach subjects the director to a minimum objective standard, viz the standard of care reasonably expected of a person discharging the responsibilities that the director has assumed. … A director must take the trouble to discover what his rights and obligations are under the articles of association and at law. Ignorance of the law does not excuse an act that is against the law, no matter how well-intentioned that act may be. A director must take the trouble to discover just what his rights and obligations are, if necessary by taking legal advice when in doubt. … It is not necessary for each director to be a legal expert as long as he has a general familiarity with what the law requires of him.

- Lim Weng Kee v PP [2002] 4 SLR 327 (High Court, Singapore) [Woon 8.13]

  [Summary: A lady had pawned $4m worth of jewellery at the pawnshops as pledges for loans. However, the jewellery did not belong to her. When she was asked to settle the outstanding interest due to the pawnshops, she expressed her intention to redeem the jewellery and issued a cheque in favour of one of the pawnshops. However, before the cheque had been cleared, Lim allowed her to redeem the jewellery. The cheque was later dishonoured. The pawnshops and their shareholders suffered substantial losses. Lim was charged under s 157(1) of the CA for failing to use reasonable diligence as managing director of the pawnshops in the discharge of his duties. See above for more details]

- Re Duomatic Ltd [1969] 2 Ch 365 (Chancery Division, England)

  [Summary: None of the directors of the company had contracts of service, so they drew sums according to their personal needs and at the end of the year, these sums were totalled up and entered in the accounts as “director salaries”. These payments were approved by the directors and only shareholders of the company, E and H. When the company was liquidated, the liquidator brought claims against E and H for breaches of their duties as directors. The court found E liable for misapplication of the company’s funds, especially since he had failed to take legal advice]

- Re Duomatic Ltd [1969] 2 Ch 365 (Chancery Division, England)33

  [Excerpt: In my judgment a director of a company dealing with a matter of this kind who does not seek any legal advice at all but elects to deal with the matter himself without a proper exploration of the considerations which contribute, or ought to contribute, to a decision as to what should be done on the company's behalf, cannot be said to act reasonably]

- Assuming it is permitted by the Articles, a director may delegate administrative tasks (but not their discretion) to subordinates or experts

- Such a delegation will not breach the standard of care if the delegate is properly supervised, reasonably qualified and can reasonably be expected to honestly and

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33 Referred to in Yong Kheng Leong v Panweld Trading Pte Ltd [2013] 1 SLR 173 (Court of Appeal, Singapore).
effectively perform the task (i.e., there is no reasonable suspicion that the delegate is incompetent or a rogue)

- The standard of care with respect to delegation will normally be more stringent for executive directors than non-executive directors as they would reasonably be expected to have a more in-depth knowledge of the delegate and greater ability to supervise


  [Excerpt: Directors may delegate their powers and trust to their delegates, in the absence of circumstances that would excite the suspicion of a reasonable man. A director must of necessity trust the officers of the company to perform properly and honestly the duties allocated to them. … A director is not negligent merely because the person he trusted turned out to be a rogue. A director cannot be held liable for being defrauded; to do so would make his position intolerable. Once there is reason for suspicion, however, a director who trust as delegate does so at his own risk. If a director knows facts that would excite the suspicion of a reasonable man, he must make reasonable inquiries or take the consequences of his inaction]


  [Summary:] Barings Bank employed dishonest futures trader, who fraudulently doctored the bank's accounts and reported large profits while racking up huge trading losses. After an earthquake in Kobe, Japan, the stock market went into a downward spiral, and the truth of his losses were uncovered. The Secretary of State sought director disqualification orders under the Company Directors Disqualification Act 1986 against three directors of Barings for their failure to supervise his activities. They were alleged to be incompetent, and therefore “unfit to be concerned in the management of a company”]

  [Excerpts: Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. (i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors. (ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions. (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the directors role in the management of the company]

- Section 157C of the Companies Act entitles a director of a company to rely on information prepared by employees or another director, and on professional or expert advice by a professional adviser

  - The director relying on such reports or advice can only escape liability if she had acted in good faith, had made proper inquiry where the need for inquiry was indicated by the circumstances and had no knowledge that such reliance was unwarranted

9.4 The standard of diligence

- There is a minimum objective standard of diligence that applies to all directors (i.e., whether the director has exercised the same degree of diligence as a reasonable director found in her position)

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34 Followed in Vita Health Laboratories Pte Ltd v Pang Seng Meng [2004] 4 SLR(R) 162 (High Court, Singapore).
• This minimum standard will not be lowered to accommodate any inadequacies in the individual director’s abilities, knowledge or experience
• However, the minimum objective standard of diligence is different for executive directors and non-executive directors
  ▪ Executive directors are expected to attend all company meetings (unless there is a good reason not to) and to give continuous attention to the affairs of the company
  ▪ Non-executive directors are only expected to provide intermittent attention to the company and attend periodic board meetings
• The articles of most companies automatically disqualify directors if they are absent, without permission, from board meetings for a specific period (often six months)

➢ AWA Ltd v Daniels (1992) 7 ACSR 759 (Supreme Court, New South Wales)\(^\text{35}\)

[Summary: In this case, a rogue trader in AWA was left unsupervised and ran up massive liabilities. The board of AWA was concerned about the FX operations, but it was assured by management and by the auditor that all was well. The company sued its auditor for negligence. The auditor pleaded that the company had been contributorily negligent. At trial the court held that the non-executive directors had not been negligent under the circumstances but that the Chairman/CEO was negligent. The Chairman/CEO lost control of his subordinates and left them to their own devices. This finding was upheld by the Court of Appeal. See above for more details]

➢ Lim Weng Kee v PP [2002] 4 SLR 327 (High Court, Singapore) [Woon 8.13]

[Summary: A lady had pawned $4m worth of jewellery at the pawnshops as pledges for loans. However, the jewellery did not belong to her. When she was asked to settle the outstanding interest due to the pawnshops, she expressed her intention to redeem the jewellery and issued a cheque in favour of one of the pawnshops. However, before the cheque had been cleared, Lim allowed her to redeem the jewellery. The cheque was later dishonoured. The pawnshops and their shareholders suffered substantial losses. Lim was charged under s 157(1) of the Companies Act (Cap 50, 1994 Rev Ed) for failing to use reasonable diligence as managing director of the pawnshops in the discharge of his duties. See above for more details]

[Excerpt: The civil standard of care and diligence expected of a director is objective, namely, whether he has exercised the same degree of care and diligence as a reasonable director bound in his position. This standard is not fixed but a continuum depending on various factors such as the individual’s role in the company, the type of decision being made, the size and the business of the company. However, it is important to note that, unlike the traditional approach, this standard will not be lowered to accommodate any inadequacies in the individual’s knowledge or experience. The standard will however be raised if he held himself out to possess or in fact possesses some special knowledge or experience.]

9.5 The relationship between the negligence duties and section 157(1) of the CA

• Section 157(1) of the Act requires all directors to “at all times…use reasonable diligence in the discharge of the duties of his office” [emphasis added]
• In Singapore, case law and most leading scholars suggest that the term “diligence” in s 157(1) is referring to care, skill and diligence (i.e., all of the negligence duties—not

\(^{35}\) Followed in JSI Shipping (S) Pte Ltd v Teafwoongwolcoong (a firm)[2007] 4 SLR(R) 460 (Court of Appeal, Singapore).
diligence only). Therefore, the general consensus is that s 157(1) of the CA will be breached whenever any of the negligence duties are breached.

- It should be noted, however, that there is no Singapore case law on this point. Conversely, there is Australian case law on an equivalent provision to s 157(1) that takes the position that it refers to diligence only (and not to all of the negligence duties).
  
  - Byrne v Baker [1964] VR 443 (Supreme Court, Australia)

    [Summary: The Supreme Court of Victoria considered a provision that was the predecessor to the provision on which s 157 is based. The court expressed the view that as the provision only included the term “diligence” and not care or skill that “what the legislature by the subsection is demanding of honest directors is diligence only”]

- See below for more detailed information on the interaction between general law duties and statutory duties on directors’ behavior under the CA
10.0 Overview of statutory duties on directors’ behaviour

- The CA has a number of statutory duties on directors’ behaviour that supplement the above described fiduciary and negligence duties at general law
- It should be noted that a breach of a general law duty does not (necessarily) *ipso facto* result in a director breaching her statutory law duties and *vice versa*
- It is important to understand how these statutory duties overlap with the directors’ duties at general law because both are often engaged by the same directorial misconduct and will, therefore, be relevant in similar cases
- It is, however, perhaps even more important to be aware of the differences between the general law and statutory provisions for several reasons:
  - The general law duties and statutory duties may generally prohibit similar directorial misconduct but often require directors to take different actions to avoid a breach
  - Some statutory duties explicitly apply to directors, executive employees and agents of the company whereas directors’ duties at general law apply to directors only (and not executive employees or agents of the company)
  - The consequences of breaching general law and statutory duties are often different—with breaches of statute often including criminal liability
  - The criminal enforcement of the statutory duties is undertaken by the public regulatory authority whereas directors’ duties at general law are normally enforced either directly by the company or indirectly by its members through a derivative action


[Excerpt: Where a duty has been elevated to a statutory duty, the consequences of breach are generally more serious. In addition to civil liabilities, the defaulting director may also be subject to criminal sanctions as well as disqualification from being involved as a director in any company. As with all penal laws, the hope is that with more severe consequences, the behavior of person in such roles of responsibility will be affected positively.

It should be noted that a director could potentially be made liable under both common law and legislation for breach of duties in respect of a single act.]


[Excerpt: However, it can be asked whether the fiduciary duties apply as a matter of common law to the senior managers of the company who are not directors. … Moreover, it is clear that, in principle, the employment relationship is not a fiduciary relationship, so it would be inappropriate to apply the full range of director duties even to senior employees. However this proposition is subject to a number of qualifications. First, a senior employee who does in fact discharge the duties of a director may be classed as a *de facto director*, under the principles discussed above. Secondly, the courts have held that, as a result of the specific terms of an employee’s contract and of the particular duties undertaken by him or her, a fiduciary relationship may arise

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between employee and employer even in the case of employees who are not part of senior management, though the fiduciary duty may be restricted to some part of their overall duties. … It goes without saying that, should a senior manager place him- or herself in an agency relationship with the company, then the normal fiduciary incidents of that relationship would arise. Thirdly, the implied and mutual duty of trust and confidence which is imported into all contracts of employment can in some cases operate in the same way as directors’ fiduciary duties. This is particularly the case in relation to competitive activities on the part of an employee or the nondisclosure by senior managers of the wrongdoing of fellow employees and in some cases their own wrongdoing. The exclusion of senior managers as such from the statutory general duties of directors probably depends on the continuation of the UK practice, as recommended in the UK Corporate Governance Code, that the board should contain a substantial number of executive directors. If British practice were to move in the US direction of reducing the number of executive directors on the board, sometimes to one (the CEO), confining the statutory duties to members of the board might become a policy which needed to be reconsidered. Finally, the above discussion has concerned the fiduciary duties of employees and directors. In relation to the statutory duty of care, which equally applies only to directors, the common law duty of care required of employees seems to come very close to that now required of directors (taking account of the fact that the application of the reasonable care standard will produce different results in different circumstances)]

- Pearlie Koh, Company Law, 130 (2nd ed, LexisNexis, 2008)
  [Excerpt: Although fiduciary duties have traditionally been couched as director duties, there seems to be increasing acceptance amongst the courts that these duties should apply to non-executive senior executives as well. It is necessary, of course, in the decision to impose such fiduciary duties to first consider closely the specific facts of each case and to see if the employee in question occupies a position of managerial responsibility with decision-making discretion.]

- Falmac Limited v Cheng Ji Lai Charlie [2013] SGHC 113 (High Court, Singapore)
  [Excerpt: Notably, a breach of a director’s statutory duty, which may well give rise to certain consequences under statute, does not ipso facto result in a breach of fiduciary duty. Persistent failure to comply with obligations as regards the filing of accounts and returns may amount to unfitness to hold appointment as a director under s 155 of the Companies Act. Such failures, however, need not involve any dishonest intent; nor would such conduct constitute a breach of fiduciary duty. Thus, it is necessary to have in mind that in order for a particular act or omission to constitute a breach of fiduciary duty, it must fall within the various obligations of a fiduciary that reflect the core duty of loyalty recognised at common law, or the duties that fall within the scope of director’s duties as defined under s 157 of the Companies Act.]

10.1 Directors’ duties at general law and s 157(1) of the CA

- Section 157(1) of the CA requires that “a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office”
- There are several important ways in which s 157(1) of the CA and the fiduciary and negligence duties at general law overlap:
  - Whenever the duty to act bona fide in the interests of the company at general law is breached then s 157(1) will also be breached
    - The Court of Appeal found in Townsing Henry George v Jenton Overseas Investment Pte Ltd that the duty to act honestly under s 157(1) and the duty to act bona fide in the interests of the company at general law “may be regarded as a composite obligation”
Whenever the duty to avoid conflicts of interest at general law is breached then s 157(1) will also arguably be breached
- The Court of Appeal suggested in *Townsing Henry George v Jenton Overseas Investment Pte Ltd* that the no conflict duty at general law fails within the scope of the duty to act honestly under s 157(1)
- Whenever any of the negligence duties at general law are breached then s 157(1) of the CA will also arguably be breached
  - Case law and most leading authorities suggest that the term “diligence” in s 157(1) is meant to refer to all of the negligence duties (i.e., care, skill and diligence) and not just diligence. However, Australian case law suggests that s157(1) is strictly limited to diligence only
- An important difference between directors’ duties at general law and s 157(1) is that a breach of s 157(1) may result in civil liabilities and criminal sanctions whereas a breach of directors’ duties at general law will only result in civil liabilities

*Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR 597 (Court of Appeal, Singapore)

[Summary: Normandy loaned $2m to the Newman Group, with assets from Newman being used as security. In the Newman Group, NQF was the subsidiary of Jenton and Jenton was the subsidiary of NGH. Subsequently, Normandy discovered the security agreement was defective; the Newman Group also refused to pay back the loan. Normandy then appointed receivers for NGH, who removed all of Jenton’s directors, excluding the appellant. The appellant was then appointed as Jenton’s representative for NQF. The appellant unilaterally passed shareholder resolutions to remove all other NQF directors and transfer $2m to Normandy. The liquidators of Jenton then sued the appellant for breach of his fiduciary duties as a director of Jenton in causing NQF to pay the $2m to Normandy. The court held the appellant had breached the duty of good faith and the actual conflict of interest rule. The appellant not only placed himself in a position where Normandy’s and Jenton’s interests were clearly and directly in conflict, he consciously and unequivocally preferred Normandy’s interests over those of Jenton]

[Excerpt: In our view, the appellant’s duty of honesty [s 157(1)] and duty to act bona fide may be regarded as a composite obligation. The appellant’s duty of honesty, which is said to require him to ‘act honestly in the discharge of his duties as a director’, appears to be a reference to the statutory duty imposed on directors under s 157(1) of the CA. This duty is the statutory equivalent of the duty to act bona fide which exists at common law...These two duties impose a unitary obligation to act ‘bona fide in the interests of the company in the performance of the functions attaching to the office of director’...One important facet of the duty of honesty (or the duty to act in good faith) is a director's duty of loyalty [no conflict duty] to his company. In the present case, the appellant owed a duty of undivided loyalty to both Jenton and NQF]

*DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR 424 (High Court, Singapore)

[Summary: The defendant was employed to manage the plaintiff’s business. Subsequently, it came to light that the defendant was misappropriating the plaintiff’s moneys and assets. The plaintiff brought an action against the defendant for breach of director duties]

[Excerpt: It is trite law that directors owe fiduciary duties to their companies....At law, the fiduciary duties owed by directors would include the duty to act honestly and in good faith in the best interests of their company; not to exercise their powers for an improper purpose such as feathering their own nests; and not to place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to others. These common law duties are now incorporated as statutory duties in ss 156 and 157 of the Companies Act (Cap 50, 1994 Rev Ed) the breach of which attracts penal consequences]
Falmac Limited v Cheng Ji Lai Charlie [2013] SGHC 113 (High Court, Singapore)

[Excerpt: The duty to exercise reasonable diligence also encompasses the duties of care and skill (Walter Woon at para 8.13). The relevant standard of care and diligence is objective, ie, whether the director has exercised the same degree of care and diligence as a reasonable director found in his position, and may be raised if the director possesses some special knowledge and experience.]

Byrne v Baker [1964] VR 443 (Supreme Court, Australia)

[Summary: The Supreme Court of Victoria considered a provision that was the predecessor to the provision on which s 157 is based. The court expressed the view that as the provision only included the term ‘diligence’ and not care or skill that “what the legislature by the subsection is demanding of honest directors is diligence only”. See above for more details]

[Excerpt: The duty and liability of directors of a company have for many years been considered on misfeasance summonses in the course of windings up, under a section that corresponds with s 227 of the 1958 Act. It has been laid down in the books that a director in discharging the duties of his office must act honestly and must exercise such degree of both skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take in the circumstances on his own behalf … The rule was stated in this way in that leading case by Romer J, and a comparison of the language he used with the language of s 107(1) would suggest that the latter was inspired by the former. In these circumstances, the omission from the subsection of all reference to ‘skill’ would seem significant. What the legislature by the subsection is demanding of honest directors is diligence only; and the degree of diligence demanded is what is reasonable in the circumstances and no more. It is clear from what Romer J said that his conception of the diligence required of a director was something quite different from the diligence of a man who might aptly be described as a diligent person, in the sense that he could always be relied upon to give close attention to all business affairs in his hands. For Romer J the test of an honest director's liability was whether or not it could be said of him that he had been negligent, that is to say that he had failed to exercise such skill and diligence as it was reasonable to expect of him in the circumstances. And the legislature, in the subsection, though it has omitted the requirement of skill which forms part of the concept of ‘reasonable care’, has clearly enough followed Romer J, by limiting the requirement of diligence which it imposes to what may reasonably be expected of the director under the circumstances…]

10.2 The duty to act bona fide in the best interest of the company and related statutory duties under the CA

- The duty to act bona fide in the best interest of the company under the general law and s 157(2) under the CA
  - Under s 157(2), officers (including past officers) or agents (including the company’s lawyers) of the company are prohibited from making improper use of information that they acquire by virtue of their position as officers or agents of the company to gain either directly or indirectly a benefit for themselves or any other person or to cause detriment to the company
  - Whenever s 157(2) is breached it is likely that the director will also breach the duty to act bona fide in the best interest of the company
  - However, it is important to note several important differences between the duty to act bona fide in the best interest of the company under the general law and s 157(2) under the CA
    - Section 157(2) applies to officers, which includes all directors and executive employees in a corporation, whereas directors’ duties at general law only apply to directors
    - A breach of s 157(2) may result in civil liabilities and criminal sanctions whereas a breach of directors’ duties at general law will only result in civil liabilities
- It should be noted that s 157(2) sometimes also overlaps with the general law duty to avoid conflicts of interest in cases where a director has failed to disclose her involvement in a competing business to which she improperly supplies company information

- The duty to act *bona fide* under the general law and ss 339 & 340 under the CA

  - As explained in section 6 above, under the general law, directors have a duty to act *bona fide* in the best interest of the company
  - When a company is on the brink of insolvency the interests of the company become tantamount to the interests of the present and future creditors
  - Under ss 339 and 340, directors of the company may be held criminally and civilly liable if they allow the company to incur debts when the company has no reasonable prospect of being able to repay those debts
    - Under s 339(3), any officer of a company who *knowingly* causes a company to enter into debts which she has no reasonable expectation the company will be able to repay shall be liable of a criminal offence. Under s 340(2), the creditor/liquidator may apply to the court to make an officer convicted of a criminal offence under s 339(3) personally liable for the company’s debts
    - Under s 340(1) *any person* who knowingly was a party to the company carrying on its business with *intent to defraud* the company’s creditors may be held personally liable for the company’s debts
  - Whenever a director is found liable under ss 339 & 340, she will also likely breach her duty to act *bona fide* in the best interest of the company under the general law
  - However, there are several important *differences* between ss 339 & 340 and the duty to act *bona fide* in the best interest of the company at general law:
    - Under ss 339 & 340 creditors have a *direct right* to pursue their claims against a director whereas directors’ duties at general law are normally owed to the company and therefore can only be enforced indirectly by creditors through the company
    - Section 339 applies to all directors and executive employees of the company and s 340(1) applies to *any person* whereas directors’ duties at general law only apply to directors
    - Section 340 requires *fraudulent intent* which is considerably more difficult to prove than the subjective test required to prove a breach of the duty to act *bona fide* in the best interest of the company
    - Breaching ss 339 & 340 may result in civil and criminal liability whereas breaching directors’ duties at general law results in civil liabilities only

  ➢ *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict* [2005] 3 SLR(R) 263 (Court of Appeal, Singapore)

  [Summary: The appellant, trading as Niklex Supply Co, was a creditor of Amrae Benchuan Trading Pte Ltd ("the Company"). The first and second respondents were the directors and shareholders of the Company. The first and second respondents conducted business with the appellant's representative, Chan, on behalf of the Company. Chan was given an interest in the Company and was also given access to the Company books and
financial records. The appellant subsequently brought an action against the respondents under s 340(1) of the CA. Various allegations of fraud were made against the respondents whom the appellant alleged had caused the company to continue trading even when they knew it to be insolvent. The trial judge found the respondents not liable, and the High Court dismissed the appellant’s appeal]

[Excerpt: Generally, to defraud was to cheat. Cheating was an act or omission in which the fraudster deceived the innocent party so as to enrich the fraudster, or cause the innocent party to suffer loss or detriment. The invariable element was that of dishonesty on the part of the fraudster. Whether any given circumstances amounted to fraud was a question to be determined by the court. A dishonest intention could always be inferred from the surrounding circumstances. … In the context of an allegation of fraud, the objective standard of what an honest person would have done in the circumstances could be a useful device to test the honest intention of the person concerned against all the other evidence available, including, and especially, the explanation by that person of his deviation from what an honest person would have done in his circumstances. However, to rely on the objective standard as the sole test would be exceptional as it would require the court to be convinced that the negative answer given in the factual circumstances was sufficiently indicative of fraud to warrant a finding of fraud. … The civil standard of proving on a balance of probabilities applied where fraud was the subject of a civil claim, despite the infusion of a criminal element (ie, fraud). However, because of the severity and potentially serious implications attaching to a fraud, the court's expectation of proof would be higher even in a civil trial. The more serious the allegation, the more the party on whom the burden of proof fell had to do in order to establish his case on a balance of probabilities.]

Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek [2007] 2 SLR(R) 77 (High Court, Singapore)

[Summary: The plaintiff was the liquidator of Leong Seng Hin Piling Pte Ltd (“LSH”).The plaintiff sought a declaration under s 340(1) of the CA that the three defendants, who were former directors of LSH, were knowingly parties to the carrying on of the business of LSH with intent to defraud creditors. The High Court held that the plaintiffs had no grounds on which to bring a claim under s 340(1) and dismissed the claim]

[Excerpt: It is important to keep in mind that the pre-requisite for the exercise of the court's power under s 340(1) of the Companies Act to declare persons personally liable for the debt is that it should appear to the court "that any business of the company has been carried on with intent to defraud creditors of the company or ... for any fraudulent purpose". Furthermore, there are in s 340(1) references to "intent to defraud", "for any fraudulent purpose" and "knowingly". Plainly, these words connote dishonesty which is an essential ingredient to liability. Thus, there must be a finding of dishonesty on the part of the defendants for a case of s 340(1) to be made out. The question of whether a person carrying on the business was dishonest was subjective, not objective, in the sense that he personally must have been dishonest. The question of dishonesty is one of fact to be determined by the court based upon an assessment of all the facts and circumstances of the case. The burden of proving fraud lay with the plaintiff as the party alleging it. On the standard of proof, the Court of Appeal in Tang Yoke Kheng reiterated that the strength of the evidence required before a court will come to the conclusion that fraud has been perpetrated even in a civil trial will usually be higher than in run-of-the-mill civil claims, notwithstanding that the standard of proof is nominally (and theoretically) the same in all cases. A related matter is the standard of what constitutes honest conduct. Whilst honesty is not measured according to some private standard of a defendant, neither is the objective standard of the reasonable man a proper test. However, that objective standard might serve as a guide in the assessment of whether the defendant was dishonest.]

10.3 The duty to avoid conflicts of interest at general law and under s 156(1) of the CA

- Whenever a director directly or indirectly has an interest in a transaction with the company both the duty to avoid conflicts of interest at general law and s 156(1) will be relevant
- However, there are several important differences between the duty to avoid conflicts of interest at general law and s 156(1):
  - Disclosure under s 156(1) must be made to the board whereas disclosure at general law must prima facie be made to the shareholders at general meeting
However, if the articles contain a clause specifically allowing directors to disclose to the board then disclosure to the board will meet both the obligation under 156(1) and at general law.

- Disclosure under s 156(1) must be made as soon as practicable after the relevant facts have come to the director’s knowledge whereas under the general law, in some cases, disclosure and consent can be made after the transaction and the company can decide to affirm/adopt the contract.

- Disclosure under s 156(1) must only be made if the director directly or indirectly has an “interest” in the transaction whereas under the general law, disclosure must only be made if the transaction objectively creates a conflict of interest.
  - See section 7.1 above for a discussion of how “interest” is defined in 156(1)
  - See section 7.1 for the two tests at general law (i.e., “a real sensible possibility of conflict” or “a mere possibility of conflict”) for determining whether objectively a conflict of interest exists.

- Section 156(1) only requires disclosure (and not consent) whereas the general law requires disclosure and fully informed consent.

- The failure to properly disclose under s 156(1) results in criminal liability whereas a breach of directors’ duties at general law will result in civil liability.

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Walter Woon on Company Law, 286 - 289 ((Revised 3rd ed, Sweet & Maxwell Asia, 2009)

[Excerpt: Directors are not prohibited from dealing with the company. However, where they have an indirect interest in a transaction with the company – whether a direct or indirect one – that interest must be disclosed to the board of directors on pain of fine or imprisonment. If a director’s interest consists only of his being a member or creditor of a corporation dealing with the first company, the disclosure obligation does not apply where his interest may properly be regarded as not being a material interest. … [Section 156(1)] expressly requires the declaration to be made as soon as practicable at a meeting of the directors. On the face of it, a written notice to all the directors is not compliance; however, as boards may transact business by written and signed resolutions (see e.g. Table A art 90), it may be that this would be sufficient. … The weight of judicial authority inclines towards the view that the statutory provision does not affect the validity of a contract. That is a matter to be determined under general law.]

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10.4 The duty to avoid conflicts of interest at general law and under s 156(5) of the CA

- Whenever a director holds any office or possesses any property that creates a conflict of interest between the director and the company both the duty to avoid conflicts of interest at general law and s 156(5) will be relevant.

- However, there are several important differences between the duty to avoid conflicts of interest at general law and s 156(5):
  - Disclosure under s 156(5) must be made to the board whereas disclosure at general law must be made to the shareholders at general meeting.
    - However, if the articles contain a clause specifically allowing directors to disclose to the board then disclosure to the board will meet both the obligation under 156(5) and at general law.
Disclosure under s 156(5) must be made at the first meeting of the directors held after the director becomes a director or (if already a director) after he commenced to hold the office or to possess the property whereas under the general law (in some cases) disclosure and consent can be made after the transaction and the company can decide to affirm/adopt the contract

- Section 156(5) only requires disclosure (and not consent) whereas the general law requires disclosure and fully informed consent
- Disclosure under s 156(1) results in criminal liability whereas a breach of directors’ duties at general law will result in civil liability

10.5 The duty to avoid conflicts of interest at general law and other related duties under the CA

- Directors’ compensation: the duty to avoid conflict of interest at general law and ss 168 & 169
  - Compensation contracts with directors present an acute conflict of interest problem. Such contracts are inevitable but present the obvious risk of directors using their management power to overpay themselves
  - As explained in section 10.3 above, in conflict of interest situations (such as compensation contracts with directors) s 156 only requires disclosure to the board. Although the common law generally requires disclosure and approval of such transactions by shareholders at general meeting, most companies include a provision in their Articles which allows disclosure to be made to the board only. Therefore, based on s 156 and the general law, directors may be able to approve their own compensation without any shareholder input
  - As such, the CA creates an extra level of rules to regulate the compensation of directors:
    - Section 169 requires companies that wish to improve a director’s emoluments to obtain a separate resolution for such an improvement by the shareholders at general meeting
    - Section 168 prohibits companies from paying a director compensation for loss of office as a director or executive officer unless there is full disclosure and approval of the actual payment by the shareholders at general meeting
  - Although these seem like stringent requirements on directors’ compensation they are more relaxed than they first appear for several reasons:
    - Section 169 only applies to directors’ emoluments and does not cover compensation which is received by directors in their capacity as an executive employee of the company
    - Section 168 has been narrowly interpreted by the Singapore courts. Specifically, it has been held that not every payment made to a director on the termination of her office falls under this section. If compensation is paid at or after termination but it is not directly linked to “the loss of office” then it will generally not be prohibited under this section. In fact, payments at or after termination that are

37 Emoluments includes fees and other benefits received by a director in her capacity as a director.
structured as “severance benefits” or incentives for completing the employment contract will likely not be caught by this section and, thus, will not require shareholder approval.

- Grinsted Edward John v Britannia Brands (Holding) Pte Ltd [1996] 1 SLR(R) 743 (Court of Appeal, Singapore) [Woon 7.101]

[Summary: The appellant was employed as the Asian regional director of the respondent. The executive employment agreement provided that on expiry of the term of the agreement on 31 March 1993, or on any renewals or extensions thereof, the respondent would continue to pay the appellant certain contractually specified sums for a two-year period as "severance benefits". The appellant’s term of employment was later extended to 12 April 1993 at the same remuneration and benefits then enjoyed by the appellant. The appellant commenced an action against the respondent on 26 August 1993 for the unpaid emoluments due to him under the agreement and the supplemental agreement. The appellant’s claim was dismissed by the High Court on the grounds that s 168 required payments to officers for loss of office to be disclosed to and approved by the company's shareholders in general meeting, which was not done in the appellant’s case. The Court of Appeal allowed the appeal.]

[Excerpt: In applying s 168 two considerations should be borne in mind. Firstly, not every person employed in an executive position by the company would be caught by the sanctions of s 168(1)(a) of the Act. He would also have to be a director of the company for what is not lawful by the section is "for a company to make to any director any payment". In other words he must be a director of the company as well as being employed by the company in an executive position, i.e. an officer of the company, as a managing director of a company would be and as the appellant was in the respondents. Secondly, not every payment made to a director upon the cessation of his employment with the company would fall within s 168(1). … The "severance benefits" were a part and parcel of the remuneration package and were not intended to be paid with the object of compensating the appellant for loss of his office or in consideration for his retirement therefrom. They were payments which the respondents agreed to make and were liable to make to the appellant in the event that happened on the termination of his employment with the respondents. It seems to us that such “severance benefits” in the circumstances of this case do not fall within s 168(1)]

- Fasi Paul Frank v Specialty Laboratories Asia Pte Ltd [1999] 1 SLR(R) 1111 (High Court, Singapore)

[Summary: The plaintiff Fasi was Managing Director of the defendants, Specialty Laboratories Asia Pte Ltd ("SLA"). Fasi's service agreement provided that were SLA to terminate his employment with cause, in exchange for severance benefits of six months’ salary, Fasi would not compete with SLA for 12 months. In the case of termination without cause, the agreement provided that Fasi was not to compete with SLA for 24 months in exchange for severance benefits of 24 months' salary. The terms of the service agreement were approved by SLA's shareholders at a general meeting except for those relating to payment of severance compensation. SLA posted Fasi to Santa Monica in the US. Fasi considered this to amount to a repudiatory breach of his service agreement and commenced this action against SLA. SLA contended that it had terminated the agreement with cause as Fasi had refused to comply with the express directive to move. It also alleged that the shareholders' approval was a condition precedent to the severance compensation. The High Court allowed the plaintiff’s appeal.]

[Excerpt: However, on close examination of cl 3(b), the true nature of the severance compensation was not for loss of office but in exchange for a fairly lengthy period of non-competition by the plaintiff. The intent and object of the payment, perhaps inaptly described as severance compensation, was in reality a consideration for the plaintiff's promise not to compete with the defendants' business for a specified period of time after leaving the company. In my opinion, that payment had nothing to do with any compensation per se for the loss of the plaintiff's office as the managing director. As such, I held that the severance compensation under cl 3(b) had not contravened s 168 and was not unlawful. It did not require any approval of a general meeting.]
• Loans to directors and companies in which directors have an interest: the duty to avoid conflict of interest at general law and statutory provisions under the CA\textsuperscript{38}
  
\begin{itemize}
  \item Loaning funds to directors or companies in which directors have an interest presents an acute conflict of interest problem. As such, the CA provides an extra layer of rules (i.e., over and above s 156) to govern such loan transactions
  \item Section 162 prohibits companies from granting loans or entering into any guarantee in relation to loans made to their directors or the directors of their related companies. However, the following types of loans are excluded from this general prohibition:
    \begin{itemize}
      \item All loans to directors in exempt private companies
      \item All loans to directors in foreign incorporated companies
      \item Loans that are advances to a director to provide her with funds to meet expenditures incurred or to be incurred by her as a director
      \item A loan to a director who is a fulltime employee for the purpose of purchasing a home
      \item Loans made to a director in the ordinary course of business by a bank, financial institution, finance company or insurance company
    \end{itemize}
  \item Section 163 extends s 162 to prohibit loans from the company to another company in which the director and/or her associates are interested either by virtue of shareholding or voting control. This is to prevent directors from easily avoiding the prohibitions in s 162 by making a loan to a company in which they control
\end{itemize}

\textsuperscript{38} Walter Woon on Company Law, 282-283 (Revised 3rd ed, Sweet & Maxwell Asia, 2009).
XI. REMEDIES AND RELIEF

11.0 Who enforces a breach of directors’ duties?

- General law duties are enforced by the company and the board normally decides whether the company will pursue the claim (unless the company is being wound up and the liquidator decides)
- When the board decides not to pursue a claim, individual shareholders may force the company to pursue a breach through a derivative action or they may attempt to use the breach as evidence of a personal claim for oppression or a just and equitable winding up (See, for more detailed information, the Shareholder’s Remedies Handout)
- Statutory duties are generally enforced by the public regulator

11.1 Possible remedies for breach of a general law duty

- The remedy that will be sought depends on the nature and result of the breach
- The remedies are not mutually exclusive and the company can normally elect, at the time of judgment, the remedy that would be most favourable
- **Injunction**
  - If the breach is continuing, the company can seek an injunction to stop the director from doing something or requiring the director to undertake a particular action to remedy the breach (S 409A)
  - A company may be able to seek an injunction where there is evidence of an impending breach
- **Compensation or damages**
  - Where the director has breached her duty and by doing so has caused a loss to the company, the company can seek damages from the director to compensate for its loss
  - The company has the option to choose to sue for damages where damages are greater than the profit made by the director (but not for both)
- **Account of profits**
  - This can be claimed where a director profits because of a breach
  - This remedy can be claimed even when the company has suffered no loss as a result of the breach
  - The starting point is that a fiduciary should not be allowed to retain any of the profit derived from the breach of fiduciary duty. This means that the company may gain a windfall by recovering profits made by the fiduciary that it might not have been otherwise able to earn itself
  - However, fiduciaries who breach their duty by making a profit may claim an allowance from the company for the work and skill they invested to make the profit – but only if they acted in good faith. Such an allowance will only be awarded by the court in limited circumstances because it is an exception to the overriding no-conflict and no-profit rules

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Mona Computers (S) Pte Ltd v Singaravel Murugan [2014] 1 SLR 847 (Court of Appeal, Singapore)

[Summary: The respondent was an officer of the appellant company. The appellant appealed against a High Court order that excluded from the account of profits the commissions that the respondent had earned from his newly-incorporated company, MN, which was in direct competition with the appellant. The main issues were: (1) whether an account of profits should exclude sums that the principal would have to pay the fiduciary had the fiduciary not breached her duties; and (2) whether the respondent was entitled to an equitable allowance for the work that he had done at MN. The Court of Appeal ordered the respondent to account to the appellant for the full amount of the commissions that he had obtained from MN, but permitted him to retain the director’s fees he had earned from MN because they were not contested]

[Excerpts: [With regards to the account of profits], the thrust of these decisions is that the fiduciary should not be allowed to retain any of the profit derived from his breach of duty. A deduction for what the company would have to pay the defendant had he dutifully secured the benefits for the company instead is out of place given the gains-based basis for disgorgement. Similarly, in the present case, whether the Respondent would likely have continued in the Appellant’s employment and continued to receive commissions from it had he not breached his fiduciary duty is not a relevant consideration in the fashioning of the account. The only question is what profit the Respondent gained which could be attributed to his breach of duty. In our view, the Judge erred in principle when he reasoned that the accounting of profits should not result in the Appellant enjoying a windfall. The commissions that the Respondent received from MN were derived from the profits which MN earned from the diverted contracts, and therefore fell squarely within the profits to be accounted to the Appellant. … As a matter of principle, the Respondent should also have to account to the Appellant for the director’s fees which he received from MN. If not for the profits earned from the diverted contracts, MN would not have the funds to pay out the director’s fees. … [However], the Appellant did not appeal to the High Court against that part of the AR’s order allowing the Respondent to retain the directors’ fees. [With regards to the equitable allowance], the circumstances of the present case seem to us to resemble the classic case of a fiduciary reaping profits from deliberately placing himself in a position of conflict. The Respondent, while still being the sole key employee of the Appellant, set up a rival company operating the exact same business, and then submitted tenders for contracts with the Appellant’s clients which the Appellant was still actively pursuing and without obtaining the informed consent of the Appellant. In our view, this is the kind of case to which the remedy of account should proceed with all rigor. The Respondent has done little to show why, and to what extent, he should be granted an indulgence of an allowance. … The defences raised before us related to the question of liability but that line of argument was no longer open to the Respondent. What would have been more relevant to the Respondent’s case at this stage was for him to describe and evidence the nature and value of his work in servicing the diverted contracts and explain why some allowance ought to be accorded to him notwithstanding his breach as a fiduciary. However, this was not done either before us or in the assessment proceedings below]

- Constructive trust
  - Where a director has breached a duty and as a result has some property of the company, the company can seek a court order that the director (or possibly a third party) holds the property on trust for the company
  - If the director sells the property to a third party who has knowledge of the breach, or a third party has the property because they assisted in the breach, the court can order the third party purchaser to hold the property on trust for the company
  - The result of a constructive trust is that the property cannot be sold and it must be returned to the company upon request
  - The advantages of a constructive trust are that the property is not subject to the directors’ or third parties’ creditors and the company can benefit from any increase in the value of the property
• Rescission of contract
  ▪ Normally applied when the director enters into a contract in breach of their duty which the company does not want to ratify
  ▪ Where a contract is rescinded (i.e., terminated) as a result of a breach of directors’ duties the parties may be returned to the position that they were in prior to entering the contract
  ▪ Rescission will normally be available (unless the company has affirmed the contract) when the transaction is with the director who breached the duty
  ▪ Rescission may be available when the transaction in which the director breached his duty is with a third party—if the third party has knowledge of the breach of duty
  ▪ Rescission is not normally possible if the goods contracted for have been sold to a bona fide purchaser who is unaware of the breach (in which case an account of profits and/or damages may be claimed from the director)

11.2 Possible remedies for breach of a statutory law duty
• The specific wording of the section must be examined to determine the precise consequences
• Generally, breaching a statutory provision results in an offence that is punishable by a fine and/or imprisonment which is enforced by the public regulator
• However, some statutory provisions specifically provide for civil remedies against directors
• The company may also obtain an injunction to restrain directors from acting in contravention of the provisions of the Act or to compel them to comply with the Act (s 409A)

11.3 Relief from liability for breach of duty from the courts (s 391)
• Section 391 provides the court with the power to relieve an officer of the consequences of their breach of duty, negligence, default, or breach of trust
• In order for relief under s 391 to be obtained three elements must be proven by the officer:
  ▪ The person has acted honestly;
  ▪ The person acted reasonably; and
  ▪ It is fair to excuse her—having regard to all the circumstances of the case
• The test is semi-subjective in that the court will consider the experience and qualifications of the person to determine reasonableness
• The burden is on the director to demonstrate that she acted honestly and reasonably
• In the event that the director is liable for negligence, it may be prudent to plead both s 391 and the defence of contributory negligence. This is because the requirements of honesty and reasonableness for s 391 are not requisites for contributory negligence
• Section 391 does not apply to criminal proceedings (See, Re Indeaglobal.com Ltd [2000] 3 SLR 100, High Court, Singapore)
[Excerpt: In determining whether or not a director has acted reasonably, the court will consider whether he has acted in the affairs of the company as he would have done in relation to his own affairs. The test appears to be semi-subjective, in that the court will consider the experience and qualifications of the person in uniform standard. In Re Haji Ali bin Haji Mohd Noor [1933] 1 MLJ 153 (High Court, Straits Settlements), where the court excused a trustee from liability, the court gave regard to the fact that the trustee in question was a semi-literate woman who depended upon her co-trustee. The burden is on the director to show that he acted honestly and reasonably. A director who stands by and does nothing while the company’s assets are dissipated is not acting reasonably. It will be difficult to obtain relief if the court has held the applicant liable for negligence, for ex hypothesi he would not be acting reasonably]

[Excerpt: Having regard to all the circumstances of the case, we find this an appropriate case for an exercise of the discretion conferred by s 391, which was duly pleaded by the respondent, and partially excuse the respondent from liability flowing from the failure to adequately verify Riggs’ entitlement to remuneration. The present allocation of responsibility under the auspices of s 391 remains consistent with the basic “principles of liability” by fairly attributing the fault between the auditors and the directors of the appellant, both of whom were negligent, in accordance with the respective degrees of culpability of these parties. From a broader perspective, this emphasises the dual responsibility imposed on auditors and directors to scrupulously adhere to the standard of care in the fulfilment of their occasionally overlapping duties. Effective corporate governance requires both sets of professionals to assiduously discharge their responsibilities accordingly to good corporate governance]

**11.4 Relief from liability for breach of duty from the company**

- Any provision in the company’s articles or in any contract with the company by which a director is exempt from or indemnified against liability to the company for breach of duty is rendered void by s 172(1)
  - However, the company may indemnify for legal costs if the director is successful
  - The company may also purchase D&O liability insurance (s 171(2))
- In certain instances, it is possible for a majority of members of a company to ratify an action of a director that would otherwise be a breach of duty by the director
  - Members of the company must have all necessary information to ratify the breach
- In general, members cannot ratify a breach where
  - The breach is the result of an *ultra vires* act (but the logic supporting this may be questioned, see excerpt from Puchniak & Tan below)
  - The breach is the result of an unlawful act
  - It prejudices creditors because the company is insolvent or on the brink of insolvency
  - It is oppressive and may be challenged under s 216
It qualifies as a true exception to the rule in *Foss* (the ‘fraud on the minority’ exception or s 216A)

- **Lim Suat Hua v Singapore HealthPartners Pte Ltd** [2012] 2 SLR 805 (High Court, Singapore)

  [Summary: The two warring factions on the board of directors at Singapore HealthPartners agreed that one faction would buy the other faction out. The plaintiff was a member of the faction that was bought out. Her Settlement Agreement contained a clause that excused her from liability due to her failure to disclose a conflict of interest to the board. Singapore HealthPartners brought a counterclaim against the plaintiff for failing to disclose her conflict of interest (i.e. the breach of duty that the clause was meant to excuse her from). The High Court held that the clause was valid and that the plaintiff was excused from liability.]

  [Excerpt: However as noted by the learned authors of *Walter Woon on Company Law*, just as a natural person may validly release another party from liability, a company may similarly do so. The members of a company may release a director from his fiduciary duty by agreement]


  [Excerpt: By virtue of the fiduciary obligations imposed on a director or senior manager, they may not obtain a profit in connection with their position without the informed consent of the company. Where a director or senior manager has placed himself in a position where his duty to the company may conflict with his personal interests and has made a profit in the process, the company may seek disgorgement of such profit from the director or senior manager. However, as the obligation is owed to the company, the company can release the director or senior manager from such obligation. The release can be prospective or retrospective, provided the decision to release is a fully informed one. It therefore behooves the fiduciary to disclose his interest fully to the company when seeking its consent to take advantage of an opportunity (or to forgive an earlier breach of duty) that has come to the fiduciary’s attention as a result of the fiduciary’s position. In *Lim Suat Hua v Singapore HealthPartners Pte Ltd* [2012] 2 SLR 805, Andrew J held that the company and shareholders had released the plaintiff director from her inadequate disclosure of two contracts that she had an interest in. There was no release, however, for a third contract as this contract was not referred to in the settlement agreement to which all the shareholders were parties]

- **Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others** [2013] 1 SLR 374 (Court of Appeal, Singapore)

  [Summary: Raffles Town Club Pte Ltd ("RTC"), which owned and operated a proprietary social club known as Raffles Town Club ("the Club"), sued its former directors for breaching their duties. The defendant directors were the only shareholders of the company. One of the RTC’s claims was that the former directors wrongfully caused RTC to transfer by way of a loan ("the Loan") to a subsidiary company, Raffles Town Club (International) Ltd ("RTC"), the sum of $33m which the Former Directors subsequently applied to earn interest for themselves ("the Profits"). The Court of Appeal dismissed the claim. It held that the claim in respect of the Profits was not made on the basis that the Loan was an illegal distribution of RTC’s assets (i.e., a return of capital) or that it was a fraud on creditors as the Loan had been repaid. As shareholders, the former directors were entitled to make decisions in their own selfish interests; hence, they were not in breach of their duties as directors. In deciding as shareholders to waive RTC’s rights to recover the Profits, the Former Directors were not trustees for RTC or for one another. They were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of RTC or other shareholders]

  [Excerpt: It is established law that directors of a company may not make use of their position to make a profit at the expense of the company as they owe a fiduciary duty to act in the interests of the company (see *Lim Koei Ing v Pan Asia Shipyard and Engineering Co Pte Ltd* [1995] 1 SLR(R) 15 at [54]; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at 153). Applying this principle to the facts of this case, the Former Directors would be accountable to RTC for the Profits. However, this conclusion does not necessarily assist RTC in its claim for the Profits because the Judge had found as a fact that the Former Directors, as shareholders of RTC, had assented to themselves keeping the benefits (see [202] of the Judgment). The question, therefore, is whether the Former Directors as shareholders could lawfully waive RTC’s right to recover the Profits which the Former Directors gained from the proceeds of the Loan. In this regard, it may firstly be noted that RTC’s claim for the return of the Profits is not based on the Loan being *ultra vires* in the sense that RTC had no power to make any loan. An unlawful loan made by a company would not be capable of ratification by its shareholders (see *Rolled Steel Products* ([38] supra) at 296 (per Slade LJ); *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722]
(“Kinsela”). However, an unlawful loan is not per se an ultra vires loan. Secondly, while any return of capital other than in accordance with the Companies Act or any transaction which is a fraud on creditors is incapable of being ratified by shareholders, even voting unanimously (see Ridge Securities Ltd v Inland Revenue Commissioners [1964] 1 WLR 479 at 495 (per Pennycook J); Avelling Barford Ltd v Perion Ltd [1989] BCLC 626 at 633 (per Hoffmann J); Barclays Bank plc v British & Commonwealth Holdings plc [1995] BCC 19 at 23 (per Harman J); and Progress Property Co Ltd v Moorgarth Group Ltd [2010] 1 BCLC 1 at [23] (per Mummery LJ), affirmed on appeal in Progress Property Company Limited v Moorgarth Group Limited [2010] UKSC 55), the claim in respect of the Profits is not made on the basis that the Loan was an illegal distribution of RTC’s assets (ie, a return of capital) or that it was a fraud on creditors as the Loan had been repaid. In the circumstances, we see no reason in principle why the shareholders of RTC may not waive the recovery of the Profits from the Former Directors by the exercise of their shareholding powers. They could not be said to have been negligent in waiving RTC’s claim, nor could they be said to have acted fraudulently vis-à-vis RTC or any creditor (as RTC was solvent) in not causing RTC to take steps to commence proceedings against themselves. In deciding as shareholders to waive RTC’s rights to recover the Profits, the Former Directors were not trustees for RTC or for one another (see Peters’ American Delicacy Company Limited v Heath (1939) 61 CLR 457). They were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of RTC or other shareholders. In Pender v Lashington (1877) 6 Ch D 70, Jessel MR stated the law as follows (at 75–76): “[A] man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be taken in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.”

In our view, in the absence of any factor that would disqualify shareholders from ratifying unauthorised or unlawful acts of directors, we see no reason why a company may not waive any claims it may have against its directors for any kind of liability where the company is solvent. As Street CJ said in Kinsela (at 730 and 732): “… In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled to, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company’s assets… It is … legally and logically acceptable to recognise that, where directors involved in a breach of their duty to the company affecting the interests of shareholders, then shareholders can either authorise that breach in prospect or ratify it in retrospect. Where, however, the interests at risk are those of creditors I see no reason in law or in logic to recognise that the shareholders can authorise the breach”


[Excerpt: Section 162 of the Act sets out a general prohibition against companies (other than an exempt private company) extending loans to directors of such companies or to companies which by virtue of s 6 of the Act are deemed to be related to the lending companies. One of the issues that arose in Raffles Town Club Pte Ltd v Lim Eng Hock Peter [2013] 1 SLR 374 concerned whether, assuming that there was a breach of s 162(1) of the Act, the plaintiff company could recover the profits which its former directors had received from the proceeds of the loan. In principle, the answer should be yes except that in the present case the former directors had in their capacity as members of the company assented to themselves retaining the benefits of the loan. The question was, therefore, whether shareholders of a company could lawfully waive a company’s right to recover such profits. The basis of the plaintiff’s claim was founded on the former directors being constructive trustees of the profits, such profits being the plaintiff’s property or derived from the use of the plaintiff’s property. In such circumstances, the Court of Appeal saw no reason why the shareholders of the plaintiff at the material time could not waive the recovery of the profits from the former directors. It could not be said that by not causing the plaintiff to commence proceedings against themselves, the shareholders had been negligent in waiving the plaintiff’s claim, nor could the shareholders be said to have acted fraudulently vis-à-vis the plaintiff or any creditor given that the plaintiff’s claim was solvent at the material time. In deciding as shareholders to waive the plaintiff’s rights to recover the profits, the former directors were not trustees for the plaintiff or for one another. They were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of the plaintiff or other shareholders. The court concluded that in the absence of any factor that would disqualify shareholders from ratifying unauthorised or unlawful acts of directors, it saw no reason why a company may not waive any claims it may have against its directors for any kind of liability where the company was solvent. With respect, this approach is clearly correct as shareholders who act as such do not owe fiduciary duties to their companies regardless of whether they are concurrently directors. The Court of Appeal, however, appeared to imply that if the plaintiff’s claim had been premised on the loan being ultra vires in the sense that the plaintiff had no power to make such loan, such an unlawful loan would not be capable of ratification. With respect, it is suggested that such position does not take into consideration s 25 of the Act. While it is true that under common law ultra vires transactions could not be ratified (indeed the court cited Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch 246), the ultra vires doctrine has been abolished in Singapore by virtue of s 25 of the Act which states in sub-s (1) that “no act … shall be
invalid by reason only of the fact that the company was without capacity or power to do such act”. Accordingly, assuming that a company has objects clauses, and such objects clauses do not contain a power to lend money, where directors authorise a loan such act is not ultra vires but amounts at most to a breach of fiduciary duty or an act outside authority. Such acts can be ratified assuming the company is solvent and therefore no creditors’ rights are affected]

➢ Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1 (High Court, Singapore)

[Summary: Both the plaintiff and the defendant were shareholders in a ship-owning company. The defendant was the director of the company, and the plaintiff applied to commence a derivative action against the defendant. The High Court dismissed the plaintiff’s application. The court subsequently considered whether the plaintiff’s case would fall under the “fraud on the minority” exception to the rule in Foss. It then went on to examine the nature of “fraud” in the following excerpt]

[Excerpt: The orthodox school of thought defines “fraud” by distinguishing between two different types of wrongs perpetrated against the company - ratifiable wrongs and unratable wrongs. In so far as ratifiable wrongs are concerned, no question of a derivative action arises as such wrongs may be ratified by a resolution passed by the shareholders of the company. In contrast, the nature of unratable wrongs is so egregious that no ratification is possible. Such unratable wrongs, therefore, constitute a “fraud on the minority” by virtue of their very nature; the “fraud” is one that inheres in the act giving rise to a breach of duty by the directors. The difficulty, of course, is determining where the demarcation lies between ratifiable wrongs and unratable wrongs. It is clear from case law that a case of dishonesty or cheating by a director would qualify as an unratable wrong: see Burland v Earle [1902] AC 83 (at 93). The ambit of unratable wrongs also extends beyond dishonesty and cheating: see Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 WLR 2 (at 12). However, it is unclear how far beyond actual dishonesty it would extend]
How to answer a directors’ duties question

Who are the directors/officers?

What type of directors/officers are they?

Have the directors breached any fiduciary duties?

Have the directors breached any negligence duties?

Have the directors/officers breached any statutory duties?

What are the remedies for the common law and statutory breaches?

Will relief be given by the court (s 391) or the company?

How will the company bring the action?
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<td>S 157(2) • An officer or agent’s improper use of company information</td>
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<td>S 162 • A company (other than an exempt private company) makes a loan to their director (or the directors of their related company) which is not permitted</td>
<td>S 162(4) &amp; (5) • The director that authorized the loan or guarantee shall be guilty of an offence ($20,000; 24 months) • The director may be made to indemnify for any loss suffered as a result of an unauthorized grant of FA</td>
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XIII. SOME PROPOSED AMENDMENTS

13.1 After considering a wide scope of feedback, the Steering Committee for Review of the Companies Act have proposed a large number of amendments to Singapore’s shareholder remedies regime. Here are a few of the more interesting proposals:

- **Recommendation 1.19**
  Section 157A(1) of the Companies Act should be amended to provide that the business of a company shall be managed by, or under the direction or supervision of, the directors.

- **Recommendation 1.20**
  The Companies Act should provide that a person dealing with the company in good faith should not be affected by any limitation in the company’s articles.

- **Recommendation 1.21**
  Section 161 of the Companies Act should be amended to allow specific shareholders’ approval for a particular issue of shares to continue in force notwithstanding that the approval is not renewed at the next annual general meeting, provided that the specific shareholders’ approval specifies a maximum number of shares that can be issued and expires at the end of two years. This does not apply to the situation referred to in section 161(4) for the issue of shares in pursuance of an offer, agreement or option made or granted by the directors while an approval was in force.

- **Recommendation 1.22**
  It would not be desirable to exhaustively codify directors’ duties. The developments in the UK and other leading jurisdictions should continue to be monitored.

- **Recommendation 1.23**
  Pending ACRA’s review, a breach of the duties in section 157 should still render an officer or agent of a company criminally liable.

- **Recommendation 1.24**
  The prohibition in section 157(2) should be extended to cover improper use by an officer or agent of a company of his position to gain an advantage for himself or for any other person or to cause detriment to the company.

- **Recommendation 1.25**
  The disclosure requirements under sections 156 and 165 should be extended to the Chief Executive Officer of a company.
• **Recommendation 1.26**
  The duty to act honestly and use reasonable diligence in section 157(1) should be extended to the Chief Executive Officer of a company.

• **Recommendation 1.27**
  Section 158 of the Companies Act should be amended —
  ▪ (a) to enable the board of directors to allow the disclosure of company information, whether by general or specific mandate, subject to the overarching consideration that there should not be any prejudice caused to the company; and
  ▪ (b) to remove the requirement in section 158(3)(a) for declaration at a meeting of the directors of the name and office or position held by the person to whom the information is to be disclosed and the particulars of such information, but to leave it to the board of directors to require such details if desired.

• **Recommendation 1.28**
  Section 172 of the Companies Act should be amended to expressly allow a company to provide indemnity against liability incurred by its directors to third parties.

• **Recommendation 1.29**
  The Companies Act should be amended to clarify that a company is allowed to indemnify its directors against potential liability.
XIV. RELEVANT SECTIONS OF THE COMPANIES ACT

Disclosure of interests in transactions, property, offices, etc.

156.—(1) Subject to this section, every director of a company who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.

(2) The requirements of subsection (1) shall not apply in any case where the interest of the director consists only of being a member or creditor of a corporation which is interested in a transaction or proposed transaction with the first-mentioned company if the interest of the director may properly be regarded as not being a material interest.

(3) A director of a company shall not be deemed to be interested or to have been at any time interested in any transaction or proposed transaction by reason only—

(a) in a case where the transaction or proposed transaction relates to any loan to the company — that he has guaranteed or joined in guaranteeing the repayment of the loan or any part of the loan; or

(b) in a case where the transaction or proposed transaction has been or will be made with or for the benefit of or on behalf of a corporation which by virtue of section 6 is deemed to be related to the company — that he is a director of that corporation,

and this subsection shall have effect not only for the purposes of this Act but also for the purposes of any other law, but shall not affect the operation of any provision in the articles of the company.

(4) For the purposes of subsection (1), a general notice given to the directors of a company by a director to the effect that he is an officer or member of a specified corporation or a member of a specified firm or a partner or officer of a specified limited liability partnership and is to be regarded as interested in any transaction which may, after the date of the notice, be made with that corporation, firm or limited liability partnership shall be deemed to be a sufficient declaration of interest in relation to any transaction so made if—

(a) it specifies the nature and extent of his interest in the specified corporation, firm or limited liability partnership;

(b) his interest is not different in nature or greater in extent than the nature and extent so specified in the general notice at the time any transaction is so made; and

(c) it is given at a meeting of the directors or the director takes reasonable steps to ensure that it is brought up and read at the next meeting of the directors after it is given.

(5) Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.

(6) The declaration shall be made at the first meeting of the directors held—

(a) after he becomes a director; or

(b) (if already a director) after he commenced to hold the office or to possess the property, as the case requires.

(7) The secretary of the company shall record every declaration under this section in the minutes of the meeting at which it was made.

(8) For the purposes of this section, an interest of a member of a director’s family shall be treated as an interest of the director and the words “member of a director’s family” shall include his spouse, son, adopted son, step-son, daughter, adopted daughter and step-daughter.

(9) Subject to subsection (3), this section shall be in addition to and not in derogation of the operation of any rule of law or any provision in the articles restricting a director from having any interest in transactions with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director.

(10) Any director of a company who fails to comply with any of the provisions of this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months.
As to the duty and liability of officers

157.—(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

(3) An officer or agent who commits a breach of any of the provisions of this section shall be —

(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and

(b) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months.

(4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

(5) In this section —

“officer” includes a person who at any time has been an officer of the company;

“agent” includes a banker, solicitor or auditor of the company and any person who at any time has been a banker, solicitor or auditor of the company.

Loans to directors

162.—(1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person but nothing in this section shall apply —

(a) subject to subsection (2), to anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;

(b) to provide a loan to such a director who is engaged in the full-time employment of the company or of a corporation that is deemed to be related to the company, as the case may be, for the purpose of purchasing or otherwise acquiring a home occupied or to be occupied by the director, except that not more than one such loan may be outstanding from the director at any time;

(c) to any loan made to such a director who is engaged in the full-time employment of the company or of a corporation that is deemed to be related to that company, as the case may be, where the company has at a general meeting approved of a scheme for the making of loans to employees of the company and the loan is in accordance with that scheme; or

(d) to any loan made to such director in the ordinary course of business of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons if the activities of that company are regulated by any written law relating to banking, finance companies or insurance or are subject to supervision by the Monetary Authority of Singapore.

(2) Subsection (1)(a) or (b) shall not authorise the making of any loan, or the entering into any guarantee, or the provision of any security except —

(a) with the prior approval of the company given at a general meeting at which the purposes of the expenditure and the amount of the loan or the extent of the guarantee or security, as the case may be, are disclosed; or

(b) on condition that, if the approval of the company is not given as aforesaid at or before the next following annual general meeting, the loan shall be repaid or the liability under the guarantee or security shall be discharged, as the case may be, within 6 months from the conclusion of that meeting.

(3) Where the approval of the company is not given as required by any such condition the directors authorising the making of the loan or the entering into the guarantee or the provision of the security shall be jointly and severally liable to indemnify the company against any loss arising therefrom.

(4) Where a company contravenes this section any director who authorises the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years.

(5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section.
(6) For the purpose of subsection (1), a reference to a director therein includes a reference to the director’s spouse, son, adopted son, step-son, daughter, adopted daughter and step-daughter.

Payments to director for loss of office, etc.
168.—(1) It shall not be lawful —
(a) for a company to make to any director any payment by way of compensation for loss of office as an officer of the company or of a subsidiary of the company or as consideration for or in connection with his retirement from any such office; or
(b) for any payment to be made to any director of a company in connection with the transfer of the whole or any part of the undertaking or property of the company, unless particulars with respect to the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting and when any such payment has been unlawfully made the amount received by the director shall be deemed to have been received by him in trust for the company.

(2) Where such a payment is to be made to a director in connection with the transfer to any person, as a result of an offer made to shareholders, of all or any of the shares in the company, that director shall take all reasonable steps to secure that particulars with respect to the proposed payment, including the amount thereof, shall be included in or sent with any notice of the offer made for their shares which is given to any shareholders, unless those particulars are furnished to the shareholders by virtue of any requirement of law relating to take-over offers or any requirement of the Take-over Code referred to in section 139 of the Securities and Futures Act (Cap. 289).

(3) A director who fails to comply with subsection (2) and a person who has been properly required by a director to include in or send with any notice under this section the particulars required by that subsection and who fails to do so shall be guilty of an offence, and if the requirements of that subsection are not complied with any sum received by the director on account of the payment shall be deemed to have been received by him in trust for any person who has sold his shares as a result of the offer made.

(4) If in connection with any such transfer the price to be paid to a director of the company whose office is to be abolished or who is to retire from office for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of the like shares or any valuable consideration is given to any such director, the excess or the money value of the consideration, as the case may be, shall for the purposes of this section, be deemed to have been a payment made to him by way of compensation for loss of office or as consideration for or in connection with his retirement from office.

As to payments to directors
(5) Any reference in this section to payments to any director of a company by way of compensation for loss of office or as consideration for or in connection with his retirement from office shall not include —
(a) any payment under an agreement entered into before 1st January 1967;
(b) any payment under an agreement particulars of which have been disclosed to and approved by special resolution of the company;
(c) any bona fide payment by way of damages for breach of contract;
(d) any bona fide payment by way of pension or lump sum payment in respect of past services, including any superannuation or retiring allowance, superannuation gratuity or similar payment, where the value or amount of the pension or payment, except in so far as it is attributable to contributions made by the director, does not exceed the total emoluments of the director in the 3 years immediately preceding his retirement or death; or
(e) any payment to a director pursuant to an agreement made between the company and him before he became a director of the company as the consideration or part of the consideration for the director agreeing to serve the company as a director.

(6) This section shall be in addition to and not in derogation of any rule of law requiring disclosure to be made with respect to any such payments or any other like payment.

(7) In this section, “director” includes any person who has at any time been a director of the company or of a corporation which is by virtue of section 6 deemed to be related to the company.
Provision and improvement of director’s emoluments

169.—(1) A company shall not at any meeting or otherwise provide emoluments or improve emoluments for a director of a company in respect of his office as such unless the provision is approved by a resolution that is not related to other matters and any resolution passed in breach of this section shall be void.

(2) In this section, “emoluments” in relation to a director includes fees and percentages, any sums paid by way of expenses allowance in so far as those sums are charged to income tax in Singapore, any contribution paid in respect of a director under any pension scheme and any benefits received by him otherwise than in cash in respect of his services as director.

Liability where proper accounts not kept

339.—(1) If, on an investigation under any other Part or where a company is wound up, it is shown that proper books of account were not kept by the company throughout the period of 2 years immediately preceding the commencement of the investigation or winding up or the period between the incorporation of the company and the commencement of the investigation or winding up (whichever is the lesser) every officer who is in default shall, unless he acted honestly and shows that, in the circumstances in which the business of the company was carried on, the default was excusable, be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months.

(2) For the purposes of this section, proper books of account shall be deemed not to have been kept in the case of any company if there have not been kept such books or accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of the annual stocktaking and (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified or if such books or accounts have not been kept in such manner as to enable them to be conveniently and properly audited, whether or not the company has appointed an auditor.

(3) If, in the course of the winding up of a company or in any proceedings against a company, it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time of the company being able to pay the debt, the officer shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 3 months.

Responsibility for fraudulent trading

340.—(1) If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

(2) Where a person has been convicted of an offence under section 339(3) in relation to the contracting of such a debt as is referred to in that subsection, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

(3) Where the Court makes any declaration pursuant to subsection (1) or (2), it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any charge or any interest in any charge on any assets of the company held by or vested in him or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(4) For the purpose of subsection (3), “assignee” includes any person to whom or in whose favour by the directions of the person liable the debt, obligation or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.
(5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $15,000 or to imprisonment for a term not exceeding 7 years or to both.

(6) Subsection (5) shall apply to a company whether or not it has been, or is in the course of being, wound up.

(7) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

(8) On the hearing of an application under subsection (1) or (2), the liquidator may himself give evidence or call witnesses.

Power to grant relief

391.—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

(1A) For the avoidance of doubt and without prejudice to the generality of subsection (1), “liability” includes the liability of a person to whom this section applies to account for profits made or received.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are —

(a) officers of a corporation;

(b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.

Injunctions

409A.—(1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of this Act, the Court may, on the application of —

(a) the Registrar; or

(b) any person whose interests have been, are or would be affected by the conduct,

grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that he is required by this Act to do, the Court may, on the application of —

(a) the Registrar; or

(b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing,

grant an injunction requiring the first-mentioned person to do that act or thing.

(3) Where an application is made to the Court for an injunction under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in subsection (1) pending the determination of the application.

(4) The Court may rescind or vary an injunction granted under subsection (1), (2) or (3).

(5) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the power of the Court to grant the injunction may be exercised —

(a) if the Court is satisfied that the person has engaged in conduct of that kind — whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will engage in conduct of that kind — whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(6) Where an application is made to the Court for a grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised —

(a) if the Court is satisfied that the person has refused or failed to do that act or thing — whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or

(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will refuse or fail to do that act or thing — whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

(7) Where the Registrar makes an application to the Court for the grant of an injunction under this section, the Court shall not require the Registrar or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

(8) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.
XV. RELEVANT SECTIONS OF TABLE A

Proceedings of directors
80. Subject to these Regulations, questions arising at any meeting of directors shall be decided by a majority of votes and a determination by a majority of directors shall for all purposes be deemed a determination of the directors. In case of an equality of votes the chairman of the meeting shall have a second or casting vote.

82. Any director with the approval of the directors may appoint any person, whether a member of the company or not, to be an alternate or substitute director in his place during such period as he thinks fit. Any person while he so holds office as an alternate or substitute director shall be entitled to notice of meetings of the directors and to attend and vote thereat accordingly, and to exercise all the powers of the appointor in his place. An alternate or substitute director shall not require any share qualification, and shall ipso facto vacate office if the appointor vacates office as a director or removes the appointee from office. Any appointment or removal under this regulation shall be effected by notice in writing under the hand of the director making the same.

90. A resolution in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. Any such resolution may consist of several documents in like form, each signed by one or more directors.

90A. Where the company has only one director, he may pass a resolution by recording it and signing the record.

Managing directors
93. The directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit, and either collaterally with or to the exclusion of their own powers, and may from time to time revoke, withdraw, alter, or vary all or any of those powers.
LECTURES 4 & 5

SHAREHOLDERS’ REMEDIES IN SINGAPORE

THE PROTECTION OF MINORITY SHAREHOLDERS
I. OBJECTIVES & MATERIALS

1.0 Lecture objectives

The protection of minority shareholders is an extremely interesting and complex area of company law that challenges the finest legal scholars, policymakers, lawyers and judges around the world. These lectures do not attempt to provide you with an in-depth analysis of all of the issues in this complex area of the law. Instead, these lectures aim to:

- Introduce you to the policy rationale that forms the foundation for the protection of minority shareholders
- Explain the rule in *Foss v Harbottle*—with a particular emphasis on how it relates to the other subject matter considered in this course (e.g., directors’ duties, amendment of the articles (s. 37), separate legal personality, members’ “contractual rights” under the memorandum and articles (s. 39), separation of powers (s. 157A) and procedural irregularities (s. 392))
- Provide you with a clear understanding of the four main mechanisms for the protection of minority shareholders in Singapore: (1) common law derivative actions; (2) statutory derivative actions; (3) the oppression remedy; and (4) just and equitable winding up
- Provide you with an analytical framework to determine how and when each of these four main mechanisms may be used to most effectively serve your future clients
- Introduce you to a number of the forthcoming amendments to the shareholders’ remedies provisions in the *Companies Act* so that you are aware of how the law will change in the future

1.1 Materials

- Handout
  - This handout provides a detailed overview of the material that will be covered in lectures 4 & 5. I expect that you will read this handout and briefly consider the short questions contained within before lecture 4 on 4 September 2014. I will be asking you to respond to the questions in the lectures

- PowerPoint slides
  - I will be using PowerPoint slides, which will be made available to students following each of the lectures. The PowerPoint slides are not meant to be a substitute for attending the lectures. My hope is that by providing the PowerPoint slides and this detailed handout you will be able to engage in the lectures rather than be consumed by note taking
Textbooks

- The main topics examined in the lectures are generally addressed in Walter Woon on Company Law (Revised Third Edition, 2009) (pp. 163-207, 351-90, 718-29) (hereinafter “Woon”). However, the lectures will not cover all of the issues and cases considered in Woon. Instead, the lectures will supplement Woon by providing an overall framework for understanding this area of the law and by highlighting the most important legal principles and cases. In addition, the lectures will consider several important decisions that have been released since Woon was published.

- Many of the points made in the handout, PowerPoints and lectures have been extracted from or draw heavily upon Margaret Chew’s text, Minority Shareholders’ Rights and Remedies (Second Edition, LexisNexis, 2007) (hereinafter “Chew”). Chew has been cited by the High Court and Court of Appeal on a number of occasions and is the leading work in this field in Singapore. It is an excellent text. However, due to its length and detail you are not required to read it. For those of you who desire a more detailed explanation, this handout contains a number of footnotes that will guide you to the relevant sections in Chew.

Statute and Cases

- The most relevant portions of the Companies Act are attached to this handout (See, Section IX below). Unless indicated otherwise, all statutory references in this handout are to the Companies Act.

- The protection of minority rights is the core issue in many of the legal disputes that arise in companies. As such, this area of the law has generated a substantial body of case law. Many of the cases are lengthy and complex. To assist you in digesting this complex body of case law, this handout provides a number of brief case summaries and excerpts from the most important decisions. In addition, where possible, it provides references to relevant case excerpts from Sealy’s text, Cases and Materials in Company Law (Eighth Edition, Oxford, 2008).

- To aid you in working your way through the cases, I have selected one case for each of the four main mechanisms of minority shareholder protection that should provide you with an efficient entry point for your understanding of the case law:
  - Common law derivative action: Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore)
  - Statutory derivative action (s. 216A): Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] 3 SLR 1 (Court of Appeal, Singapore)
  - Oppression remedy (s. 216): Over & Over Ltd. v Bonvest Holdings Ltd [2010] 2 SLR 776 (Court of Appeal, Singapore)
  - Just and equitable winding up (s. 254(1)(i)): Sim Yong Kim v Evenstar Investment Pte Ltd [2006] 3 SLR 827 (Court of Appeal, Singapore)
II. POLICY RATIONALE

2.0 Fundamental issue

- When should the court intervene to protect minority shareholders from majority rule?

2.1 Policy considerations

- Rationales for majority rule
  - Contractual bargain
    - Minority shareholders freely choose to be minorities (and normally freely exit)
    - Minority shareholders invest/risk less than majority shareholders
    - The contractual bargain in company law is based on the notion of economic, not individual, equality
  - Economic efficiency
    - The majority has the greatest incentive to maximize profits
    - Majority rule is administratively efficient
    - Majority rule promotes business decisions being made by business people (rather than the court or disinterested shareholders)
    - Too much minority power promotes “greenmail” and “strike suits” and may disrupt corporate stability

- Rationales for minority protection
  - Contractual bargain
    - Enforcing the “contractual bargain” (s. 39), which includes minority rights, promotes certainty, investor trust and ultimately increases investment
    - In closely held companies minority shareholders may be unable to exit
  - Economic efficiency
    - Tyranny of the majority can destroy corporate value
    - Business decisions made by a “disinterested” court may be more efficient than business decisions by a majority with a conflict of interest

- The difficult balance
  - Prima facie legitimate and normally efficient majority rule vs. selective intervention by the court to prevent unfair and normally inefficient prejudice towards the minority

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40 Margaret Chew, Minority Shareholders’ Rights and Remedies, 1-12 (2nd ed, LexisNexis, 2007).
Question: Is the protection of minorities in a constitutional democracy analogous to the protection of minorities in the corporate context?

Question: From a policy perspective, when should the court intervene to protect minority shareholders from majority rule?
III. THE RULE IN FOSS & THE COMMON LAW DERIVATIVE ACTION

3.0 The rule in Foss v Harbottle

- Generally, the rule is viewed as being composed of two principles:
  - The “proper plaintiff principle”
  - The “majority rule principle”

  Edwards v Halliwell [1950] 2 All ER 1064 (Court of Appeal, UK) [Sealy, 11.08]

  [Summary: The plaintiffs, as members of a trade union, sued the union and the members of its executive committee claiming a declaration that a decision to increase the union dues payable by members was invalid on the ground that the union’s rules—requiring a two-thirds majority vote on a ballot of its members—had not been observed. The central issue was whether the plaintiff members’ claim was based on a “wrong done to the union” (in which case the members would have no standing to sue) or a “wrong done to the members individually” (in which case the members would have standing to sue). The Court of Appeal upheld the declaration by the lower court affirming that the plaintiff members’ action was based on a “wrong to the individual members” (not “a wrong to the union”) and therefore the members were entitled to bring an action in their names]

  [Excerpt: The rule in Foss v Harbottle...comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company...is prima facie the company...Secondly, where the alleged wrong is a transaction which might be made binding on the company...and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company...is in favour of what has been done, then cadit quaestio [that is the end of the argument]. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue]

3.1 The proper plaintiff principle

- The legal rationale for the proper plaintiff principle is that a company is a separate legal entity
- As a company is an entity separate and apart from its members, a member may not sue to enforce a company’s rights
- Therefore, the “proper plaintiff” in an action for a wrong alleged to have been done to the company (e.g., a breach of contract or where directors have breached their duties to the company) is the company itself
- The practical effect of the proper plaintiff principle is that it restricts minority shareholders from bringing an action with respect to wrongs done to the company because the majority shareholders have the de facto power to decide when the company will pursue an action

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41 Chew, supra note 1, at 1-114.
42 Chew, supra note 1, at 18-30.
Foss v Harbottle (1843) 2 Hare 461 (Court of Chancery (Vice-Chancellor, UK) [Sealy, 11.01]

[Summary: Two shareholders alleged that certain directors of the company had sold land to the company at exorbitant prices and had caused the company to make improper mortgages in relation to the land. The shareholders, who did not hold a majority of the shares, sued the directors for the alleged wrongs done to the company. The court chose not to intervene and held that the shareholders did not have locus standi to pursue the action. The court noted that the suit by the minority shareholders could not be sustained when the fact was that the powers of the general meeting as an organ of corporate decision-making were still existent. To allow the minority shareholders to maintain a suit that alleged a wrong done to the company would be to endorse the minority’s usurpation of the decision-making powers of the general meeting. It should be noted that there was no suggestion in the decision that the directors who were alleged of wrongdoing held a majority of shares or had de facto control of the corporation. Therefore, if the court had held that the directors breached their duties and the sale of land was voidable, the company in the general meeting could have defeated the court by ratifying the sale. In addition, there was no indication that the complainant shareholders had taken any steps to put to the general meeting whether a suit against the directors ought to be pursued]

[Excerpt: In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative]

Questions: Who decides whether the company will sue when a wrong has allegedly been done to the company? When might this cause a problem?

3.2 The majority rule principle

- The rationale for the majority rule principle is that it would be fruitless to allow a shareholder to commence an action based on an irregularity where the irregularity can be cured by majority ratification
- Therefore, according to the common law, the court should not intervene where a majority of the shareholders may lawfully ratify the irregularity that forms the basis for the shareholder claim
- The practical effect of the majority rule principle is that it restricts minority shareholders from commencing an action with respect to mere irregularities—even if those irregularities are breaches of a minority shareholder’s prima facie personal/members’ rights
- In Singapore, s. 392 renders the common law jurisprudence on irregularities moot as it makes clear that the only irregularities that will support a minority claim are those that cause “substantial injustice” (i.e., they are more than mere irregularities)

Foss v Harbottle (1843) 2 Hare 461 (Court of Chancery (Vice-Chancellor, UK) [Sealy, 11.01]

[Excerpt: Whilst the Court may be declaring the acts complained of to be void at the suit of the present Plaintiffs, who may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of the proprietors assembled at a special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained whilst the body retains its functions…]

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43 Chew, supra note 1, at 5-9.
MacDougall v Gardiner (1875) 1 Ch D 13 (Court of Appeal, UK) [Sealy, 11.04]

[Summary: Gardiner, the chairman of the Emma Silver Mining co., had adjourned a general meeting of the company without acceding to the request of a shareholder, MacDougall, and others, that a poll be held on the question of the adjournment. MacDougall now claimed a declaration that the chairman’s action was improper, and an injunction restraining the directors from taking further action. The Court of Appeal held that this was a matter of internal management in which it should not interfere. It is worth noting that had a poll been held on the question of adjournment, MacDougall would have commanded a majority due to the proxies that he held—however, on a show of hands, he and his supporters were in the minority. Nevertheless, by the time that the issue was heard on appeal a general meeting of the company (subsequent to the one wherein MacDougall’s request for a poll was refused) had been held and a new board of directors had been appointed, including MacDougall himself. Therefore, the Court of Appeal was asked to address an entirely academic/moot issue. This no doubt influenced the decision.]

[Excerpt: In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company is entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided in...Foss v Harbottle...]

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)(1982) Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Excerpt: (1)...the elementary principle [is] that A cannot, as a general rule, bring an action against B to recover damages...on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured and therefore, the person in whom the cause of action is vested; (2) an individual cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company’s affairs if the irregularity is one which can be cured by a vote of the company in general meeting]

Question: According to MacDougall, the majority is entitled to do anything “irregularly” or “illegally” that it can do “legally” and “regularly”. If this were the law, would the Articles place any restrictions on actions of the directors or the company supported by the majority?

3.3 The link between the proper plaintiff and majority rule principles

- Both principles emphasize the *prima facie* right of majority shareholders in a company to decide how the company’s affairs are to be conducted
- More specifically, both principles restrict the ability of minority shareholders to commence litigation and place the power to do so in the hands of the majority
  - Making the company the “proper plaintiff” vests the power to pursue claims for wrongs against the company in the hands of the majority
  - Prohibiting minority shareholders from bringing claims based on irregularities limits the power of minority shareholders in favour of the majority

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Margaret Chew, Minority Shareholders’ Rights and Remedies, 7 (2nd ed, LexisNexis, 2007)

[Excerpt: The proper plaintiff rule may indeed be viewed as a subset of the principle of majority rule, for it is premised on the notion that the majority ought, in the ordinary course of corporate decision-making, to have a predominating influence. Ordinarily, the management of a company’s business is vested in the board of directors by the company’s articles of association [e.g., Art. 73, Table A; 157A Companies Act]. Directors, in most instances, are elected to sit on the board, because they themselves are majority shareholders or because they have been accorded the support…of the majority shareholders. Where circumstances arise such that a company may have grounds to pursue legal action against another person or entity, the decision as to whether or not a company should sue is therefore a management decision to be made by the board of directors. Barring any circumstances to suggest otherwise, the directors’ decisions may be expected, at least theoretically, to project or reflect the majority will. To allow a minority shareholder…to sue on behalf of a company, and in the process ignore the majority will, would be to displace the government procedure of the company. Why should the minority be able to leapfrog the majority to assert its own agenda, after having agreed to procedures and rules, which are premised upon majority rule?]

3.4 The benefits and costs of the rule in Foss

- **Benefits**
  - Reduces the scope for wasteful litigation
  - Constrains the potential for duplicative litigation and double recovery
  - Allows management to decide whether to sue—without being second guessed by “less qualified” parties

- **Costs**
  - Provides a shield for majority shareholder-directors who engage in conduct that is detrimental to corporate value
  - Robs minority shareholders who have been treated unfairly of an equitable remedy
  - Provides courts with an ambiguous tool to reduce their dockets

- The exceptions to the rule in Foss attempt to maintain the benefits while reducing the costs

3.5 Applicability of the rule in Foss and its exceptions

- At its core, the rule in Foss is a procedural rule that is concerned with locus standi
- Unless a plaintiff can demonstrate that the proceedings she seeks to bring fall within one of the established exceptions to the rule she has no standing to bring an action
- The four “exceptions” to the rule in Foss are:
  1. Personal claims
  2. Transactions requiring a special majority
  3. Ultra vires or illegal transactions
  4. Cases of “fraud on the minority”

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Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]\(^{46}\)

[Summary: Newman Industries Ltd ("Newman") was a public listed company, in which Prudential Assurance Co. Ltd. ("Prudential"), an institutional investor, had a minority shareholding of 3.2%. Prudential pursued a derivative action (i.e., an action where the shareholder seeks to enforce a right vested not in herself but in the company of which she is a member) against two of the executive directors of Newman (Bartlett and Laughton) alleging various instances of fraud. Prudential also pursued a personal action and a representative action on behalf of Newman’s shareholders, based on the claim that the directors’ fraud reduced Newman’s net profits and thus negatively affected the price of its shares resulting in losses to Prudential and the other shareholders. One of the allegations involved Newman’s purchase of assets from Toma and Laughton, but Vinelott J, at first instance, declined to determine as a preliminary issue whether Prudential was entitled (as an exception to the proper plaintiff principle in Foss) to bring a derivative action and proceeded to hear the evidence. After hearing the evidence, Vinelott J held for Prudential and found that there had been fraud by the directors who were in control. Bartlett and Laughton appealed. However, despite its previous objection to the proceedings, Newman by its counsel indicated to the appellate court that it would accept the benefit of any order in its favour made against Bartlett and Laughton. Since Newman, by the appellate stage, had adopted the derivative action (i.e., there was no longer the need for a derivative action because Newman had in essence taken over the action), the issues surrounding whether Prudential, as a shareholder, could bring an action as an exception to the rule in Foss was moot. Nevertheless, the Court of Appeal took the opportunity to discuss aspects of the rule in Foss and the exceptions to it. Specifically, the Court of Appeal opined that: (1) A shareholder cannot bring a personal claim against a wrongdoer, even in a claim based on fraud or deceit, when the loss which he claims that he has suffered is the diminution in the value of his investment in the company as a consequence of the effect of the fraud on the company. The company alone can sue for such a wrong; (2) a judge must always give his ruling on an application to strike out an action because of the plaintiff’s want of standing to proceed to hear the substantive case; (3) there is no broad exception to Foss based on "the interests of justice"]

[Excerpt: The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ in Edwards v Halliwell [1950] 2 All ER 1064 as follows: (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders’ action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue]

3.6 Exceptions to the rule in Foss\(^{47}\)

**Exception 1 to Foss:** *The wrong complained of is an injury to a member in their personal capacity*

- The proper plaintiff principle does not prevent a member from pursuing a claim for an injury to themselves in their personal capacity

\(^{46}\) Followed in Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore).

\(^{47}\) Chew, supra note 1, at 23-30, 83-114.
Edwards v Halliwell [1950] 2 All ER 1064 (Court of Appeal, England) [Sealy, 11.08]

[Excerpt: In my judgment, this is a case of a kind which is not even within the general ambit of the rule [in Foss]. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union. It is a case in which certain members of a trade union complain that the union, acting through the delegate meeting and the executive council in breach of the rules by which the union and every member of the union are bound, has invaded the individual rights of the complainant members, who are entitled to maintain themselves in full membership with all the rights and privileges appertaining to that status…Those rights, these members claim, have been invaded. The gist of the case is that the personal and individual rights of membership of each of them have been invaded…In those circumstances, it seems to me the rule in Foss v Harbottle has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members]

- A member may acquire personal rights in **four** ways:

  (1) Express contracts

  - A member may be a party to an express contract with other members or a party to an express contract with the company
  - A member can bring an action to enforce these contractual rights under the general principles of contract law

  (2) Statutory contract (s. 39)

  - The memorandum and articles form a statutory contract between the members of the company and between the company and its members
  - A member may enforce her personal rights based on the statutory contract subject to two significant limitations:
    - The right must be a personal right conferred on the member as a member (and not in a capacity “other than as a member”)—unless the “wide-view” of Salmon v. Axtens applies.
    - The member cannot make a claim based on a “procedural irregularity” unless the Court is of the opinion that the irregularity has caused or may cause “substantial injustice” (s. 392)

Rayfield v Hands [1960] Ch 1 (Chancery Division, UK) [Sealy, 4.38]

[Summary: The plaintiff-shareholder brought an action to force the other directors (who were also members) to buy his shares, in accordance with the articles. The shareholder was allowed to bring his personal action (without joining the company as a party) against the director-members based on a breach of the articles because the court held that the articles form a contract between the members [i.e., a personal right]. The court declared that the director-members were bound to buy the shares]

48 This assumes that the “in a capacity other than a member” principle applies in Singapore—which may not be the case. For a discussion of the applicability of the “in a capacity of than a member” principle in Singapore, See Woon at para. 4.49.
(3) Companies Act

- Section 409A allows a member to seek an injunction to compel compliance or prevent someone from contravening the *Companies Act*
- Examples of personal rights conferred on members in the *Companies Act* include:
  - Two or more members who hold at least 10% of the share capital of the company may call a general meeting (s. 177)
  - A member of a company who is entitled to attend and cast a vote at a meeting of the company’s members has a right to appoint a person as a member’s proxy to attend and vote at the meeting (s. 181)
  - A member has the right to inspect the minute books of meetings of the company’s members free of charge (s. 189)
  - A member’s other major remedies (ss. 216, 254(1)(i) and 216A)

(4) Common law

- There is a large body of conflicting case law concerning the common law rights vested in individual members.\(^49\) Two important examples of such rights are:
  - The right to vote (unless the right is denied by an irregularity)
    - *Pender v Lushington* (1877) 6 Ch D 70 (Court of Chancery, Master of the Rolls, UK) [Sealy 11.15]
      [Summary: The plaintiff transferred some shares to nominees so that the nominees could vote. This was done to defeat a provision in the articles which limited a member to a maximum number of votes. The chairman of the meeting refused to accept the nominees’ votes and the plaintiff challenged this refusal. The court held that a nominee whose name was on the register was entitled to vote, and the court would not look behind the register for any beneficial interests. In essence, what the plaintiff sought to do was simply to have a say in business policy concomitant with both his legal and beneficial shareholding]
      [Excerpt: He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue...That has nothing to do with the question raised in *Foss v Harbottle* and that line of cases. He has a right to say, “Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you”]
    - *MacDougall v Gardiner* (1875) 1 Ch D 13 (Court of Appeal, UK) [Sealy, 11.04]
      [Summary: Plaintiff-member was not allowed to bring an action based on a denial of the member’s right to vote because the denial was an irregularity which could be ratified by the majority (*See above*, for more detailed facts)]
  - The right of a member-director not to be *wrongfully* removed from their position as a director

\(^{49}\) Chew, supra note 1, at 45-53. For a detailed list of members rights that may exist as a result of the common law, see VICTOR JOFFE, MINORITY SHAREHOLDERS: LAW, PRACTICE AND PROCEDURE, 78-80 (2nd, LexisNexis, 2004).
Pullbrook v Richmond Consolidated Mining Company (1878) 9 Ch D 610 (Chancery Division, UK) [Sealy, 5.01]

[Summary: A director was required by the company’s articles, by way of qualification for the post, to hold “as registered member in his own right” shares worth 500 pounds. Pullbrook had mortgaged his qualification shares, and delivered to the mortgagee an unregistered transfer. The directors, on learning this, refused to allow him to sit on the board. The court held: (1) that he still held the shares “in his own right”; and (2) that he had suffered an individual wrong for redress of which he could sue in his own name]

[Excerpt: In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence. Besides that, he is in the position of a shareholder, or a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his service. It appears to me that for the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and those decisions which say that, where a wrong is done to the company by the exclusion of a director from board meetings, the company may sue and must sue for that wrong, do not apply to the case of wrong done simply to an individual. There may be cases where, by preventing a director from exercising his functions in addition to it being a wrong done to the individual, a wrong is also done to the company, and there the company has a right to complain. But in a case of an individual wrong, another shareholder cannot on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong. That being so, in my opinion, the plaintiff in this case has a right of action. [His Lordship then ruled that he still held his qualification shares in “his own right”, and so had been properly elected a director. He accordingly granted an injunction]]

- **Reflective loss cannot** be the basis for a member’s personal action

  - A shareholder does not have a cause of action against a defendant merely because the company in which she holds shares has a cause of action against that defendant
  - This rule applies even if the shareholder has suffered a “reflective loss” (either by a decrease in the value of her shares in the company or the amount received as dividends from the company) as a result of the defendant’s wrongdoing towards the company
  - A shareholder **cannot** make a claim for “reflective loss” even if the company decides not to pursue its claim against the wrongdoer that caused the direct loss to the company and the shareholder has their own separate cause of action
  - It should be noted that a minority shareholder is always free to attempt to recover the direct loss to the company by pursuing a derivative action (either in common law by claiming “fraud on the minority” or under s. 216A) on behalf of the company

  Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Excerpt: [A shareholder] cannot…recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a “loss” is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only loss is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The
[claimant’s] shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The [claimant] still holds all the shares as his own absolutely unencumbered property. The deceit practiced upon the [claimant] does not affect the shares; it merely enables the defendant to rob the company…Suppose that the sole asset of a company is a cash box containing 100,000 pounds. The company has an issued share capital of 100 shares, of which 99 are held by the [claimant]. The [claimant] holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the [claimant] to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunders, is: (i) to denude the company of all its assets, and (ii) to reduce the sale value of the [claimant]’s shares from a figure approaching 100,000 pounds to nil. There are two wrongs, the deceit practiced on the [claimant] and the robbery of the company. But the deceit on the [claimant] causes the [claimant] no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The [claimant] obviously cannot recover personally some 100,000 pounds damages in addition to the 100,000 pounds damages recoverable by the company.

- Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 (House of Lords, England) [Sealy, 11.17]

Summary: A company, WWH, commenced proceedings against a firm of solicitors, GW, for professional negligence related to the exercise of an option to purchase land. That claim was eventually settled. Subsequently, Johnson, a majority member in the company, commenced proceedings against the same firm for personal losses sustained which arose out of the same circumstances. It was argued by the firm that Johnson could not recover his own personal losses as these were essentially the same as the losses sustained by the company. The House of Lords explained the relevant legal rules.

Excerpt: (1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder’s shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company’s assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from Prudential Assurance Co Ltd v Newman Industries (No 2)…(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so) even though the loss is a diminution in the value of the shareholding…(3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other…

- Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liq) [2007] 2 SLR 597 (Court of Appeal, Singapore)

Summary: The Court of Appeal acknowledged that the origins of the no reflective loss principle in Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 and followed Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1

- There are two exceptions to the “no reflective loss rule”

1. Where the company has no cause of action to recover its loss
   - The company may not be able to pursue its claim because of the actions of the wrongdoer
   - The company may not be able to pursue its claim because the company is in a jurisdiction that has no proper remedy

2. Where the shareholder suffers a loss separate and distinct from that suffered by the company
Giles v Rhind [2002] EWCA Civ 1428, [2003 Ch 618 (Court of Appeal, UK) [Sealy, 11.18]

[Summary: G and R had been members in a company which became insolvent following the diversion by R of a contract to a third party, in contravention of a shareholders’ agreement. The company discontinued its proceedings against R as a consequence of its insolvency, but G sought to pursue in his own right damages against R. G contended that his claims were not merely reflective of the company’s loss. Accepting this argument, the Court of Appeal held G had a cause of action against R separate from that of the company. In any case, with regard to G’s losses which reflected those of the company, G was entitled to proceed with his personal claim, as the company had been prevented from pursuing its own action as a result of R’s wrongdoing. Hence, this case can be distinguished from Johnson v Gore Wood, where additional claims by a member in relation to reflective losses were barred where the company was in fact able to pursue its own action (and had pursued it to settlement)]

Hengwell Development Pte v Thing Chaing Chin [2002] 4 SLR 902 (High Court, Singapore)

[Summary: The plaintiff, Hengwell (“H”), was the majority shareholder of a Singapore unlisted joint venture company (“JVC”). Far East Packaging Industrial Pte Ltd (“FE”) was H’s minority partner in the JVC. The only business of the JVC was that of a wholly owned China subsidiary (“Q”). Under the JV agreement FE was granted day-to-day control of Q. H claimed that the directors appointed by FE to Q misappropriated funds from Q by making fraudulent misrepresentations (with the assistance of FE) to Q and the JVC. Thus, H claimed that FE and the directors appointed by FE breached their contractual and fiduciary duties owed to Q and the JVC. An action could not be commenced against the directors of Q by Q’s board because the board was controlled by the wrongdoer directors and there was no derivative action (or any equivalent) under Chinese law—so the JVC could not bring an action for and on behalf of Q. The JVC also could not commence an action against Q’s directors and FE because there was no quorum at the JVC’s directors meeting. Therefore, H sought leave to commence a s. 216A derivative action in the name of the JVC for damages flowing from the misappropriated funds. In response, the defendants claimed that the JVC had no standing as it had merely suffered a reflective loss (i.e., the loss in the value of its Q shares). The court held that as there was no risk of double recovery, the policy reasons for the no reflective loss rule did not apply—and a Johnson v Gore Wood & Co exception was permitted. Therefore, H was allowed to bring a s. 216A derivative action in the name of the JVC for recovery of the damages resulting from the misappropriated funds]

[Excerpt: If there is no risk of double recovery and there is no prejudice to the creditors or shareholders of the company, which has no remedy in any event under Chinese law, the policy reasons behind the decision in Johnson v Gore Wood & Co do not apply]

Question: Does the reflective loss doctrine support the policy rationale for the protection of minorities?

Exception 2 to Foss: The matter is one which could validly be done or sanctioned only by some special majority of members

- The proper plaintiff rule has no application where the articles require a special majority and the proceedings are brought to challenge a decision which has disregarded such a requirement
- In the case where articles require a special majority, the rights can be considered personal rights of members on which members can bring a personal action

Edwards v Halliwell [1950] 2 All ER 1064 (Court of Appeal, UK) [Sealy, 11.08]

[Summary: The rule of the trade union provided that employed members’ contributions could only be increased by a two-thirds majority on the taking of a ballot of its members. A delegate meeting of the union passed a resolution increasing the contributions without taking a ballot. The claimants were held to be entitled to a declaration that the increase in subscription was valid (See above, for more detailed facts)]
[Excerpt: There is a further exception which seems to me to touch this case directly. [The rule in *Foss v Harbottle* does] not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the members of the company or association, but only by some special majority… [The reason for this] exception is clear, because otherwise, if the rule were applied in its full rigour, a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution. That exception exactly fits the present case inasmuch as here the act complained of is something which could only have been validly done, not by a simple majority, but by a two-thirds majority obtained on a ballot vote. In my judgment, therefore, the reliance on the rule in *Foss v Harbottle* in the present case may be regarded as misconceived on that ground alone]

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)[1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Excerpt: There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority]

❖ Question: In light of exception 1 to the rule in *Foss*, is exception 2 redundant?

**Exception 3 to Foss: The wrong complained of is an ultra vires act of the company**

- Under the common law, an *ultra vires* act could not be ratified by the majority and therefore, in relation to *ultra vires* transactions, the rule in *Foss* could not apply
- Section 25 substantially limits the scope of the common law *ultra vires* doctrine. However, the remaining limited powers of a member to deal with an *ultra vires* act in s. 25 can still be enforced by a member in their own right (and, therefore, remain an exception to the rule in *Foss*)
  - Section 25(1) validates *ultra vires* transactions and therefore a member can no longer seek to recover any property transferred under an *ultra vires* agreement by reason of the act being *ultra vires*
  - However, under s. 25(2)(a) a member can *restrain* the company from committing an *ultra vires* act—but this right is lost when the act is wholly executed
  - Section 25(2)(b) allows a company or a member to use *ultra vires* acts to support a claim against a director. Thus, a minority member may claim “oppression” (s. 216), “just and equitable winding up” (s. 254(1)(i)) or seek a derivative action on behalf of a company for a breach of directors’ duties (s. 216A), all of which may be supported by evidence of *ultra vires* acts

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)[1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Excerpt: There is no room for the operation of the rule [in *Foss*] if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction]

❖ Question: In light of exception 1 to the rule in *Foss*, is exception 3 redundant?
**Exception 4 to Foss: The wrong complained of amounts to “fraud on the minority”**

- An action commenced under this exception is often referred to as a common law derivative action
  - It is a “derivative action” because although it is pursued by a member of the company, the member is not suing to enforce their own personal rights, but rather those of the company (i.e., the rights being enforced are “derived” from the company)
  - It is a “common law” action in that it is not based on a provision in the Companies Act and is distinct from the statutory derivative action available under s. 216A

- The common law derivative action is a procedural device based in equity which provides an exception to the rule in *Foss*
- The “fraud on the minority exception” was introduced by the courts to prevent wrongdoings by corporate controllers from going without redress. In the absence of the exception, wrongdoing corporate controllers would stifle the claims against themselves by preventing the company from suing

  - **Burland v Earle** [1902] AC 83 (Privy Council, UK) [Sealy, 11.10]
    
    [Summary: Burland was a director of the British American Bank Note Company (the “Company”). In his personal capacity, Burland had purchased assets at the price of $21,564 from an insolvent company. He came to know of the opportunity as he was a shareholder and creditor of the insolvent company. He resold the purchased assets to the Company for $60,000. A minority shareholder of the Company sought to challenge the sale on the basis that it was a “fraud on the minority”—but was unsuccessful. Evidence was given to say that the price at which Burland had sold the assets to the Company was not unfair. The company, therefore, had not suffered a loss. Neither had Burland appropriated an opportunity belonging to the Company. What he had failed to do was to give the Company the benefit of an opportunity that was his personally, and for this he could not be faulted]

  [Excerpt: It is clear that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself…But an exception is made…where the persons against whom relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case, the courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress…[I]t is obvious that in such an action the plaintiffs cannot…complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which acts complained of are of a fraudulent character…A familiar example is where the majority are endeavouring directly or indirectly to appropriate themselves money, property, or advantages which belong to the company…It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish LJ in *MacDougall v Gardiner*]

  - **Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)** [1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

    [Excerpt: There is an exception to the rule in *Foss* where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case, the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders’ action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court]

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Chew, *supra* note 1, at 83-114.
because the wrongdoers themselves, being in control, would not allow the company to sue. A derivative action is an exception to the elementary principal that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested.

**Question:** Why are we not concerned about “fraud on the majority”?

- There are two elements that must be established for a “fraud on the minority” claim to succeed (i.e., for a common law derivative action (“CLDA”) to be allowed to proceed):

  (1) The company is prima facie entitled to the relief claimed; and
  (2) The wrongdoers have committed “fraud on the minority”

  - Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

    [Excerpt: In our view, whatever may be the properly defined boundaries of the exception to the rule [in Foss v Harbottle (1843) 2 Hare 461; 67 ER 189], the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v. Harbottle. …]

  - Establishing Element (1) for a CLDA: The company is prima facie entitled to the relief claimed

    - The complainant must establish that the company has a reasonable basis for the relief claimed and that the action sought is a legitimate or arguable one
    - However, the complainant does not need to prove the company’s claim on a balance of probabilities but only on a prima facie basis
    - The recent High Court decision in Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1 (which is the only Singapore decision which considers this element in detail) suggests in obiter that this element should involve the same analysis as the “prima facie” case requirement in s. 216A (which is explained in depth in Part 4.2 below)

    - Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1 (High Court, Singapore)

    [Summary: The plaintiff-shareholder claimed that the defendant-director had breached his fiduciary duty to the company and that the company had wrongfully decided not to sue on the breach. Since the company was not incorporated in Singapore (i.e., it was a foreign incorporated company), the plaintiff could not pursue a s 216A statutory derivative action. Therefore, the plaintiff sought leave to bring a common law derivative action which required him to establish that the defendant’s actions amounted to “fraud on the minority”. The High Court dismissed the plaintiff’s claim for leave to bring a common law derivative action. In arriving at this decision, Justice Andrew Ang spent a significant amount of time discussing the “fraud on the minority test”. However, this entire discussion was obiter as Justice Ang ultimately found that, regardless of the outcome of the “fraud on the minority test”, leave had to be denied because “another adequate remedy” was available which made the derivative action unnecessary]

    [Excerpt: In this regard, we may take a leaf out of case law relating to the [s 216A] statutory derivative action. In Agus Irawan v Toh Teck Chye [2002] 1 SLR(R) 471…the plaintiff applied for leave to commence a derivative action in the name of a company pursuant to s 216A of the Act. Choo Han Teck JC dismissed the application. In so doing, Choo JC held…as follows:… At this stage the court need not and ought not be drawn into an adjudication on the disputed facts. That is what a prima facie legitimate or arguable case is all

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51 Followed in Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore) and Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1.
about. Leave to cross-examine in such situations ought to be sparingly granted... as stated by the Ontario Court of Appeal in Richardson Greenshields of Canada Ltd v Kalmacoff (1995) 123 DLR (4th) 628, at 636, ‘[b]efore granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one’... I, in turn, agree entirely with what was said in the above case.... whether a derivative claim is brought under statute or common law, the court must, from the outset, assess whether the company has a reasonable case against the defendant for which the company may recover damages or other relief]

• Establishing Element (2) for a CLDA: That the wrongdoers have committed “fraud on the minority”

  ▪ In Singapore, the leading authorities suggest that three elements must be established to prove “fraud on the minority” (i.e., there is a three-part test for establishing fraud on the minority)
    o The two leading Singapore texts on shareholder remedies (Chew at p. 90; Woon at p. 372) explicitly suggest the “three-part test approach”
    o Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore) is the only CLDA to reach the Court of Appeal in Singapore. As Ting Sing Ning primarily focused on the issue of “wrongdoer control” the Court of Appeal did not consider in detail the other parts of the “fraud on the minority” test and thus did not explicitly adopt the three-part test approach. However, the Court of Appeal (at para. 13) positively cites a quote from Daniels v. Daniels [1978] 2 All ER 89 (High Court, England) which provides judicial authority for the three-part test.
    o It should be noted that in the recent High Court decision Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1 Justice Ang, in obiter, acknowledged the three-part test “may well be right” (at para. 55) but went on to posit that the law in this area is not settled. Justice Ang (at para. 51) set out a possible alternative “singular test” in obiter for establishing fraud on the minority as: “any wrong committed by a director, if accompanied by an improper attempt to stifle an attempt by the company to obtain redress in respect of that wrong”
    o As the leading authorities in Singapore and the UK support the use of the three-part test (and Justice Ang’s alternative singular test was merely proposed as a possible alternative in obiter and is based on an overturned UK decision) this handout is structured according to the “three-part test approach”
    o However, note that if your client cannot meet the three-part test Justice Ang’s obiter creates a small window to argue that his less strict singular test should apply

Part 1 of 3: The wrongdoer obtained some sort of benefit

  ▪ If the wrongdoer obtained no benefit for himself it appears that a minority member is not allowed to pursue a common law derivative action
However, “fraud on the minority” does not require proof of fraud. The term “fraud” is not used in the narrow sense of deceit, but is attributed a wider meaning which embraces both fraud in the strict sense and (short of fraud) a breach which confers a benefit on the wrongdoer.

Therefore, negligence of the wrongdoer will only be sufficient when the wrongdoer obtains some sort of benefit.

- **Daniels v. Daniels** [1978] 2 All ER 89 (High Court, England)
  
  [Summary: The minority shareholders were allowed to maintain an action against the directors of the company where the directors had effected a sale of the company’s land at an undervalue. Allegations of “fraud” were not pleaded and Templeman J had to consider whether a derivative action could be allowed. He held that the minority shareholders could bring an action under the “fraud on the minority” exception where directors had acted negligently. It was significant that the sale at an undervalue was made to one of the directors who had effected the sale, from which the wrongdoers could be said to have benefited]

- **Pavlides v. Jensen** [1956] 2 All ER 518 (High Court, England)
  
  [Summary: A minority shareholder sought to pursue a derivative action against the directors of the company for damages. The directors were accused of being grossly negligent in effecting the sale of an asbestos mine belonging to the company at a price greatly below its true market value. It was held that the action could not be maintained under the “fraud on the minority” exception to the Foss v Harbottle rule]

**Part 2 of 3: The benefit was obtained at the expense of the company or that some loss or detriment was caused to the company**

- When a director benefits at the expense of the company the shareholders cannot ratify the breach to prevent a derivative action
  
  - **Burland v Earle** [1902] AC 83 (Privy Council, UK) [Sealy, 11.1]
    
    [Summary: The price at which the defendant-director sold the assets in the disputed transaction to the company was not unfair and the defendant had not appropriated an opportunity belonging to the company. The minority-plaintiff could not pursue a common law derivative action]

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52 Followed in Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore).
Cook v Deeks [1916] 1 AC 554 (Privy Council on appeal from Ontario) [Sealy, 6.15]

[Summary: Three of the four directors of the Toronto Construction Company (Deeks, Deeks and Hinds—the three defendants) resolved to break their business relations with the fourth director, Cook (the plaintiff). The company had built up considerable goodwill with the Canadian Pacific Railway Company as a result of the satisfactory performance of a series of construction contracts, each of which had been negotiated with the railway company’s representative by one of the defendants. The last of these contracts, the Shore Line contract, was negotiated in the same way, but when the arrangements were completed, the defendants took the contract in their own names and not that of the company. Cook claimed that the company was entitled to the benefit of the contract, and that a shareholders’ resolution (which the defendants had carried by their own votes) purporting to confirm (i.e., ratify) that the company claimed no interest in the contract was ineffective. The Privy Council upheld both contentions (allowing for a derivative action) and reversing the decisions of the lower courts in Ontario]

Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378 (House of Lords) [Sealy, 6.16]

[Summary: The defendant-directors had made a profit by the purchase of shares. The opportunity to purchase the shares had come to the directors in their capacity as directors. However, the company did not have the funds to purchase the shares (i.e., there was no benefit obtained at the expense of the company). Lord Russell held that if the defendant directors had wished to protect themselves from the allegations of breach they could have ratified the breach by a vote at the general meeting [i.e., no derivative action could have been brought] (this is the opposite of Cook v Deeks where the majority could not ratify and therefore in Cook v Deeks a derivative action could be brought because the benefit occurred at the company’s expense)]

Part 3 of 3: The wrongdoer used their controlling power to prevent an action from being brought against them by the company

- Even if the conduct of the wrongdoer is such that it amounts to “fraud on the minority” if the wrongdoer does not have enough control to stifle an action being brought in the name of the company then the court will not allow the minority to bring a derivative action because the action could be pursued regularly by the company

Mozely v Alston (1847) 1 Ph 790 (Court of Chancery, UK) [Sealy, 11.02]

[Summary: A plaintiff minority shareholder pursued what appeared to be a representative action against the directors of a company for exercising powers of directors in breach of the articles of association. Although the question of instituting legal proceedings had not been considered at the general meeting, the Lord Chancellor held that the plaintiff shareholder could not bring the claim because it was supported by a majority of shareholders (i.e., the wrongdoers did not have control)]

[Excerpt: The bill expressly alleges that a large majority of the shareholders are of the same opinion with them; and, if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate character to remedy the evil complained of]

- To establish that the wrongdoers have control the minority must show either that the wrongdoers:
  - Hold a majority of the voting power; or,
  - Exercised de facto control by their influence to control a majority of the voting power to vote53

53 Chew, supra note 1, at 99-102.
There is no need to show a formal application to the company to instigate an action was rejected—particularly where the wrongdoer holds a majority of voting power

- Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Excerpt: What is meant by “control”, which embraces a broad spectrum extending from an overall absolute majority of votes at one end, to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy [it amounts to more than vague de facto control]]

- Smith v Croft (No 2) [1988] Ch 114 (Chancery Division, UK) [Sealy, 11.14]

[Summary: The plaintiffs were minority shareholders claiming to recover, on behalf of their company, sums which had been paid away in transactions which were both ultra vires and in breach of the statutory prohibition on financial assistance. With their supporters, the plaintiffs had 14% of the voting rights in the company and the defendants 63%; and there were other shareholders commanding 21% of the votes who did not wish the litigation to proceed. Knox J held that: (i) a prima facie case of ultra vires and illegality had been made out, for which the company was entitled to relief; (ii) the plaintiffs accordingly had standing to bring a derivative action; but that (iii) the plaintiffs accordingly had no right to sue if a majority of the shareholders who were independent of the defendants did not want the action to continue]

[Excerpt: [In this case votes [cast for and against the action by shareholders] should be disregarded if, but only if, the court is satisfied either that the vote or its equivalent is actually cast with a view of supporting the defendants rather than securing benefit to the company, or that the situation of the person whose vote is considered such that there is a substantial risk of that happening]

- Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore)

[Summary: The appellant, who was a director and a holder of 10% of the shares in Havilland, commenced an action for the benefit of Havilland against the respondents, who were also directors of Havilland, and other directors for relief for breach of fiduciary duties. Havilland’s board of directors, however, refused to adopt the action. At an extraordinary general meeting (“EGM”), Havilland’s independent shareholders also unanimously voted against the continuation of the action. The preliminary issue of whether the appellant had locus standi to bring a derivative action on behalf of Havilland subsequently came before the High Court. The appellant could not bring a statutory derivative action under s. 216A because Havilland was a Hong Kong incorporated company with its principal place of business in Singapore (s. 216A only applies to Singapore incorporated companies which are not listed on the Singapore Exchange). At the trial, the appellant contended that there was locus standi as the action fell within the “fraud on the minority” exception to the rule in Foss. In support of that contention, it was argued that the respondents had an absolute majority of the votes in Havilland, as they, together with the first respondent’s sister (who held 10% of the shares) and one other defendant, held a total of 52% of the shares in Havilland. That argument was rejected by the judge on the ground that there was no basis for concluding that the sister was likely to vote in favour of the first respondent by virtue of their family relationship. On appeal, it was argued that the finding was wrong as the sister was also the largest shareholder of Merit Concord Holdings, a related company, which had benefited from the first respondent’s breach of fiduciary duties to Havilland and that her shares in Merit were given to her by the first respondent. The Court of Appeal held that it was more likely than not that the first respondent’s sister would vote in support of the first respondent and his group to prevent the appellant from pursuing his derivative action for three reasons: (1) the family relationship between the first respondent and his sister (particularly since they were part of an “Asian family”); (2) the first respondent’s sister was the largest shareholder in Merit which had benefited from the alleged breach of fiduciary duties by the first respondent; and (3) the sisters shareholding in Merit was a gift from the first respondent. Accordingly, the Court of Appeal held that the respondents should be regarded as having an absolute majority and as being in control of Havilland. The vote of independent shareholders against the derivative action was insufficient to convince the Court that the respondents were not in control because the independent shareholders were not fully informed of the nature of the allegations of fraud against the respondents]
[Excerpt: Given that it is conceded that there was a prima facie case of wrongdoing on the part of the respondents…all that the appellant has to do to succeed…is to show to the satisfaction of this court that the respondents either had majority control of Havilland or were in the seat of power and had used their control or power to prevent Havilland from suing them for breach of fiduciary duties as directors…Given the close relationship between Ting and his sister, quite apart from their familial connection (he gave her enough shares to make her the largest shareholder of Merit), and her indirect interest in protecting Merit from being sued in a derivative action, there is reasonable basis to conclude that Ting’s sister would have voted for Ting’s group to prevent this action from going forward. In our view, and with respect to the Judge, given these circumstances, there was a high likelihood that she would vote for her brother. We cannot, of course, conclude without any doubt that because of consanguinity alone, Ting’s sister would vote for Ting, but we think that in respect of an Asian family which still tends to be rather clan-like, especially where the ties are through blood rather than marriage, the influence of such a relationship on business decisions cannot be discounted. It is, of course, impossible to tell precisely the degree of influence that Ting has over his sister, but given the other two factors mentioned above, in this case, it is probable that she would be in his camp…]

- In a case in which both shareholders hold 50% of the shares the court will likely determine control by examining whether the wrongdoer was able to prevent the company’s action from being brought against her

  - Sinwa SS (HK) Co Ltd v Morten Innaug [2010] 4 SLR 1 (High Court, Singapore)

    [Summary: In this case, Justice Ang discussed the “wrongdoer control” part of the “fraud on the minority test” in obiter (See above, for a more detailed summary of the facts)]

    [Excerpt: In my view, while shareholding (including shares that the errant director/shareholder may be able to garner outside of his own shares) would be an obvious way of determining control, it should not be the sole determinant. In reality, controllers of companies often exercise control without resort to voting power. The crucial question, to my mind, is not whether the defendant had the requisite shareholding but whether the defendant was able to prevent an action from being brought against him. As such, I would incline towards the “substance over form” approach adopted by Vinelott J. After all, the crux of the matter is whether the errant director was able to suppress an action against himself qua director. This was also the approach adopted by the English Court of Appeal in Barrett v Duckett [1995] BCC 243 (“Barrett”). In that case, like the present, both the plaintiff and the first defendant held 50% shares in the company. Although the plaintiff’s attempt to bring a derivative action was eventually struck out, Peter Gibson LJ held, on the issue of control, as follows (at 250): Although Mrs Barrett [the plaintiff] is not a minority shareholder but a person holding the same number of shares as the other shareholder, Christopher [the first defendant], in the circumstances of this case she can be treated as being under the same disability as a minority shareholder in that as a practical matter it would not have been possible for her to set the company in motion to bring the action]

- A derivative action may not be allowed when it is brought by a minority shareholder but is opposed by a fully informed “majority of the minority” or committee of independent directors

  - Smith v Croft (No 2) [1988] Ch 114 (Chancery Division, UK) [Sealy, 11.14]

    [Excerpt: In my judgment the word ‘control’ was deliberately placed in inverted commas by the Court of Appeal in Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)… because it was recognized that voting control by the defendants was not necessarily the sole subject of investigation. Ultimately the question which has to be answered in order to determine whether the rule in Foss v Harbottle applies to prevent a minority shareholder seeking relief as plaintiff for the benefit of the company is ‘Is the plaintiff being improperly prevented from bringing these proceedings on behalf of the company?’ If it is an expression of the corporate will of the company by an appropriate independent organ that is preventing the plaintiff from prosecuting the action he is not improperly but properly prevented and so the answer to the question is “No”. The appropriate independent organ will vary according to the constitution of the company concerned and the identity of the defendants who will in most cases be disqualified from participating by voting in expressing the corporate will. Finally in this aspect of the matter I remain unconvinced that a just result is achieved by a}
single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all the minority shareholders are for disinterested reasons satisfied that the proceedings will be productive of more harm than good. If [the plaintiff’s argument] is well founded once control by the defendants is established the views of the rest of the minority as to the advisability of the prosecution of the suit are necessarily irrelevant. I find that hard to square with the concept of a form of pleading originally introduced on the ground of necessity alone in order to prevent a wrong going without redress]

➢ Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore)

[Summary: At an EGM a resolution against continuing the plaintiff minority-member’s derivative action was unanimously passed by independent shareholders. The court found that the independent shareholders had not been informed about the “nature of the allegations of fraud” against the defendants. Therefore, the court did not consider whether an independent body of shareholders voting against the action was enough to prevent it from proceeding]

[Excerpt: It would therefore appear that the shareholders voted not to support the appellant’s action against Ting, Sia and Binti for the benefit of Havilland without being told about the nature of the allegations of fraud against them. It would appear that both Ting and the solicitors for Havilland did not take the trouble to explain to the shareholders what the claims were really about, nor did they let the shareholders read the expert’s affidavit or the exhibits…]

**Exception 5 to Foss:** The wrong complained of is such that “justice of the case” dictates that the minority should be able to commence an action"54

- This exception has neither been accepted nor rejected in Singapore

➢ Biala Pty Ltd v Mallina Holdings Ltd (No 2) (1993) 11 ACLC 1082 (Supreme Court of Western Australia)

[Excerpt: Equity is concerned with substance and not form, and it seems to me to be contrary to principle to require wronged minority shareholders to bring themselves within the boundaries of the well-recognised exceptions and to deny jurisdiction to a court of equity even where an unjust or unconscionable result may otherwise ensue. The circumstances of modern commercial life are very different to those which existed when Foss v Harbottle was decided. The body of shareholders of a public company is ordinarily far greater in number, and the controlling minds of individual shareholders are far more difficult to identify than was the case with the relatively small corporations that existed 150 years ago. These developments and the complexities and sophistication of modern shareholding make it often very difficult to bring derivative claims within the established exceptions. To the extent that policy may be relevant in determining whether a fifth and general exception to the rule should be recognized, I consider it to be desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demands that such a claim be brought, irrespective of whether the claim falls within the confines of the established exceptions]

➢ Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)[1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Summary: The English Court of Appeal explicitly rejected the “just of the case” exception]

➢ Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore)

[Summary: The court found that the appellant established the “fraud on the minority” exception and therefore did not need to consider whether the “justice of the case” exception was applicable under Singapore law]

**General requirements for exceptions 4 & 5:** The plaintiff must have “clean hands” & there is no need to show that there is no other available alternative remedy

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54 Chew, supra note 1, at 26-30.
Since the power to permit a shareholder the right to pursue a common law derivative action resides in equity a minority shareholder may be disqualified if she does not have “clean hands” or delays pursuing the action.  

- **Nurcombe v Nurcombe** [1985] 1 WLR 370 (Court of Appeal, UK)

  [Summary: A wife had commenced a derivative action on behalf of a company alleging that her husband had wrongfully diverted profits from the company. However, in earlier matrimonial proceedings, the wife had treated the profits allegedly diverted from the company as the assets of her husband. On that basis, she was awarded a lump sum in the matrimonial proceedings and it was a fact that at the time of the matrimonial proceedings, she was aware of her husband’s wrongdoing. Both Rees J and the Court of Appeal rejected the wife’s claim to be entitled to bring a derivative claim on behalf of the company]

  [Excerpt: The court is entitled to look at the conduct of a plaintiff in a minority shareholder’s action in order to satisfy itself that he is a proper person to bring the action on behalf of the company and that the company itself will benefit. A particular plaintiff may not be a proper person because his conduct is tainted in some way which under the rules of equity may bar relief. He may not have come with ‘clean hands’ or he may have been guilty of delay…In Gower, Modern Company Law…the law is stated in my opinion correctly: The right to bring a derivative [claim] is afforded the individual member as a matter of grace. Hence the conduct of a shareholder may be regarded by a court of equity as disqualifying him from appearing as [claimant] on the company’s behalf. This will be the case for example, if he participated in the wrong of which he complains]

- **Ting Sing Ning v Ting Chek Swee** [2008] 1 SLR 197 (Court of Appeal, Singapore)

  [Summary: The Court of Appeal considered the plaintiff-member’s delay in pursuing the common law derivative action as a legitimate factor to be considered but held that in this case the plaintiff-member was not responsible for the delay]

- **Sinwa SS (HK) Co Ltd v Morten Inhaug** [2010] 4 SLR 1 (High Court, Singapore)

  [Summary: In this case, Justice Ang found that the plaintiff was not acting *bona fide* in the best interest of the company by attempting to bring a derivative action. He based his finding on the fact that the plaintiff had “not laid all of his cards on the table” and “might not have disclosed the real motive for bringing a derivative action in the name of [the Company]”. Justice Ang further found that the plaintiff appeared “to be throwing everything but the kitchen sink at the defendant” as a result of being unhappy with a dispute that arose in the plaintiff’s business dealings with the defendant. This unhappiness, and not the best interest for the company, appeared to be what may have been behind the plaintiff bringing the derivative action—although, Justice Ang held that it was not for him “to speculate on the real motive behind the plaintiff’s actions” and confined his finding to the fact that “the application was not *bona fide in the interest of [the company]*”]

  [Excerpt: Finally, it must be remembered that the derivative action is an equitable device, used to alleviate the harshness which on occasion may result from a strict application of the rule in Foss v Harbottle ([47] supra). Accordingly, the maxim “he who comes to equity must come with clean hands” applies. It follows that he who seeks to use a derivative action must do so in the best interests of the company and not for some ulterior purpose. In this regard, the words of Lawton LJ in *Nurcombe v Nurcombe* (1984) 1 BCC 99,269 (at 99,273) are apposite: It is pertinent to remember, however, that a minority shareholder’s action in form is nothing more than a procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders. Since the procedural device has evolved so that justice can be done for the benefit of the company, whoever comes forward to start the proceedings must be doing [2010] 4 SLR Sinwa SS (HK) Co Ltd v Morten Inhaug 35 so for the benefit of the company and not for some other purpose. It follows that the court has to satisfy itself that the person coming forward is a proper person to do so]

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• The mere availability of an alternative remedy (i.e., a shareholder remedy other than a derivative action) will not preclude the court from granting leave to pursue a derivative action—especially when the alternative remedy is not a better remedy (e.g., it may cause delay)

➤ *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197 (Court of Appeal, Singapore)

[Excerpt: As regards the second alternative of an action for oppression under the Hong Kong equivalent of s 216, the respondents have not shown us why it affords the best solution to the dispute or that it is a better remedy for the appellant. To begin with, the appellant is not alleging that he has been oppressed, but that the respondents have used Havilland’s funds in breach of their duty as directors. Furthermore, an oppression action will require the appellant to start all over again, not in Singapore but in Hong Kong under the Hong Kong companies’ legislation, resulting in even more delay to the resolution of the present dispute. Delay is one of the grounds on which the respondents have argued that this court should not give leave to the appellant to commence the derivative action. For the above reasons, we are unable to accept the respondents’ arguments that the availability of alternative remedies is a sufficient reason not to grant leave to the appellant in the circumstances of this case]


[Excerpt: In *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1… the High Court dismissed the plaintiff’s claim for leave to bring a common law derivative action. In arriving at this decision, Justice Andrew Ang spent a significant amount of time discussing the “fraud on the minority test”. However, this entire discussion was obiter as Justice Ang ultimately found that, regardless of the outcome of the “fraud on the minority test”, leave had to be denied because “another adequate remedy” was available which made the derivative action unnecessary. The general principle that the availability of an alternative remedy may effectively foreclose the court from granting leave for a derivative action is on one level straightforward and on another level vexing. We respectfully agree with Justice Ang’s finding that the fundamental reason why the derivative action is necessary is that without such an extraordinary remedy “justice would not be done”. Therefore, it logically follows that the “necessity of a derivative action” must be established before leave for this extraordinary remedy can be granted. This much is straightforward. What is vexing is whether the mere availability of another remedy (e.g., an action for oppression or just and equitable winding up) axiomatically makes the derivative action unnecessary. In other words, will leave for a derivative action only be granted if there are no other available remedies? In this case, Justice Ang seems to agree with the Court of Appeal’s finding in *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 (“*Ting Sing Ning*”) that the mere availability of another remedy is insufficient to foreclose the court from granting leave for a derivative action. However, the Court of Appeal in *Ting Sing Ning* appeared to go one step further than Justice Ang by requiring that the available alternative to a derivative action must be “a better remedy” or “the best solution” before the court would be foreclosed from granting leave to bring a derivative action. While Justice Ang acknowledged that “at first blush” *Ting Sing Ning* appears to require an alternative remedy to provide “the best solution” or “a better remedy”, he goes on to find that the language used by the Court of Appeal was “purely rhetorical”. As such, in this case, Justice Ang found that an alternative remedy needs to merely provide “a real option” (not “the best solution” or “a better remedy”) to the plaintiff-shareholder for it to effectively foreclose the court from granting leave for a derivative action. We respectfully prefer the stricter standard that the Court of Appeal suggests in *Ting Sing Ning* over Justice Ang’s approach. In our opinion, courts should not be foreclosed from choosing “the best solution” – which is the logical implication of Justice Ang’s suggested approach. This holds true even when “the best solution” is an extraordinary remedy like the derivative action. Justice Ang’s finding that a shareholder seeking leave to bring a derivative action does so “at little or no risk to himself” *(Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [22]) suggests that the derivative action is uniquely at risk for minority shareholder abuse. Indeed, if minority shareholders could bring derivative actions “at little or no risk” to themselves, we would agree that derivative actions would be uniquely open to minority abuse – which may justify limiting them whenever another adequate remedy is available (even if the other available remedy was not the best remedy). However, we respectfully suggest that minority shareholders who bring derivative actions do so with risk to themselves. As such, we are of the view that derivative actions do not necessarily present any greater risk for abuse than other shareholders’ remedies and therefore should not be foreclosed from being granted unless a better remedy is
available. There are two primary reasons why shareholders who pursue derivative actions face substantial risk. First, minority shareholders who pursue a derivative action are *prima facie* responsible for their own legal fees and are potentially liable for a substantial portion of the legal fees of the defendant if they are unsuccessful in the leave application or derivative action (which was precisely what happened in this case). Second, even if the derivative action succeeds, any financial reward is paid to the company—not the minority shareholder who pursued the action. The only way that minority shareholders can benefit from a derivative action is if the award to the company causes a pro-rata increase in the value of their shares (which econometric evidence has shown is highly uncertain in listed companies). We suspect that the substantial risk that minority shareholders face when pursuing derivative actions is the reason why it is extremely rare for shareholders to pursue derivative actions in almost all jurisdictions. It also suggests that the court should only be foreclosed from granting them when there is a better remedy available. We submit that any wider prohibition would guard against a risk of minority shareholder abuse which may not exist.

**Question:** Does the rule in *Foss* and its exceptions satisfy the policy rationale for protecting minority shareholders?

### 3.7 Procedure for a common law derivative action

- The applicant for leave to pursue a common law derivative action has to be a member of the company.
- There is no particular procedure prescribed in the Rules of Court.
- The action should be commenced as an action on behalf of all the shareholders (i.e., as a representative action) except for the defendants. The company should be added as a co-defendant to ensure that it is bound by the judgement.
- If the “wrong procedure” is followed it will not necessarily be detrimental to an applicant’s derivative action if the procedural error is an irregularity flowing from a *bona fide* mistake which can be cured without prejudice to the defendant.
- The applicant should be able to show that she attempted to persuade the company to commence the action prior to bringing the application to pursue the action derivatively.
- The issue of standing should be decided as a preliminary issue prior to trial.

- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) (1982) Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]*

  [Excerpt: He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of [the company] by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v Harbottle* and sanctions the very mischief that the rule is designed to protect.]

- At the preliminary stage, the plaintiff member must establish her case on a *prima facie* basis—but is not required to prove her case.

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56 Chew, supra note 1, at 105-14.
57 See Clarkson v Davies [1923] AC 100 (Privy Council on appeal from Canada) at 111.
58 Sinwa SS (HK) Co Ltd v Morten Innhaug (2010) 4 SLR 1 at [19]).
Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204 (Court of Appeal, UK) [Sealy, 11.13/11.16]

[Excerpt: If...the plaintiff can require the court to assume as a fact every allegation in the statement of claim, as in a true demurrer, the plaintiff will frequently be able to outmanoeuvre the primary purpose of the rule in Foss v Harbottle by alleging fraud and ‘control’ by the fraudster. If, on the other hand, the plaintiff has to prove fraud and ‘control’ before he can establish his title to prosecute his action, then the action may need to be fought to a conclusion before the court can decide whether or not the plaintiff should be permitted to prosecute it. We do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of ‘fraud’ and ‘control’ are acts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries to the exception to the rule in Foss v Harbottle]

- The costs are borne by the plaintiff member and any proceeds recovered are awarded to the corporation
- The court has the discretion to order the plaintiff-member’s costs in pursuing a common law derivative action to be paid by the company, even where the action proves to be unsuccessful

Wallersteiner v Moir (No 2) [1975] 1 QB 373 (Court of Appeal, UK)

[Excerpt: But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action – that it was a reasonable and prudent course to take in the interests of the company – he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails. It is a well known maxim of law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails]

Smith v Croft (No 2) [1988] Ch 114 (Chancery Division, UK) [Sealy, 11.14]

[Summary: Walton J held that a claimant would have to show that the indemnity is genuinely needed in the sense that the claimant did “not have sufficient resources to finance the action in the meantime”]

- The uncertainty of the procedure for determining standing, receiving indemnification for costs and the difficulty in establishing “fraud on the minority” (particularly wrongdoer control) makes the common law derivative action unappealing for most minority shareholders

3.8 Practical considerations

- The usefulness of the common derivative action is limited
  - The implementation of the more efficient statutory derivative action (s. 216A) means that for practical purposes a common law derivative action will only be an option in cases where the company is a foreign incorporated company or a company listed on the Singapore Exchange (i.e., s. 216A only applies to Singapore incorporated companies that are not listed on the Singapore Exchange)

Chew, supra note 1, at 114-18.
Both the common law and statutory derivative actions do not result in a direct personal benefit to minority shareholders. All damages recovered as a result of a derivative action are paid to the company. This normally makes the derivative action a less attractive option for minority shareholders than the oppression remedy (s. 216) which provides flexible remedies that directly benefit minority shareholders (e.g., the purchase of an oppressed minority’s shares or a division of assets on winding up).

The wide scope and flexible remedies of the oppression remedy (s. 216) has also made other common law personal shareholder rights less important (e.g., in the case of a breach of the articles or improper removal of a director) and s. 392 has rendered the common law jurisprudence on irregularities moot.

However, the common law derivative action cannot be forgotten.

- Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore) and Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1 (High Court, Singapore) illustrates that the common law derivative action is still alive in Singapore.

- The oppression remedy is meant to mainly address personal (and not purely corporate) wrongs. Therefore, in situations where there is purely a corporate wrong, which does not amount to oppression (e.g., in a one-off breach of a director’s duty), a derivative action may be the most appropriate way for a minority shareholder to seek redress. This is particularly the case where the shareholder wants to maintain their interest in the company.

- In addition, the derivative action may be used as a tactic to force a settlement because once leave is granted to pursue a derivative action the company will normally be required to indemnify the plaintiff which means that the defendant must pay her lawyer while the plaintiff-shareholder can proceed to trial “using the company’s funds”. When a company is a foreign incorporated company or is listed on the Singapore Exchange the common law derivative action (and not s. 216A) will be the only option for carrying out this strategy.
IV. STATUTORY DERIVATIVE ACTION

4.0 History of the statutory derivative action

- The inadequate procedure and uncertain grounds for bringing a common law derivative action was widely seen as unsatisfactory
- Professor Woon suggested to the parliamentary draftsman to clarify and reform the law regarding the derivative action
- In November 1993, ss. 216A and 216B were enacted based on the Canadian model

4.1 Procedural requirements for bringing a statutory derivative action

- The company must be incorporated in Singapore and not be listed on the Singapore stock exchange (s. 216A(1))
  - *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197 (Court of Appeal, Singapore)
    - [Summary: This case involved a Hong Kong incorporated company, Havilland, which had its principal place of business in Singapore (and with its directors, at the material times, resident there) and so the appellant, who held 10% of the company’s shares, could not avail himself of s. 216A. Therefore, the appellant brought a common law derivative action claiming “fraud on the minority” as an exception to the rule in *Foss*. At first instance, the Court held that the “fraud on the minority” exception was not established as there was no wrongdoer control—thus, the appellant had no standing. The Court of Appeal reversed the lower Court’s decision finding that there was “wrongdoer control” and that the “fraud on the minority” exception to the rule in *Foss* had been established (See above, for more detailed facts)]
  - *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 (High Court, Singapore)
    - [Excerpt: As previously mentioned, I dismissed the plaintiff’s application for leave to commence a derivative action on behalf of [the Company]. It is pertinent to note at the outset that because [the Company] was a company incorporated in the British Virgin Islands, the plaintiff was unable to avail itself of the remedy provided in s 216A of the Companies Act (Cap 50, 2006 Rev Ed) (“the Act”): see *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 (“Ting Sing Ning”). Thus, this judgment deals only with the common law derivative action]
- The complainant must be a member of the company, the Minister of Finance (in the case of a declared company) or any other person who the court deems “proper” (s. 216A(1))

- A s. 216A action is brought in the company’s name (as opposed to a common law derivative action which is brought in the complainant-shareholder’s name) and is therefore technically not a derivative action. However, for practical purposes, because the action is controlled by the complainant-shareholder (rather than the board) it serves the same purpose as the common law derivative action and is normally referred to as a “statutory derivative action”

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60 Chew, supra note 1, at 293-323.
The loss suffered must be to the company (not the shareholder)

As with a common law derivative action (or any action), a statutory derivative action *cannot* be brought when the company’s claim that is being advanced is based on a reflective loss—unless one of the exceptions to the reflective loss principle applies (See above, section 3.6 of this handout)

- *Hengwell Development Pte v Thing Chaing Chin* [2002] 4 SLR 902 (High Court, Singapore)

[Summary: The plaintiff, Hengwell (“H”), was the majority shareholder of a Singapore unlisted joint venture company (“JVC”). Far East Packaging Industrial Pte Ltd (“FE”) was H’s minority partner in the JVC. The only business of the JVC was that of a wholly owned China subsidiary (“Q”). Under the JV agreement FE was granted day-to-day control of Q. H claimed that the directors appointed by FE to Q misappropriated funds from Q by making fraudulent misrepresentations (with the assistance of FE) to Q and the JVC. Thus, H claimed that FE and the directors appointed by FE breached their contractual and fiduciary duties owed to Q and the JVC. An action could not be commenced against the directors of Q by Q’s board because the board was controlled by the wrongdoer directors and there was no derivative action (or any equivalent) under Chinese law—so the JVC could not bring an action for and on behalf of Q. The JVC also could not commence an action against Q’s directors and FE because there was no quorum at the JVC’s directors’ meeting. Therefore, H sought leave to commence a s. 216A derivative action in the name of the JVC for damages flowing from the misappropriated funds. In response, the defendants claimed that the JVC had no standing as it had merely suffered a reflective loss (i.e., the loss in the value of its Q shares). The Court held that as there was no risk of double recovery, the policy reasons for the no reflective loss rule did not apply—and a *Johnson v Gore Wood & Co* exception was permitted. Therefore, H was allowed to bring a s. 216A derivative action in the name of the JVC for recovery of the damages resulting from the misappropriated funds]

[Excerpt: [I]f there is no risk of double recovery and there is no prejudice to the creditors or shareholders of the company, which has no remedy in any event under Chinese law, the policy reasons behind the decision in *Johnson v Gore Wood & Co* do not apply]

- The plaintiff must provide **14 days’ notice** to the directors before commencing an application for leave (s. 216A(3)) unless it can be established that 14 days’ notice is not practicable or expedient (s. 216A(4))

  - The *Companies Act* does not stipulate the exact form, nor does it provide any guidance with respect to the notice requirement
  - Based on the intention of s. 216A, the notice should provide enough detail to alert and inform the directors of the derivative action, so that they may decide whether the company should pursue the action itself
  - The requirement of notice ought *not* to be interpreted in an unduly technical, restrictive or onerous manner
  - There is no requirement that the company have extra time (i.e., more than 14 days) if such time is required for the company to receive independent legal advice
  - If the complainant can demonstrate that providing 14 days’ notice was “impracticable” then less notice may be allowed *if* the complainant can demonstrate why the court should exercise its discretion under s. 216A(4) to alter the notice requirement
    - Evidence that providing notice would undermine the action being sought and/or have been “futile” may amount to notice being “impracticable”

61 Chew, supra note 1, at 298-99.
The Court may consider the Company’s conduct before and after the s 216A leave application was filed when determining whether notice was “impracticable”

- However, the complainant must provide notice to the company as the court has no discretion to eliminate the notice requirement under s 216A(4). If no notice is provided, the court will not grant leave

- Re Bellman v Western Approaches Ltd (1981) 130 DLR (3d) 193 (British Columbia Court of Appeal, Canada)
  
  [Excerpt: Failure to specify each and every cause of action in a notice does not, in my opinion, invalidate the notice as a whole]

- Agus Irawan v Toh Tech Chye [2002] 2 SLR 198 (High Court, Singapore)
  
  [Summary: The plaintiff, the first and second defendants were directors of the third defendant company (“the Company”). The plaintiff and the first defendant were also shareholders, and the second defendant represented the interests of another shareholder. The plaintiff applied for leave under s. 216A to commence a derivative action in the name of the Company against the first and second defendants for breach of fiduciary duties of the directors. The plaintiff claimed that the company, as the customer of the Australian Wheat Board (“AWB”), was entitled to certain rebates but never received them because the AWB gave the rebates to various other parties on the instructions of the first defendant and a manager of the company. The defendants opposed the application on the grounds that: (a) the plaintiff did not give proper notice under s. 216A(3)(a) because the plaintiff’s application was amended after notice was given; (b) that it was not prima facie in the best interests of the company that an action be brought to redress the alleged wrongs cited by the plaintiff; and (c) that the plaintiff was not acting in good faith. The Court dismissed the plaintiff’s application on the ground that prima facie there was no evidence that the Company was entitled to the rebates. Therefore, it was not in the best interests of the company that an action be brought. The Court also found that the plaintiff had not acted in good faith as he had not been fully candid with the Court. However, the notice provided by the plaintiff under s. 216A(3)(a) was sufficient as the amendment to the plaintiff’s application did not change the fundamental nature of the application and therefore the defendants were not prejudiced by the amendment]

  [Excerpt: Counsel for the defendants argued that the plaintiff did not give the requisite 14 days’ notice because he applied to amend the application to include a claim for the price rebate when his application was initiated on the basis of a claim for “volume rebates”. In my view, the amendment was in respect of the particulars; the action for which leave was sought concerned a breach of fiduciary duties and I am satisfied that the defendants were in no way prejudiced by the inclusion of the additional item especially since the basic position of the defendants is the same in respect of both rebates]

- Tam Tak Chuen v Eden Aesthetics Pte Ltd and another [2010] 2 SLR 667 (High Court, Singapore)
  
  [Summary: The plaintiff (“Dr Tam”) and Dr Khairul were equal shareholders, the two sole directors and medical practitioners in “Eden Family Clinic” which carried on its business through Eden Aesthetics Private Limited (“EA”) and Eden Healthcare Pte Ltd (“EH”). Dr Khairul suspected Dr Tam was having an illicit affair with one of their nurses. Dr Khairul installed a closed circuit camera in the clinic and in December 2006 obtained evidence of Dr Tam’s illicit activities. On 4 March 2007, Dr Khairul confronted Dr Tam with the illicit video footage and threatened him with public disclosure. He then demanded that Dr Tam’s shares in both EA and EH be sold to him at a gross undervalue (“the share transfers”). Dr Tam acceded to this demand that same night. Shortly after, however, Dr Tam decided to rescind the share transfers transaction. On 26 November 2007, Dr Tam successfully brought an action against Dr Khairul to set aside the share transfers and to remove Dr Khairul from his director’s position. Subsequently, Dr Tam discovered that on 14 November 2006 Dr Khairul had incorporated KAR Pte Ltd (“KAR”) with himself as its sole shareholder and director. Dr Tam further discovered that in April 2007 Dr Khairul transferred a substantial amount of Eden Family Clinic’s business from EH and EA to KAR resulting in KAR receiving $1,109,129 and $1,492,864 and that Dr Khairul was paid $540,000 in directors’ fees by KAR. During the same period, EH’s and EA’s
combined revenue (which had been $1,796,104 in 2005 and $1,415,908 in 2006) plummeted to $71,695. Based on this evidence, Dr Tam applied for leave to commence a s. 216A derivative action on behalf of EA and EH against Dr Khairul and KAR (“the Application”) in respect of the alleged breach by Dr Khairul of his director’s duties owed to EA and EH. The purpose of the Application was to recover damages for any losses suffered by EA and EH as a result of the diversion of their businesses and also to get an account of profits made by Dr Khairul and KAR arising out of the transfer of the Eden Family Clinic business to KAR. In response to the Application, Dr Khairul applied to wind up EA and EH on the ground that it was just and equitable to do so. The High Court granted the Dr Tam’s s. 216A application to bring a derivative action and stayed Dr Khairul’s winding up applications]

[Excerpt: All the parties before me agreed that Dr Tam had in fact provided notice (pursuant to s 216A(3)(a)) to the directors of EA and EH of his intention to commence derivative proceedings against the Non-Parties. Initially, Dr Khairul raised the objection that Dr Tam had not allowed EA and EH to seek independent legal advice so that they could consider whether to commence proceedings against him. At the hearing, however, this objection was not proceeded with. That was a correct decision since such an objection is not supported by the language of s 216A(3)(a). Further, the rationale of s 216A is to confer authority on a complainant to commence an action on behalf of a company against a director of that company in circumstances when the directors do not wish to do so or when there is a deadlock which effectively prevents any action being taken by the company. The inability or refusal of the company to sue its director thus has nothing to do with obtaining independent legal advice]

Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another [2011] SGHC 88 (This case was appealed to the Court of Appeal and all of the grounds for appeal by the Defendant were dismissed and the plaintiff’s grounds for appeal were allowed in part in Brief Grounds of Decision on 15 September 2011—with detailed reasons to follow in due course)

[Summary: In this case, the plaintiff, Ms Fong, who was a non-executive director and minority shareholder of a Singapore-incorporated private company (“Company”), brought an application under s 216A of the Companies Act, for leave to pursue a statutory derivative action against the Company’s managing director (“Defendant”). The plaintiff claimed that the Defendant, in her capacity as the Company’s managing director, breached her fiduciary duties by diverting several business opportunities from the Company to other companies in which she or her relatives had undisclosed interests and by causing the Company to engage in numerous transactions with such related companies. Based on these claims, the High Court granted the plaintiff leave to pursue a s 216A statutory derivative action—but only on certain grounds. In arriving at the decision, Justice Prakash found that in spite of the fact that the plaintiff gave notice of her s. 216A leave application to the Company after the application was filed the Court ought to exercise its power under s 216A(4) to excuse the plaintiff from the notice requirement]

[Excerpt: The Application was filed on 24 May 2010, seven days before notice was actually given. Obviously, the 14 days’ notice requirement had not been met….Section 216A(4) gives the court the power to dispense with notice or to make such orders as the court thinks fit for the giving of notice if it is not expedient to give notice prior to the commencement of the action. In Woon’s Corporations Law…the learned authors opined that “[i]n cases where the giving of 14 days’ notice is not practicable, the complainant may give less notice or none at all before the application is made”….The burden thus falls on an applicant to show why notice, as required under s 216A(3)(a) of the Act, could not have been given….“Impracticability” was mentioned by the learned authors of Woon’s Corporations Law [as a reason for failing to meet the notice requirement] but I observe that it was neither elaborated nor explained. Perhaps this was justifiable since such an inquiry would be a question of fact, and the court would be entitled to look at the totality of circumstances to determine whether impracticability existed. The scope of matters to be considered thus ought not to be restricted to the state of affairs at the time of filing the application but, in addition, encompass the conduct of the relevant parties after such an application had been brought to the notice of the company….It was a key fact that after notice was served on [the Company, that the Company] did not proceed with any meaningful exercise that amounted to a bona fide and determined effort to investigate Ms Fong’s claims….If the purpose of the notice period is to allow a company’s board of directors to evaluate and act on the complaints of a disgruntled shareholder, it appeared to me that even if proper notice had been given, this intention would not have been met…. If [the Company] was indeed sincere in considering Ms Fong’s complaints, it should have conducted its own investigations and audit in order to provide the board of directors with an informed and considered decision on the merits of those complaints. Given the totality of

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the circumstances, there was a strong inference that, had any notice been served, it would have been met with the same response. It was therefore my view that even if Ms Fong had complied with the 14 days’ notice requirement, it was likely her notice would have been futile. Hence, I considered that it would be wrong to penalise Ms Fong for her failure to do so.


[Excerpt: A central argument advanced by the Defendant was that the leave application should be dismissed because the plaintiff provided notice of the leave application to the Company’s directors seven days’ after the application was filed; clearly violating the requirement under s 216A(3)(a) of the Companies Act that 14 days’ prior notice must be provided. The High Court, relying on its discretion to dispense with notice under s 216A(4) of the Companies Act, rejected the Defendant’s argument on the basis that it would have been “impracticable” for the plaintiff to have met the notice requirement. According to Judith Prakash J, the “key fact” supporting her finding of “impracticability” was that, even after notice was provided, the Company failed to make a “bona fide and determined effort to investigate [the plaintiff’s] claim”. This led her Honour to conclude that it would have been “futile” for the plaintiff to have provided 14 days prior notice as such notice would not likely have caused the directors to have considered whether the company should pursue the proposed action; rendering moot the central purpose of the notice requirement. As such, Prakash J held that it would be wrong to penalise the plaintiff for her failure to provide prior notice as such notice would have likely been “futile”. We respectfully agree with Prakash J’s general view that a plaintiff should not be penalised for failing to provide 14 days’ prior notice when it is clear that even if such notice was provided, the directors would still not have made a bona fide effort to consider whether the company should pursue the plaintiff’s proposed action (ie, when notice is clearly “futile”). We note, however, that such a “futility exception” to the notice requirement should be treated with extreme caution as its misapplication may undermine the important practical and commercial benefits of the notice requirement. In this vein, we respectfully caution that it should not be assumed that the directors’ failure to act based upon inadequate notice is necessarily evidence that they would have similarly failed to act had proper notice been provided. This is particularly true when, as occurred in this case, notice was received after the leave application was filed and, in turn, after formal legal proceedings were commenced. Indeed, in our respectful opinion, it is possible (if not likely) that directors will respond differently to plaintiffs who meet the notice requirement and have not yet commenced legal proceedings than to plaintiffs who have neglected the notice requirement and have already rushed to the courthouse. We respectfully would like to stress, however, that even if our caution is warranted, it does not necessarily undermine the High Court’s decision in this particular case. It is still possible, based on the particular circumstances of this case, that the High Court could have reasonably concluded that prior notice would have indeed been futile. No doubt this will be one of the issues that will be raised before the Court of Appeal. Rather, our hope is that this caution will quell any attempt to extrapolate a general principle from this particular decision that the futility exception can be established based solely on evidence of the directors’ failure to properly respond to inadequate notice. This being said, even in light of our caution, it should be acknowledged that a practical implication of Prakash J’s decision is that directors will now likely be advised to always make a “bona fide and determined effort to investigate [the plaintiff’s] claim”, even if inadequate notice is provided. In our respectful opinion, this is unquestionably a positive corporate governance development, which can be maintained if the behaviour of directors who receive inadequate notice is one — but not the only — factor that the court considers when determining whether the futility exception to the notice requirement applies.]

- Lee Seng Eder v Wei Kim Chwee [2014] 2 SLR 56 (High Court, Singapore)

[Summary: The plaintiff was a shareholder, former managing director and founder of a company. The plaintiff brought an application under s 216A for leave to pursue a derivative action on behalf of the company against its current directors. The High Court dismissed the application on the grounds that no notice was given to the company.

[Excerpt: The present facts are clearly distinguishable from those in *Fong Wai Lyn* because notice in that case had been given, albeit belatedly. On the present facts, Lee did not give notice at any point in time. … Also, it should be noted that s 216A(4) of the Act does not altogether dispense with the requirement to provide notice under s 216A(3)(a) … With due respect to the learned authors of *Walter Woon*, I do not think that s216A(4) dispenses with the notice requirement altogether. Such an interpretation would not comport...]

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with a plain reading of the provision. The provision states that “the Court may make such *interim* order as it think fit pending the complainant giving notice as required” [emphasis added]. This means that notice will be required even if the court chooses to make an interim order I would add that strict compliance with the notice requirement accords with the intention of Parliament to prevent an abuse of s 216A…]


[Excerpt: The implication of Ang J’s finding is that for a complainant to succeed in a s 216A leave application they must always, regardless of the circumstances, provide notice. As such, the court’s discretion is limited to determining whether the circumstances in a given case justify a complainant providing late notice. It is noteworthy that Ang J’s finding alters the general understanding of s 216A as both the learned authors of Walter Woon on Company Law (Sweet & Maxwell, 3rd Ed, 2009) and the High Court in *Fong Wai Lyn* (in *obiter*) previously suggested that the court had the discretion to dispense with notice entirely. In the authors’ respectful opinion, Ang J’s finding is preferable to the previous understanding of s 216A for at least three reasons. First, as his Honour observed, a plain reading of s 216A does not provide the court with the discretion to dispense with notice entirely. Such an interpretation is buttressed by the fact that the language in s 216A departs from the equivalent Canadian provision which does suggest that the court has the discretion to dispense with notice entirely. In addition, as his Honour noted, a strict interpretation of s 216A comports with Parliament’s intention that the strict conditions for granting a s 216A application must be satisfied to prevent its abuse. Second, the cost to the complainant of providing notice is normally minimal, while a failure to provide any notice at all risks needlessly wasting the court’s and parties’ resources in cases where the company would have commenced an action had notice been provided. Thus, on balance, making notice a requirement in all cases makes economic sense. Third, allowing exceptions to the clear rule that a complainant must always provide notice would require the development of a complex body of case law to determine the precise nature and scope of such exceptions. Making the already complex law governing derivative actions even more complex seems unwarranted, especially considering the relative ease and minimal cost for the complainant to provide notice (at some point) in all cases.]

- A s. 216A action cannot be discontinued or settled without approval from the court (s. 216B(2))

### 4.2 The “good faith” and “interests of the company” test

- The claimant must be acting in “good faith” to be granted leave under s. 216A62
  - The requirement appears to import the common law requirement that the plaintiff ought to have “clean hands” and to proceed without unreasonable delay
  - The onus is on the plaintiff to establish that she is acting in good faith (i.e., there is no presumption of good faith in favour of the plaintiff)
  - There is a crucial link between the good faith and interests of the company requirements in s 216A. As such, the plaintiff’s self-interested or questionable motives will only amount to bad faith if they are such that the company’s interests would not be served by allowing the complainant to pursue a derivative action
  - When the action is clearly within the best interests of the company to pursue, the defendant will likely have to show that the action is frivolous, vexatious or devoid of absolutely any merit to establish bad faith
  - However, the Court of Appeal recently stressed that the legal merits of a proposed derivative action alone should not be used to determine good faith. Rather, any determination of good faith must be linked “to an assessment of whether the applicant honestly or reasonably believes that there is a good cause of action”
  - While the Singapore courts have used a claim-by-claim analysis to determine if each individual claim satisfies the “best interests” requirement, it is less clear if such a

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62 Chew, *supra* note 1, at 301-05.
claim-by-claim analysis is suitable for the “good faith” requirement. This is because evaluating good faith normally requires examining the totality of a complainant’s conduct rather than examining a complainant’s good faith with respect to each specific claim and risks reducing the “good faith” requirement to merely an analysis of the legal merits of the complainant’s claims

- **Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] 3 SLR 1 (Court of Appeal, Singapore)**

  [Summary: This case involved two rival factions of shareholder directors. Each faction accused the other of breaches of directors’ duties. The lower court was of the view that “the prospect of two sets of directors each suing and counter-suing in the name of the company is inappropriate, if not farcical”. The lower court held that the more appropriate solution was to wind up the company, and leave to pursue a derivative action under s. 216A of the Companies Act was not granted. The defendant faction in the s. 216A application had petitioned to wind up the company on “just and equitable” grounds, albeit after the launch of the s. 216A application. They had, however, prior to the s. 216A application, suggested a winding up to the applicants, and the option of winding-up was, therefore, the court found, not an afterthought. Notably, the court underlined the fact that the company was not doing well, and there was an impasse in the management of the company. A winding-up, was therefore, in the circumstances, the more sensible and desirable solution. The Court of Appeal upheld the decision of the lower court]

  [Excerpt: The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour at all. Naturally, the parties opposing a s. 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant’s concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations, that may be sufficient for the court to find a lack of good faith on his part. An applicant’s good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s. 216A (3)(b) and (c)]

- **Teo Gek Luang v Ng Ai Tong [1999] 1 SLR 434 (High Court, Singapore)**

  [Summary: A director holding 25% of the issued and paid-up capital of a company applied under s. 216A of the Companies Act for leave to commence a representative action, in the name and on behalf of the company, against its managing director to recover a sum of money allegedly withdrawn unlawfully by him. Lai Kew Chai J granted leave to the complainant, subject to conditions, to pursue a derivative action to reclaim monies that the director had withdrawn from the company]

  [Excerpt: The defendants questioned the good faith of the plaintiff and suggested that in making the application she was acting out of pique and resentment. It was true that she had taken some time before making the application, that she had left the employ of the company under less than happy circumstances and that she had personal disputes with Mr Ng. Those matters taken together were not sufficient to evidence bad faith]

- **Richardson Greenshields of Canada v Kalmacoff (1995) 123 DLR (4d) 628 (Ontario Court of Appeal, Canada)**

  [Summary: Richardson Greenshields of Canada Ltd. (“Richardson Greenshields”) was a merchant bank that had bought shares in Security Home Mortgage Investment Corporation (“Security Home”) for the express purpose of pursuing a derivative action. Several years earlier, in 1988, Security Home had offered some of

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63 The Court of Appeal in Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] 3 SLR 1 (Court of Appeal, Singapore) followed this decision stating that “the approach taken [by the Court in applying s. 216A] was generally beyond reproach”.

64 This decision was followed in Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] 3 SLR 1 (Court of Appeal, Singapore) and Agus Irawan v Toh Tech Chye [2002] 2 SLR 198 (High Court, Singapore).
its shares to the public and Richardson Greenshields had been the selling agent of the shares. The shares offered to the public were preferred shares in the sense that they carried no voting rights, except in relation to an advisory contract entered into by Security Home with an advisory company. Security Home subsequently encountered financial difficulties. In 1993, the advisory contract was up for renewal. Kalmacoff was the director and president of both Security Home and the advisory company. Richardson Greenshields objected to the renewal of the advisory contract and gathered proxies from holders of the preferred shares to vote against the renewal. The board of directors of Security Home was thus restrained from renewing the advisory contract. Nonetheless, the board of directors then proposed that Security Home employ directly all the personnel of the advisory company, some of whom were also directors of Security Home. Richardson Greenshields protested, for this course of action flew in the face of the clearly expressed views of the holders of the preferred shares. Nevertheless, the board of directors ignored the protests of Richardson Greenshields and embarked upon employing the personnel of the advisory company. Richardson Greenshields then bought itself C$155 worth of Security Home shares and applied under the Ontario provisions for leave to bring an action in the name of Security Home, to challenge the propriety of the action taken by the board of directors. It was argued that Richardson Greenshields was not acting in good faith since it was pursuing the action as a result of having disgruntled and dissatisfied clients who had bought Security Home shares on its recommendation from 1988 to 1990. By actively pursuing the action, Richardson Greenshields was allegedly to have been motivated by a desire to gain a reputation as a shareholder champion, in order to solidify its relationship with existing clients and to attract new ones. The Ontario Court of Appeal held that Richardson Greenshields had met the good faith test and was allowed to pursue the action. The action, it was said, raised legitimate issues and could not be considered frivolous, vexatious or devoid of merit.

- Tam Tak Chuen v Eden Aesthetics Pte Ltd and another [2010] 2 SLR 667 (High Court, Singapore)

[Summary: The Court decided that the complainant met the “good faith” element of the s. 216A” test (See above, for more detailed facts)]

[Excerpt: I did not find there to be any substance in the allegation that Dr Tam’s good faith had been adversely affected by his personal feelings about Dr Khairul. As the Court of Appeal pointed out in Pang Yong Hock, there is bound to be hostility between the factions involved in all cases of this nature. If the relationship of trust and confidence between the two parties had not broken down, none of the events that led to Tam Tak Chuen and thereafter to this application and the winding up applications would have occurred. That the events have engendered anger and dislike of each other in the parties did not mean that Dr Tam’s actions were motivated by spite or a personal vendetta. It was clear from the facts that the main motivation was financial, not personal, and the beneficiaries of the action would be EA and EH and their shareholders who included Dr Khairul himself (ie, he would benefit in his capacity as a shareholder of the companies although he might lose the case in his personal capacity)]

- Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another [2011] SGHC 88 (This case was appealed to the Court of Appeal and all of the grounds for appeal by the Defendant were dismissed and the plaintiff’s grounds for appeal were allowed in part in Brief Grounds of Decision on 15 September 2011— with detailed reasons to follow in due course)

[Summary: The Court decided that the complainant met the “good faith” element of the s. 216A” test (See above, for more detailed facts)]

[Excerpt: In deciding whether the good faith element had been met, I was guided by the principles established by the local cases of Pang Yong Hock CA, Law Chin Eng and Another v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants) [2009] SGHC 223, Agus Irawan v Toh Teck Chye, and Poondy Radhakrishnan and Another v Sivapiragasam s/o Veerasingam [2009] SGHC 228. These principles are: (a) where there is a prima facie cause of action against the wrongdoer by the company, good faith is assumed; (b) bad faith is usually inferred from the lack of an arguable cause of action or a prima facie case; (c) self-interest, motive and hostility alone are insufficient to evidence a lack of good faith; and (d) the burden is on the defendant resisting a leave application to show that the plaintiff is not acting in good faith….In essence, the court took the view that shareholder fights leading to a commencement of a derivative action were insufficient to taint the good faith of an application as long as there was a valid basis for the claim. Such a position was similar to the one taken in Tam Tak Chuen v Eden Aesthetics Pte Ltd & Amor [2010] 2 SLR 667 [15] – [16], citing Pang Yong Hock CA. In cases of this nature, there will always be hostility between the
opposing factions involved. Unless the proposed derivative action is purely motivated by spite or a personal vendetta, and the action lacks any basis connected with a legitimate claim, shareholder fights are insufficient bases from which to infer bad faith. In the present proceedings, while Ms Kao’s complaint was Ms Fong’s proposed buy-out of her shares, I have found that Ms Fong had raised several legitimate claims that AT could pursue against Ms Kao. As a result, such a collateral purpose (even if true) would be insufficient to support any finding of bad faith that could preclude Ms Fong’s proposed derivative action.

- **Urs Meisterhans v GIP Pte Ltd** [2011] 1 SLR 552 (High Court, Singapore) (on appeal to the Court of Appeal)

[Summary: This case involved an application by the plaintiff, a shareholder and former director of a Singapore-incorporated private company (“Company”), who sought leave under s 216A to pursue a derivative action against two of the Company’s directors, Huber and Christian, for alleged breaches of fiduciary duties that they owed, as directors, to the Company. The Company was incorporated in Singapore to manage a private energy fund (“SEF”). The plaintiff argued that leave should be granted based primarily on three grounds: (1) that he had been wrongfully removed as a director; (2) that the Company’s directors and management had wrongfully withheld information from SEF’s investors and/or himself; and (3) that the Company’s directors had mismanaged SEF’s investments to the Company’s detriment. The High Court dismissed the plaintiff’s leave application finding that it was not *prima facie* in the interests of the company for the action to be brought and that the plaintiff had not acted in good faith.

[Excerpt: As for the requirement of good faith in s 216A(3)(b), the defendant bears the burden of proving that the complainant did not act in good faith as the court is entitled to assume that “every party who comes to court with a reasonable and legitimate claim is acting in good faith – until proven otherwise” (Pang Yong Hock at [18]; Agus Irawan at [9]). Good faith may be best demonstrated by the existence of a legitimate claim which the company’s directors are “unreasonably reluctant to pursue with the appropriate vigour or at all” (Pang Yong Hock at [20]). It is generally insufficient to rely on dislike, ill-feeling or other personal reasons such as hostility between the factions involved, pique and resentment to establish that the complainant lacked good faith (Pang Yong Hock at [20]; Teo Gek Luang at [20]). However, where the defendant is able to demonstrate that the complainant was “so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations”, Pang Yong Hock suggests that this may be sufficient to find a lack of good faith on the complainant’s part (at [20]). The Court of Appeal went on to add in Pang Yong Hock at [20] that the complainant’s good faith would also be in doubt if he “appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor”. Such behaviour would also call into question the legitimacy of the intended action, namely, whether allowing the intended action to be brought would be in the company’s interests at all (ie, the s 216A(3)(c) requirements).… Turning to the s 216A(3)(b) requirement of good faith, I found that there was sufficient evidence to show that the plaintiff had not acted in good faith in making this application… it appeared to me that the plaintiff had attempted to divert the defendant’s sole business of managing SEF to Sinitus AG, a company in which the plaintiff was a director and shareholder]


[Excerpt: In *Ang Thiam Swee v Low Hian Chor* [2013] SGCA 11, the appellant and respondent were the only remaining directors and minority shareholders in a company (the “Company”) whose majority shareholder director had recently been imprisoned and disqualified as a director for making fraudulent tax claims related to the Company. Following these events, an independent audit of the Company’s accounts revealed that the majority shareholder, who was by then a former director, had also misappropriated over $5m from the Company. The respondent alleged that the independent audit further revealed that the appellant, in his capacity as a director and co-signatory of the Company’s accounts, had also breached his director’s duties by misappropriating funds from the Company. Based on these allegations, the respondent succeeded in having the High Court grant him leave under s 216A to pursue a derivative action in the name of the Company against the appellant. In a watershed decision, the Court of Appeal overturned the High Court’s ruling and denied the respondent leave to pursue a s 216A derivative action. In arriving at its decision, the court clarified three important points about the good faith requirement in s 216A. First, the court made it clear that in a s 216A application, the onus is on the complainant to establish that he is acting in good faith (ie, there is no presumption of good faith in favour of the complainant). The Court of Appeal based this finding on the clear
language of s 216A (which states that the court must be “satisfied” that the “complainant is acting in good faith”) and Canadian and Australian case law which also places the onus on the complainant to establish good faith. This clarification is important because earlier local case law suggested that the court was entitled to “assume that every party who [came] to Court with a reasonable and legitimate claim [was] acting in good faith” (Agus Irawan v Toh Teck Chye [2002] 1 SLR(R) 471 at [9] (“Agus Irawan”); see also several cases which cite this passage from Agus Irawan with approval: Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] 3 SLR(R) 1 at [18]–[19]; Poondy Radhakrishnan v Sivapiragasam s/o Veerasingam [2009] SGHC 228 at [21]; Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd [2011] 3 SLR 980 at [72]). Second, the Court of Appeal clarified that the motivations of the complainant should be assessed in determining whether he has met the good faith requirement. In making this assessment, the court stressed the “crucial link” between the good faith and interests of the company requirements in s 216A. Specifically, it noted that a complainant’s self-interested or questionable motives will only amount to bad faith if they are such that the company’s interests would not be served by allowing the complainant to pursue a derivative action. In other words, the complainant’s questionable motives per se would not amount to bad faith. Rather, such motives would only likely amount to bad faith if they prevent the derivative action from serving the company’s interests. The court put a further gloss on evaluating whether a complainant’s motives would amount to bad faith by suggesting that when the complainant’s collateral purpose for bringing the derivative action is an abuse of s 216A, and in turn the company, it would amount to bad faith. On this basis, the court suggested that a useful test for determining bad faith may be found in the jurisprudence dealing with the grounds for striking out an action under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Third, the Court of Appeal clarified that an objective consideration of the legal merits of the proposed derivative action should not be seen as determinative of whether the complainant has met the good faith requirement. The court noted (at [29]) that it is possible for a complainant to “seek to bring a statutory derivative action in good faith even where there is no arguable or legitimate case to be advanced.” Conversely, a legitimate case may lack good faith if the complainant “is so motivated by vendetta … that his judgment will be clouded by purely personal considerations” (at [12]). As such, the court stressed (at [29]) that the legal merits of a proposed derivative action alone should not be used to determine good faith. Rather, any determination of good faith must be linked “to an assessment of whether the applicant honestly or reasonably believes that there is a good cause of action.” The authors respectfully commend the Court of Appeal for significantly clarifying the good faith requirement in s 216A, thus making the filter for derivative actions in Singapore more effective. Even after the court’s helpful clarifications, however, a real question still lingers about whether it makes sense for good faith to be listed in s 216A as a separate requirement. Indeed, it appears that all of the concerns articulated by the court above could have been mediated through the interests of the company requirement. In addition, the practice in Singapore leads to the conclusion that the interests of the company requirement functions as the primary filter for determining whether a s 216A derivative action will proceed. In fact, the authors are unaware of a single case in which the court has found that a proposed derivative action was in the interests of the company but failed to grant leave based on a lack of good faith. This is to the credit of the court as many leading scholars throughout the Commonwealth are of the view that “as long as the interests of the corporation are met, it should be of no consequence whether the complainant has good or bad intent” (Dennis Peterson & Matthew Cumming, Shareholder Remedies in Canada (LexisNexis, 2nd Ed Loose-leaf, 2009) at para 16.39; see also Arad Reisberg, Derivative Actions and Corporate Governance (Oxford University Press, 2007) pp 115–120). The authors fully support this view with the caveat that bad intent should be of consequence if (and only if) it interferes with the derivative action serving the interests of the company – reconfirming the futility of the good faith requirement.


[Excerpt: In Chan Tong Fan v Chiam Heng Luan Realty Pte Ltd [2013] SGHC 192 and Chan Tong Fan v Sloane Court Hotel Pte Ltd [2013] SGHC 193 (“Chan Tong Fan”), the principal complainant in two related s 216A applications was one of ten children of the deceased founders of a family business. The founders had incorporated two related companies to run the family business (“the Companies”) and eventually allocated all of their shares in the Companies to their ten children – each of whom subsequently became minority shareholders and four of whom became directors of the Companies. The complainant, who was never made a director and “had always been seen as a troublemaker” by his siblings, brought two applications under s 216A for leave to pursue a derivative action on behalf of each of the Companies against their respective directors (all of whom were his siblings) for breaching their directors’ duties. … Prakash J dismissed one of the complainant’s applications in its entirety, finding that: (a) it would not be in the interests of the company to pursue any of the alleged breaches of directors’ duties as none of them presented a legitimate or arguable
cause of action; and (b) the complainant had failed to establish that he was acting in good faith by seeking to commence a derivative action on behalf of the company. In the other related application, her Honour dismissed all of the complainant’s claims on similar grounds, except for one. The one claim for which leave was granted was based on the complainant’s allegation that one of the Companies’ directors had breached her duties by failing to properly account for corporate income that had been deposited in her personal bank account. With respect to this particular claim, her Honour held that the company had an arguable case and, thus, that pursuing it was in the company’s interests. In addition, her Honour found that the complainant had established good faith with respect to this particular claim (but not any of the others) on the basis that he was able to establish that the claim presented the company with “a legitimate cause of action”. …The authors are respectfully more hesitant, however, about whether the court should engage in a claim-by-claim analysis when evaluating the good faith requirement in a s 216A application. To accurately evaluate a complainant’s good faith normally requires examining the totality of a complainant’s conduct rather than examining a complainant’s good faith with respect to each specific claim. Attempting to bifurcate a complainant’s good faith into watertight compartments for each claim is normally an exceptionally difficult (if not impossible) task for the court. In addition, it risks making the determination of good faith contingent entirely on whether a particular claim provides “a legitimate cause of action”. Indeed, this appears to be how the finding of good faith was decided for the single claim that the High Court granted leave for in this case. Such an approach may be problematic as it appears to run counter to the Court of Appeal’s recent finding in Ang Thiam Swee v Low Hian Chor [2013] 2 SLR 340 which requires that good faith not be reduced to merely an analysis of the legal merits of the complainant’s claims.

• The complainant must establish that it is **prima facie** in the interests of the company that the action be brought\(^\text{65}\)

  \[\text{Prima facie}\]

  o The complainant must establish that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one (i.e., there is a reasonable chance that the action will succeed if brought)

  o However, the complainant does not need to prove the allegations on a balance of probabilities

  \[\rightarrow\] Richardson Greenshields of Canada v Kalmacoff (1995) 123 DLR (4d) 628 (Ontario Court of Appeal, Canada)\(^\text{66}\)

  [Excerpt: Before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one]

  \[\rightarrow\] Agus Irawan v Toh Tech Chye [2002] 2 SLR 198 (High Court, Singapore) (Appealed, Civil Appeal No 30 of 2002, dismissed by Court of Appeal on 13 September 2002 with no written grounds)

  [Excerpt: The terms ‘legitimate’ and ‘arguable’ must be given no other meaning other than what is the common and natural one, that is, that the claim must have a reasonable semblance of merit not that it is bound to succeed or likely to succeed, but that if proved the company will stand to gain substantially in money or money’s worth…I do not see any need to expand or broaden the case at this stage. At this stage the court need not and ought not be drawn into an adjudication on the disputed facts. That is what a **prima facie** legitimate or arguable case is all about. Leave to cross-examine in such situations ought to be sparingly granted. I need only consider the grounds and points of challenge raised by the defendants to see if they are sufficient in themselves to destroy the credibility of the plaintiff’s propounded case without a full scale hearing to determine who was truthful and who was not…That was made clear from the beginning, namely, that the first and second defendants were in breach of their fiduciary duties in causing rebates from the Australian Wheat Board to be channelled to a third party. The **prima facie** case that he must show is that the company was entitled to these rebates. The affidavits and documents that were filed in this case, as well as

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\(^{65}\) Chew, supra note 1, at 305-16.

\(^{66}\) This decision was followed in Pang Yong Hock v PKS Contracts Services Pte Ltd [2004] 3 SLR 1 (Court of Appeal, Singapore) and Agus Irawan v Toh Tech Chye [2002] 2 SLR 198 (High Court, Singapore).
the numerous submissions made by counsel for all parties have at best raised some suspicion that the plaintiff and the first defendant might not have told their stories to court, the full and true. Cutting away the verbiage, dust and smoke, I am satisfied that on the documentary evidence that Mrs Thio (who took over as counsel for the first and second defendants midway through the proceedings) drew my attention to — in particular, the documents from the Australian Wheat Board — the beneficiary to any rebate from the Australian Wheat Board is the company called Citra Flour Mill and not the third defendant. For this reason alone, the plaintiff’s application must fail]

- **Urs Meisterhans v GIP Pte Ltd** [2011] 1 SLR 552 (High Court, Singapore)

  [Summary: The High Court dismissed the plaintiff’s leave application with costs finding it was not *prima facie* in the interests of the company for the action to be brought (See above, for more detailed facts)]

  [Excerpt: The phrase “*prima facie*” in s 216A(3)(c) requires the complainant to show that there is a reasonable basis for the complaint and that the intended action is a legitimate or arguable one, ie, it has a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful (*Pang Yong Hock* at [16] to [17]; *Agus Irawan* at [8]; *Teo Gek Luang* v *Ng Ai Tiong* [1998] 2 SLR(R) 426 (“*Teo Gek Luang*”) at [14]). However, this being the leave stage, there is no need to demonstrate that the intended action will or is likely to succeed….The court is not required to make an extensive inquiry into the merits of the claim and ought not to be drawn into an adjudication on the disputed facts as it is merely determining whether leave for bringing the action ought to be granted and is not trying the action itself (*Agus Irawan* at [6]; *Teo Gek Luang* at [15]). In this regard, it would be sufficient for the court to rely on affidavit evidence filed by both sides in support of their claims to ascertain whether the action to be brought in the company’s name has any semblance of merit (*Pang Yong Hock* at [16] to [17]; *Agus Irawan* at [6])…the intended action bore no reasonable resemblance of merit]


  [Excerpt: The recent case of *Urs Meisterhans v GIP Pte Ltd* [2011] 1 SLR 552 (on appeal to the Court of Appeal) further highlights the complexity of s 216A of the Companies Act leave applications and also suggests that local courts have implemented a number of pragmatic and effective solutions to respond to such complexity…The High Court dismissed the plaintiff’s leave application on two grounds. First, Tay Yong Kwang J held that it would not have been *prima facie* in the interests of the Company to pursue the plaintiff’s proposed action as his claims supporting the action “were all without merit”. Second, his Honour found that the plaintiff had not brought the s 216A of the Companies Act leave application in good faith; evidenced by the fact that the plaintiff had sent unsubstantiated emails to investors and regulators which harmed the Company and had attempted to divert the Company’s sole business to a company in which he was a director and shareholder. In arriving at these findings, Tay J reiterated the well established standard that plaintiffs must demonstrate only that “the intended action is a legitimate or arguable one” to satisfy the requirement under s 216A(3)(c) of the Companies Act that the proposed action must appear to be “*prima facie* in the interests of the company”. Moreover, in line with existing authorities, his Honour noted that because applications under s 216A of the Companies Act are for leave, the court is not required to make an extensive inquiry into the merits of the claim and can rely solely on affidavit evidence. For at least three reasons, the authors respectfully agree with this facilitative approach to s 216A leave applications. First, it would be impractical to require a s 216A Companies Act plaintiff in a leave application to establish more than a legitimate and arguable case based on affidavit evidence. Indeed, requiring anything more would essentially force the plaintiff to conduct a trial in the leave application in order to be granted leave to conduct yet another trial; clearly a redundant and inefficient result. Second, such a facilitative approach is justified in light of the significant economic and informational hurdles that s 216A plaintiffs face as a result of being in the unique position of a plaintiff which is saddled with the burden of funding and building a case on behalf of another (separate) legal person: the company. The court sometimes attempts to mitigate the uniquely disadvantaged position of s 216A plaintiffs by including indemnification for costs or corporate disclosure requirements in orders granting leave. However, such formal *ex post* remedies do nothing to level the playing field for inherently disadvantaged plaintiffs in the leave application itself. In this vein, the facilitative approach of only requiring the plaintiff to establish an arguable case based on affidavit evidence can be seen as a much needed *ex ante* attempt to level the playing field for s 216A plaintiffs in the leave application. Third, even though the arguable case based on affidavit evidence standard is clearly facilitative, it can nevertheless still
provide an effective filter for weeding out abusive claims. As seen in this most recent case, if it is upheld by the Court of Appeal, even such a facilitative standard will rightfully scorn plaintiffs who try to thrust the company into a derivative action based on claims that are “without merit”]

➢ *Teo Gek Luang v Ng Ai Tong* [1999] 1 SLR 434 (High Court, Singapore)

[Excerpt: However, was there a case for a claim of $258,000 against Mr Ng? The plaintiff was unable to give any *prima facie* evidence capable of making out an arguable case. Regarding the substantial repayments, all she could do was to speculate, rather imaginatively, that Mr Ng could have withdrawn cash from one bank account of the company and paid it into another account. She also referred to two sums in her second affidavit. She alleged that Mr Ou omitted the sum of $30,851.65 relying on the acknowledgement of Mr Ng on 29 October 1996. Mr Ou’s accounts as deposed to by him covered the period including and much after 29 October 1996. There was no basis to say that there was an omission. The plaintiff boldly asserted that she would not accept the accounts of Mr Ou. She had to do much better than that before she could raise arguably a reasonable doubt over the accounts kept by Mr Ou. She was completely out of the picture after Mr Ou effectively had taken over the accounts department. The other was the payment by one Ooi Si Yuen of $31,000 to the company under a joint venture agreement with the company. The plaintiff alleged that this sum was wrongly credited in favour of Mr Ng. The answer was that this sum was credited to Mr Ng because he had paid Hishi Builders Pte Ltd on behalf of the company the sum of $50,000. The payment to Hishi Builders Pte Ltd was proved by their receipt in writing, exhibit NC-1. These transactions took place in the ordinary course of the company’s business. I could not act on the suspicions of the plaintiff. Accordingly, any order permitting the plaintiff to commence an action against Mr Ng to recover the sum of $258,000 had no reasonable prospects of success. The alternative of allowing her to proceed on terms that she provided security for costs was unattractive to me because the debts had been substantially paid and this piece of remedial legislation was not intended to encourage any litigation which was reasonably and objectively evaluated as devoid of merit. What had to be borne in mind was the fact that the plaintiff had personally agreed to the withdrawals of some $180,000. As for the balance, her counsel submitted that she was ‘constrained’ to agree, seeing that Mr Ng had already made the withdrawals. This submission was as tenuous as it was feeble. In any event, a substantial part of those debts had been paid. There was, however, the debt of $13,322.58 which should have been repaid by Mr Ng. I took into account, as required under s. 216B(1), that this loan was approved by 75% of the members of the company. Nevertheless, it was reasonable that Mr Ng should repay it, having received financial assistance from the company for a period of time. I decided to give him time and the orders were accordingly made]

Israel the company

- The broad commercial interests of the company must be considered (not just the monetary amount of the claim) when determining if it is in the company’s interests
- Whether other adequate remedies exist may also be considered in refusing to grant leave. However, merely because there is an alternative remedy is not alone a sufficient reason for the court to refuse leave
- The requirement of “good faith” in s. 216A(3)(b) and the requirement that the action be brought “in the interests of the company” are interconnected
- The defendant has the *onus* of demonstrating that any ratification by the majority was independent before the court will consider whether such a ratification demonstrates that bringing the action is not in the interests of the company (s. 216B)

➢ *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1 (Court of Appeal, Singapore)

[Excerpt: Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands “to gain substantially in money or in money’s worth” (per Choo JC in Agus Irawan) relates more to the issue of whether it is in the interests of the company to pursue the claim rather
than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway...In considering the requirement in s 216A(3)(c), the court should also consider whether there is another adequate remedy available, such as the winding up of the company (Barrett v Duckett [1995] 1 BCLC 243). We shall return to this case later when we consider the arguments on the “winding up reason”]

➢ Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore)

[Excerpt: Counsel for the second respondent has also submitted that this court should not allow this appeal because there are alternative remedies available to the appellant. The first is that Havilland can be wound up as the shareholders had expressed their agreement to such a course of action at Havilland’s annual general meeting held on 31 March 2006. Counsel cited Pang Yong Hock v PKS Contract Services Pte Ltd [2003] SGHC 195 (HC), [2004] 3 SLR 1 (CA) (“Pang Yock Hock”) as authority for this proposition....It would appear from this passage that the Court of Appeal held that Pang and Lee had not made out a prima facie case against Koh and Tan to justify the court granting leave to them to pursue a s 216A action against Koh and Tan. The appeal was dismissed but not for the reason that, as a matter of law, winding up PKS was an alternative remedy. In other words, it is not clear that Pang Yong Hock establishes the principle that when the remedy of a winding-up is available, the court should not entertain any application to pursue a s 216A action, however meritorious it may be]  

➢ Tam Tak Chuen v Eden Aesthetics Pte Ltd and another [2010] 2 SLR 667 (High Court, Singapore)

[Excerpt: First of all, it should be noted that the Court of Appeal made it clear in Ting Sing Ning v Ting Chek Swee [2008] 1 SLR(R) 197 (“Ting Sing Ning”) that Pang Yong Hock ([13] supra) was not authority for the proposition that, as long as the alternative of winding up the company was available, leave would be refused, however meritorious the proposed claim may be. It would be noted that one of the grounds on which the application in Pang Yong Hock was rejected was that the Court of Appeal had there held that the more appropriate remedy was to wind up the company. In Ting Sing Ning, however, the Court of Appeal confined the holding in Pang Yong Hock to the specific facts of that case. Neither of the applicants in Pang Yong Hock had made out a prima facie case against the proposed defendants. On the other hand, the special-accountant’s report had indicated that a case could be made out against all the shareholder-directors. If leave to commence derivative proceedings were granted, this would likely result in multiple derivative actions driven by the various factions of shareholder-directors against each other. It was therefore a more sensible solution in Pang Yong Hock to wind up the company concerned. What I had to determine was whether in this particular case the remedy of winding up was more beneficial to EA and EH than the commencement of derivative proceedings against the Non-Parties would be. I decided that winding up would, in all the circumstances of this case, be the less appropriate course]  


[Excerpt: In Teo Seng Hoe v IDV Concepts Pte Ltd [2013] SGHC 269, the complainant was a co-founder, director and 50% shareholder of a company (“Company”) who brought an application under s 216A for leave to pursue a derivative action on behalf of the Company against his co-founder (who was also a director and 50% shareholder of the Company), the co-founder’s wife (who was a senior employee of the Company) and the wife’s company (which she allegedly incorporated, with her co-founder-husband’s help, to misappropriate the Company’s business) (“defendants”). The High Court granted the complainant leave under s 216A to pursue a derivative action on behalf of the Company against the defendants. In arriving at its decision, the High Court rejected the defendants’ argument that the leave application should be denied merely because the alternative remedy of winding up the Company was available. Citing the Court of Appeal’s decision in Ting Sing Ning (above, para 9.21), Belinda Ang Saw Ean J held that an alternative remedy should only foreclose the court from granting leave to pursue a derivative action when it provides a remedy that “would be more beneficial” to the company than a derivative action. Her Honour’s interpretation of the Court of Appeal’s finding in Ting Sing Ning is important as previously the High Court in Sinwa SS (above, para 9.20), after citing Ting Sing Ning, held that an alternative remedy could foreclose the court from granting leave for a derivative action if it provided merely another “real option” (but not necessarily a better
option) than a derivative action. The authors respectfully prefer the approach taken by Ang J in this case as it appears to better reflect the Court of Appeal’s reasoning in Ting Sing Ning that an alternative remedy must provide “a better remedy” in order to foreclose the court from granting leave to pursue a derivative action. In addition, her Honour’s approach rests on the sound logic that the court should normally have the discretion to select the best available remedy to resolve a case. It also avoids the unsatisfactory result that the court may be forced to order a suboptimal remedy merely because another possible remedy provides a “real option” in a given case.]

Margaret Chew, Minority Shareholders’ Rights and Remedies, 299-300 (2nd ed, LexisNexis, 2007)

[Excerpt: Section 216B(1) of the Companies Act was clearly included by the draughtsman to remove the common law barrier to a minority shareholder action posed by the possibility that majority shareholders may ratify breaches of directors’ fiduciary duty. Section 216B(1) disallows the court to take unreasoned refuge behind a ratification of breach of duty by the majority shareholders. This is not to say that the courts cannot take reasoned refuge behind the fact that the majority shareholders have approved the breaches of duty by the directors, and thereby object to action being taken in respect thereof. Where the allegedly wrongdoing directors do not hold the majority of shares, or where they do not have any control or influence over the majority of shareholders, there is little justification for the courts to disregard the voice of the majority. The difference, however, between the common law procedure and the statutory derivative action appears to be that under the common law, the minority shareholder had to show that the wrongdoers were in control of the majority shareholders to establish a ‘fraud on the minority’ before the court would disregard the views of the majority shareholders. Section 216B appears to reverse the burden of proof such that the onus is on the allegedly wrongdoing directors to convince the courts that any shareholders’ resolutions absolving them of breaches of duty was a result of independent voting. If it is clearly shown that the directors did not have any influence or control over an independent majority of shareholders, who chose to approve the directors’ breaches of duty, the court may, as expressly provided for in section 216B(1), take evidence of this approval by the members into account]

4.3 Advantages and disadvantages of a s. 216A derivative action

- Advantages of s. 216A compared to the common law derivative action
  - It is clear that standing will be addressed as a preliminary issue (s. 216A(2))
  - It is clear that a plaintiff, on its leave application, may obtain an order that reasonable fees and disbursements will be indemnified by the company (s. 216A(5)(c))
  - The court may make any order “it thinks fit” to help facilitate the action—which may include giving the complainant access to important evidence (s. 216A(5))
  - No requirement to establish “fraud on the minority,” and in particular “wrongdoers control,” to have standing
  - Under common law, the minority shareholder had to show that the wrongdoers were in control of the majority shareholders to establish a “fraud on the minority” before the courts would disregard the views of the majority shareholders. Under s. 216B, the burden of proof is reversed as the onus is on the alleged wrongdoing directors to convince the court that any shareholder resolution absolving the directors was the result of an independent vote (s. 216B(1))
  - The complainant can intervene in an existing action (s. 216A)
  - The statutory derivative action may be used as a tactic to force a settlement because once leave is granted to pursue a derivative action the company will normally be required to indemnify the plaintiff which means that the defendant must pay her lawyer while the plaintiff-shareholder can proceed to trial “using the company’s funds”

67 Chew, supra note 1, at 310-16.
• Disadvantages that remain
  ▪ The courts at the interlocutory stage will still have to decide whether it is “in the interests of the company” to allow a derivative action (this may be no easier for the courts than determining “fraud on the minority”)
  ▪ The statutory derivative action fails to simplify the law as it does not appear to replace the common law derivative action for Singapore incorporated companies which are not listed on the Singapore Exchange and is not available for foreign incorporated companies or Singapore incorporated companies listed on the Singapore exchange

➢ Ting Sing Ning v Ting Chek Swee [2008] 1 SLR 197 (Court of Appeal, Singapore)

[Excerpt: These proceedings are concerned with a common law derivative action and not one under s 216A of the Companies Act because Havilland is a Hong Kong company and therefore is not entitled to avail itself of the remedy provided by s 216A. The extent to which the common law derivative action is still available to Singapore companies (if at all) in the light of the existence of s 216A is not one that we need to deal with in this case and we therefore make no comment thereon]

▪ As with any derivative action, the company (not the shareholder pursuing the claim) will receive any damages awarded—but the shareholder may be indemnified for costs

❖ Question: For practical purposes, what is the main difference(s) between the “fraud on the minority” test in a common law derivative action and the “good faith and interest of the company” test in a s. 216A derivative action?
V. OPPRESSION REMEDY (Commercial unfairness remedy) 68

5.0 Who may bring a s. 216 oppression claim for commercial unfairness?

- Sub-section 216(1) & (7) provide that the following categories of people may bring a claim:

1. A member of the company
   - A person who is merely the equitable owner of shares, but is not listed on the company register, is not a member (s. 19(6)) and therefore cannot bring a s. 216 claim
   - However, according to English case law, which is arguably persuasive, an equitable share owner can:
     - Have her nominee (i.e., the registered but not equitable shareholder) bring a claim on her behalf; 69 or,
     - Register as a member and bring a claim based on the commercial unfairness that occurred as an equitable member 70
   - A defendant in a s. 216 action is estopped from objecting to an applicant’s claim based on:
     - The unfair removal of the applicant member’s name from the registry; 71 or
     - The failure of those responsible for the company register to properly register the member 72

2. A person who (although not a member) has shares transmitted to her by operation of law
   - This includes a trustee in bankruptcy or personal representative of a deceased member, who although not listed on the company register, received the shares “by operation of law”
   - Note that an equitable purchase of shares is not considered “a transmission of shares by operation of law” and therefore does not provide an equitable owner of shares with a right to bring a s. 216 claim

3. A debenture holder of the company

4. The Minister in the case of a declared company
   - A “declared company” is a company which is designated as such by the Minister pursuant to Part IX of the Act 73

68 Chew, supra note 1, at 119-251.
69 Atlasview Ltd v Brightview Ltd [2004] EWHC 1056.
70 Lloyd v Casey [2002] 1 BCLC 454.
71 Owen Sim Liang Khui v Pasion Jaya Sdn Bhd [1996]1 MLJ113 (Court of Appeal, Malaysia).
72 Kitnasany v Nagatheran [2000] 2 SLR 598 (Court of appeal Singapore).
73 See Woon at 390-93.
• Section 216 only applies to companies and not “foreign incorporated” corporations—as the section uses the term “company” and not “corporation” throughout

  ➢ *Lim Chee Twang v Chan Shuk Kuen Helina [2010] 2 SLR 209* (High Court, Singapore)

[Summary: The plaintiff-shareholder (“Lim”) claimed he was the victim of oppression as a 40% shareholder of a “group” of five companies. The defendant (“Ms Chan”) was the only other shareholder, who in effect held 60% of the shares in all of the five group companies, except for one. Three of the group companies were incorporated in Singapore, one in the British Virgin Islands and one in Hong Kong. The two shareholders used all of the companies to carry out their artwork business. The business affairs of the group companies were not kept entirely distinct from one another and the majority-defendant-shareholder had absolute discretion to manage the companies as she deemed fit. Eventually, the relationship between the plaintiff-shareholder and defendant-shareholder broke down and the plaintiff-shareholder brought a s. 216 oppression action. He alleged that there was an agreement that all the companies would be owned 60% by the defendant-shareholder and 40% by him and that the companies had the character of a “quasi-partnership” which entitled him to certain expectations. In addition, the plaintiff-shareholder also alleged that the defendant-shareholder committed several acts of oppression against him including misappropriation of funds, failure to pay dividends and misuse of a company name. Accordingly, the plaintiff-shareholder sought orders under s. 216 to address these allegedly oppressive acts of the defendant-shareholder. The plaintiff-shareholder also sought that the defendant-shareholder buyout his shares at a fair price. The plaintiff-shareholder partially succeeded and the court ordered that the defendant-shareholder buyout the plaintiff-shareholder’s shares in the group companies]

[Excerpt: Section 216 clearly provides, inter alia, remedies for shareholders or debenture holders of “a company”. Under s 4 of the Act, this is defined to mean “a company incorporated pursuant to the Act or pursuant to any corresponding written law”. In *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197, the Court of Appeal held that a foreign company (in that case incorporated in Hong Kong) was not entitled to relief under s 216A of the Act. By a parity of reasoning, neither would s 216 apply to BVI and Consultants HK. It is therefore not surprising that Lim never served the writ on BVI or Consultants HK even though they are named defendants]

• A shareholder can bring an oppression action even if she is a majority shareholder. The key issue in the oppression claim is whether the oppressive party had “effective control over the affairs of the company”, and not whether they were a majority or minority shareholder


[Excerpt: In *Sim City Technology Ltd v Ng Kek Wee* [2013] SGHC 216, the plaintiff was a company that was a majority shareholder in a holding company (“Holding Company”). The Holding Company, through its subsidiary companies (“Subsidiary Companies”) and in co-operation with a number of other companies, was part of a group of companies that carried on a single business (“Corporate Group”). The plaintiff brought an action for oppression under s 216 against the managing director of the Holding Company (“defendant”) who, although only a minority shareholder of the Holding Company, managed to exercise effective day-to-day control over it and the Corporate Group. The High Court allowed the plaintiff’s s 216 claim … the High Court further reinforced Singapore’s pragmatic and expansive approach towards the oppression remedy by rejecting the defendant’s argument that the plaintiff’s status as a majority shareholder should bar it from succeeding in a s 216 action. In arriving at this finding, Lai J reasoned that the key issue in an oppression claim is whether the oppressive party had “effective control over the affairs of the company” (and not whether they were a majority or minority shareholder). Her Honour’s approach astutely recognises the complex reality of business relationships which may, as in this case, sometimes allow a minority shareholder to gain effective control of a company and, thus, to oppress the majority. It is also in line with the *raison d’être* of s 216: preventing non-controlling shareholders from being treated in a manner that is commercially unfair.]
5.1 The test in s. 216(1) is “commercial unfairness”

- Section 216(1) provides that any member (or debenture holder; Minister in the case of a declared company; or, “non-member legal possessor of shares”) of the company may apply to the court for an order on the ground:
  (a) That the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members…including himself or in disregard of his or their interests as members…of the company; or,
  (b) That some act of the company has been done or is threatened or that some resolution of the members…has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members …(including himself)

- As s. 216 provides members a remedy for personal wrongs suffered in their capacity as members (i.e., their personal capacity) it is an exception to the rule in Foss

- As s. 216 is a personal action, the applicant is prima facie responsible for her own costs and can receive direct benefits from a remedy (which is not possible in a derivative action)

- Although prima facie there are four grounds in s. 216(1) upon which a member can make an application, the four grounds have been interpreted as alternative expressions of a single ground based on “commercial unfairness”. To succeed under s. 216 the complainant member must demonstrate that the conduct of the company “offsends the standards of commercial fairness and is deserving of intervention by the courts”

- Over & Over Ltd. v Bonvest Holdings Ltd [2010] 2 SLR 776 (Court of Appeal, Singapore)

  [Summary: In Over & Over Ltd v Bonvests [2010] 2 SLR 776 (‘Over & Over’), the plaintiff and defendant were two family controlled companies that entered into a joint venture agreement to develop and manage a large hotel in Singapore. For the purpose of the joint venture, the plaintiff and defendant companies incorporated another company (‘JV Company’) in which they respectively owned 30% and 70% of the shares. The JV Company purchased land on Scotts Road and developed and managed a hotel on the land. The hotel was the sole business of the JV Company. Under s. 216 of the Companies Act (Cap 50, 2006 Rev Ed), the plaintiff claimed that three actions taken by the defendant, during a six-year period after the hotel was built, amounted to oppression: (1) the transfer of JV Company shares by the defendant to its related company which allegedly breached the plaintiff’s pre-emptive rights under an oral agreement it had with the defendant; (2) a rights issue in the JV Company orchestrated by the defendant to allegedly dilute the plaintiff’s JV Company shares; and (3) several related party transactions which were allegedly undertaken by the defendant in an unfair manner and without proper disclosure. At trial, the Judge rejected all three claims holding that the plaintiff consented to the share transfer, the rights issue was properly undertaken in order to repay the JV Company’s loan and the related party transactions were not unfair. Accordingly, his Honour rendered a decision dismissing the s. 216 action for oppression which was appealed by the plaintiff. In a watershed judgment, the Court of Appeal allowed the appeal. It held that the appellant had suffered oppression under s. 216 and ordered the respondent to purchase all of the appellant’s JV Company shares at fair market value without a minority discount. In arriving at this decision, Judge of Appeal V K Rajah (delivering the judgment of the Court of Appeal) respectfully disagreed with each of the three main findings of the trial Judge. The Court of Appeal held that the transfer of the JV Company shares in itself amounted to oppression. Justice Rajah reasoned that the share transfer ‘manifestly and irretrievably altered’ the informal nature of the JV]
Company by transforming it from a private to a semi-public company. This ‘profound’ change caused a ‘loss of substratum’ which, when considered together with the respondent’s conduct in securing the transfer, was oppressive. Contrary to the trial Judge’s finding, the Court of Appeal held that the appellant’s consent to the share transfer did not prevent the transfer from being used as evidence in the appellant’s s. 216 oppression claim. Specifically, Justice Rajah suggested that the importance of the appellant’s consent was substantially diminished by the fact that the respondent had made it known that the share transfer would ultimately be carried out with or without the appellant’s consent. The Court of Appeal further held, contrary to the trial Judge’s decision, that the rights issue was also in itself sufficient to support the appellant’s claim for oppression. Justice Rajah cited the ‘complete absence of any commercial justification’ for the rights issue as evidence of its oppressive nature. In a similar vein, he described the rights issue as an ‘ill-conceived attempt to dilute the [appellant’s] shareholding’ in the JV Company. Ultimately, the Court of Appeal held that the rights issue prejudicially forced the appellant to incur the unnecessary expense of infusing extra capital into the JV Company for no valid commercial reason—which was oppressive. With respect to the respondent’s related party transactions, the Court of Appeal agreed with the trial Judge’s general finding that the transactions did not in themselves amount to oppression. In fact, Justice Rajah acknowledged that the respondent’s related party transactions may have even benefited the JV Company and in turn indirectly benefited the appellant. However, he went on to find that the manner in which the related party transactions were conducted—which included numerous breaches to the JV Company’s articles—reinforced ‘the perception that the [respondent] had been in the habit of riding roughshod over the [appellant’s] interests’. As such, the Court of Appeal held that when viewed ‘holistically’ the related party transactions served to reinforce its finding of oppression.

[Excerpt: As pointed out by the [trial Judge] s. 216 appears to provide four alternative limbs under which relief may be granted – oppression, disregard of a member’s interest, unfair discrimination or otherwise prejudicial conduct. These four limbs are not to be read disjunctively. The common thread underpinning the entire section is the element of unfairness....In her book Minority Shareholders’ Rights and Remedies (LexisNexis, 2nd Ed, 2007), Margaret Chew rightly points out that (at pp. 120–121):... any exercise in further defining or refining each of the expressions ‘oppression’, ‘disregard of interests’, ‘unfair discrimination’ or ‘prejudice’, in order to ascertain any differences in their meaning and application looks to be a frustrating one. It would be futile, if not impossible, to split pedantic hairs over the precise and exact meaning of the medley phraseology favoured by the legal draughtsmen. The fruit of such labour could only add uncertainty and confusion....The expressions in the Singapore, Malaysian, UK and Australian provisions –‘oppression,’ ‘disregard of interests’ (or ‘contrary to interests’), ‘unfair discrimination’ and ‘prejudice’ (or ‘unfair prejudice’) – all point toward behaviour on the part of the majority shareholders or the controllers of a company that departs from the standards of fair play amongst commercial parties. Traditionally, such behaviour would have attracted the dyslogistic labels of unfair, improper, unjust or inequitable. Other unflattering labels have included the lukewarm tag of “reprehensible” to the fiery rebuke of “tyrannical”. It is such opprobrious behaviour, it is submitted, that the legal draughtsmen of section 216 of the Companies Act and its foreign equivalents, sought to impugn. Therefore, rather than distinguishing one ground from the other in section 216, the four grounds set out therein ought to be looked at as a compound one, the purpose of which is to identify conduct which offends the standards of commercial fairness and is deserving of intervention by the courts. To this end, the combined language of section 216 is suggestive, descriptive and evocative. Section 216 of the Companies Act was conceived and passed with the objective of protecting minority shareholders from majority abuse. In order to offer effective and comprehensive protection, section 216 confers on the courts a flexible jurisdiction to do justice and to address unfairness and inequity in corporate affairs. ...The discretionary power of the courts under section 216 is notoriously wide. Thus, in determining the scope of section 216, rather than deciphering the precise nuance of each of the expressions ‘oppression,’ ‘disregard of interests,’ ‘unfair discrimination’ and ‘prejudice,’ a compendious interpretative approach, with an emphasis on the rationale and purpose of section 216, is hereby advocated [emphasis added by the Court of Appeal]]

➢ Ng Sing King v PSA International Pte Ltd [2005] SGHC 5 (High Court, Singapore)

[Summary: The seven plaintiffs were minority shareholders who held approximately one-third of the shares in eLogicity International Pte Ltd (“eLogicity”). The first defendant was PSA International Pte Ltd (“PSAI”), a subsidiary of PSA Corporation (“PSA”) which held approximately one-third of the shares. The second defendant, P&O Australia Pty Ltd (“POAP”) was owned by P&O Ports Ltd (“P&O”) which held approximately one-third of the shares. In September 2000, PSAI and POAP (“the strategic shareholders”) entered into a detailed Shareholders’ Agreement with the plaintiffs, under which they acquired approximately
two-thirds of the shares in eLogicity and were entitled to nominate directors to the company’s board of directors. At the material time, the first plaintiff Ng Sing King (“Ng”) was Chairman of the board of directors and Chief Executive Officer. The second plaintiff Lim Khoon Hock (“Lim”) was a director and part of eLogicity’s management. The plaintiffs commenced the present proceedings against the strategic shareholders for alleged breaches of s. 216 of the Companies Act. Three specific circumstances were alleged as constituting the breaches. First, it was alleged that the plaintiffs were wrongfully excluded from negotiations between the strategic shareholders, their parent companies and SAVI Technology Inc (“SAVI”), an American company that was a competitor of eLogicity. Upon the termination of Ng and Lim’s employment, the strategic shareholders and their parent companies collaborated with SAVI. Second, PSAI and POAP’s nominee directors participated in discussions for the formation of the Port Information Exchange (“PIE”), an organisation which would possibly be in direct competition with eLogicity. Subsequently, POAP’s Jonathan Ladd (“Ladd”), also a director of eLogicity, negotiated on P&O’s behalf with HPH/LINE and Stevedoring Services of America (“SSA”) to invest in a “new eModal”, which was akin to the PIE. It was alleged that Ladd had breached his fiduciary duties to eLogicity. Third, the plaintiffs claimed that the strategic shareholders had systematically removed eLogicity’s existing management to put in place a new management that would comply with their instructions. They then decided to downsize eLogicity to facilitate their pursuit of similar businesses with other parties. In response, PSAI argued that Ng had initially recognised the benefits of an alliance between eLogicity and SAVI, but later became hostile to such a possibility and caused eLogicity to lose the opportunity to work with SAVI. PSAI also contended that the termination of Ng and Lim’s employment was a result of their poor performance, which caused eLogicity to suffer huge losses of approximately $800,000 a month. The subsequent decision to downsize eLogicity was made in the best interests of the company. On these responses, POAP concurred with PSAI. Additionally, POAP maintained that the plans concerning PIE never materialised. It submitted that Ladd’s involvement with the new eModal as the representative of P&O and done with the belief that the new eModal would complement eLogicity’s business. The plaintiffs prayed for the purchase of their shares by the strategic shareholders at fair value while POAP sought the winding up of eLogicity pursuant to s. 254 of the Companies Act, on the ground that the plaintiffs were entitled to SAVI and granted the POAP’s winding-up petition under s. 254. The court held that there was insufficient evidence to determine whether the strategic shareholders had worked together with SAVI in a business that was similar to eLogicity’s. Their parent companies, PSA and P&O, had collaborated with SAVI, but their actions could not be imputed to the strategic shareholders. Furthermore, it was not unreasonable for PSA and P&O to work with SAVI after all attempts by the strategic shareholders to convince eLogicity to join an alliance with SAVI had failed. The strategic shareholders’ decision to terminate Ng and Lim’s employment was not unfair. The unambiguous terms of the Shareholders’ Agreement precluded any understanding that Ng’s position would be entrenched or that the plaintiffs would be represented in the management. The strategic shareholders were entitled to remove Ng and Lim from management. Moreover, the alliance with SAVI was merely one of several factors the strategic shareholders took into consideration when deciding to remove Ng. It was also not unreasonable for them to hold Ng responsible for the poor performance of eLogicity. Their decision was ultimately not made in bad faith. There was no sinister motive underlying the strategic shareholders’ decision to downsize eLogicity. There was insufficient evidence to conclude that their desire to collaborate with SAVI was the sole reason for this decision. On an objective analysis of eLogicity’s performance, it was evident that the company was on the brink of atrophy and corrective steps had to be taken. Downsizing the company seemed to be the most realistic course of action to take in order to minimise eLogicity’s losses. Although the PIE could have posed a competitive threat to eLogicity’s business, there was meagre evidence to show that it actually came into being. With regard to the new eModal, although Ladd’s conduct in negotiating on behalf of P&O constituted a breach of his fiduciary duty to eLogicity, POAP was not vicariously liable for Ladd’s breach of duty since Ladd had exceeded the scope of his responsibility as POAP’s nominee director in eLogicity. Further, a breach of duty was not tantamount to oppressive behaviour unless it resulted in loss to the plaintiffs. HPH/LINE and SSA had cited other reasons for refusing to work with eLogicity, and might still have been keen to invest in the new eModal with or without Ladd’s involvement. Hence, Ladd’s actions, while deplorable, had not caused the plaintiffs any loss. It was clear that eLogicity’s business had been crippled by endless disputes between the shareholders and that they would no longer be able to work together. There was also evidence that the company was no longer viable and it was doubtful whether it could operate profitably. It was therefore just and equitable to wind up the company. Although the strategic shareholders had successfully defended themselves, they had made unfounded allegations against the plaintiffs and brought up irrelevant issues. In addition, their conduct, though not oppressive, had given the plaintiffs cause to be aggrieved. It was thus not appropriate for costs to follow the event in these circumstances. The parties were to bear their own costs for the originating summons]
There appears to be three alternative bases for establishing liability under s 216—oppression, disregard of a member’s interest and unfair discrimination or prejudice. However, it is now recognized that there should be no minute distinction between these individual terms, and that the common thread underlying the entire section is the element of unfairness. The Court of Appeal in Low Peng Boon v Low Janie [1999] 1 SLR 761 adopted this stance by construing s 216 broadly and using “fair dealings” as the litmus test. The quintessential litmus test in s 216 is therefore as Lord Wilberforce aptly put it in the seminal case of Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 at 229, in relation to the Malaysian equivalent of our s 216: “There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made…”

- Lim Swee Khiang v Borden Co (Pte) Ltd [2006] SGCA 33 (Court of Appeal, Singapore)

[Summary: It was accepted by the parties that the company was a quasi-partnership. The minority shareholder plaintiff was an executive director but was stripped of his executive powers at a shareholders’ meeting when it was proposed and resolved that directors were not to hold executive positions. However, several months later, at a directors meeting, two members of the majority shareholding faction were appointed as executive directors. The minority director maintained his director position but was “kept out entirely” from the affairs of the company. The court held that the treatment was unfairly discriminatory and oppressive under s. 216]

- Westfair Foods Ltd v Watt (1991) 79 DLR 48 (Alberta Court of Appeal, Canada)

[Excerpt: I cannot put elastic adjectives like “unfair”, “oppressive” or “prejudicial” into watertight compartments. In my view, this repetition of overlapping ideas is only an expression of the anxiety of Parliament that one or the other might be given a restrictive meaning]

- Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692 (Supreme Court of New South Wales, Australia)

[Excerpt: It has been accepted that one no longer looks at the word “oppressive” in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely, conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair…in my view a court now looks at [the relevant Australian provision] as a composite whole, and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely, commercial unfairness]

- Despite the four grounds being compounded in a single “commercial unfairness” test, the inclusion of four grounds in s. 216 must not be forgotten when considering case law from other jurisdictions

- Section 210 of the UK Companies Act 1948 only included the ground of “oppression” and made it difficult for the court to exercise its broad remedial power. As such, case law that considers s. 210 of the UK Companies Act 1948 provides little guidance for the application of s. 216
Section 459 of the UK Companies Act 1985 replaced the ground of “oppression” with “unfair prejudice” (which is now s. 994 of the UK Companies Act 2006) and made it easier for the court to exercise its broad remedial power. As such, case law that considers s. 459 of the UK Companies Act 1985 or s. 994 of the UK Companies Act 2006 provides useful guidance.

Malaysia, Australia and Canada have sections in their respective Companies Acts that are similar (but not identical) to s. 216 and thus, their case law may also provide useful guidance.

5.2 “Commercial unfairness” under s. 216 is determined by the written agreement and legitimate expectations between the shareholders

- The concept of “commercial unfairness” provides the court with extremely wide discretion for determining when to intervene into corporate affairs to disrupt majority rule.
- This makes it extremely difficult to provide a general rule for what corporate conduct will offend the standard of fairness and lead to a successful action under s. 216.
- The potential danger of the uncertainty created by the wide discretion of the court has been recognized by academics and the court.

- O’Neill v Phillips [1999] 1 WLR 1092 (House of Lords, UK) [Sealy, 11.25]

[Summary: Phillips initially owned the entire issued share capital of the company. O’Neill was employed by the company as a manual worker but soon rose through the ranks as he impressed Phillips with his energy and ability. In January 1985, Phillips gave O’Neill 25% of the issued share capital of the company and O’Neill was appointed as a director. O’Neill took over the running of the business and in December 1985, Phillips retired from the board. From 1985 to 1990, the construction industry saw a boom. The company was profitable and Phillips allowed O’Neill to draw 50% of the profits of the company, in the form of salary and dividend. Between 1989 to 1990, there were negotiations between Phillips and O’Neill to increase O’Neill’s shareholdings in the company to 50% but the negotiations did not result in a concluded agreement. In 1991, the construction industry went into a recession and the company was struggling. Relations between Phillips and O’Neill soured and in an acrimonious meeting in November 1991, Phillips told O’Neill that he was no longer to have overall management of the company and would no longer receive 50% of the profits. O’Neill continued to manage the German branches of the company and to receive what was payable in accordance with his 25% shareholding. O’Neill issued proceedings alleging unfairly prejudicial conduct under s. 459 of the UK Companies Act 1985. O’Neill’s grievances were that Phillips had acted unfairly in first, terminating the equal profit-sharing arrangement and second, repudiating the alleged agreement for the allotment of more shares to O’Neill. The House of Lords reversed the English Court of Appeal and held that the conduct of Phillips did not amount to any unfairness to O’Neill. The court was of the opinion that there was no basis consistent with established principles of equity to hold that Phillips had behaved unfairly either by resiling from the equal profit-sharing arrangement or by withdrawing from the negotiations with respect to increasing O’Neill’s shareholding to 50% of the share capital.

[Excerpt: Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history…that it chose this concept to free the court from technical considerations of legal right and to confer wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in Re J E Cade & Son Ltd … “The court…has very wide discretion, but it does not sit under a palm tree”]
- The starting point for determining commercial unfairness is the “written agreement” between the members

  - A member cannot normally claim unfairness unless there has been a breach of the articles (i.e., what is fair is what the members have agreed to)
  - Acting in accordance with the articles is indicative of fair play and therefore should be the starting point for any s. 216 action
  - However, a minor breach of a rule, which does not produce unfairness, will clearly not support a remedy under s. 216. In fact, successful cases under s. 216, normally involve on-going or multiple breaches that amount to commercial unfairness

- Over & Over Ltd. v Bonvest Holdings Ltd [2010] 2 SLR 776 (Court of Appeal, Singapore)

  [Excerpt: Distinctly, another principle that should be remembered.. is that courts, in deciding whether to grant relief under s. 216 of the Companies Act, must take into account both the legal rights and the legitimate expectations of members… “Commercial fairness”, therefore, is the touchstone by which the court determines whether to grant relief under s. 216 of the Companies Act…. However, whether the majority’s conduct may be characterised as unfair is, to be sure, a multifaceted inquiry… [It is well-established that informal understandings and assumptions may be taken into account in determining whether the minority has been unfairly treated. Hoffman LJ insightfully summed up the position in Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 (“Harrison”) when he stated…”Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term “legitimate expectation” to describe the correlative “right” in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form …(emphasis added by the Court of Appeal).” The inquiry as to the equities of the situation ultimately calls for a textured approach, rather than a technical one that is concerned only with the strict rights of parties]

- Re Saul D Harrison & sons Plc [1995] 1 BCLC 14 (Court of Appeal, UK) [Sealy 11.24]

  [Summary: The petitioner held ‘C’ class shares in a company that made industrial cleaning cloths. The business had been founded by her great-grandfather in 1891. The ‘C’ class shares carried rights to dividends and to capital distributions in a liquidation, but no entitlement to vote. The company had substantial assets but had recently been run at a loss. The petitioner complained that the directors (her cousins) had unreasonably continued to run the business (and to pay themselves salaries, although the court ruled that these were not excessive), instead of closing the business down and distributing the assets to the shareholders. Vinelott J and the Court of Appeal held that the petitioner had no ‘legitimate expectations’ over and above and expectation that the board would manage the company in accordance with their fiduciary obligations and the terms of the articles of association and the Companies Act, and that no breach of these obligations had been shown]

  [Excerpt: In deciding what is fair or unfair…it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case… will be to ask whether the conduct which the shareholder complains was in accordance with the articles of association]
• However, where the majority’s assertion of power complies with the written agreement between the members but conflicts with the “legitimate expectations” of the minority members, the conduct of the majority can be challenged under s. 216. “Legitimate expectations” or “equitable considerations” arise out of informal or implied understandings between the shareholders which formed the basis of their association and “mutual trust and confidence” but were not put into contractual form

➢ Over & Over Ltd. v Bonvest Holdings Ltd [2010] SGCA 7 (Court of Appeal, Singapore)

[Excerpt: ....[A] majority shareholder may be within his strict legal rights but the manner in which he exploits his legal rights may call for the court’s intervention. In particular, it is trite law that conduct can be unfair without even being unlawful (emphasis added by the Court of Appeal)... First, those who enter into a corporate structure often do not always spell out their rights and obligations in their entirety, in part because they are unable to anticipate all the eventualities that may arise, but also because it would be disproportionately expensive and time-consuming to do so even if they could. Naturally, this problem is particularly acute in respect of those who set up business with others essentially on the basis of mutual trust and confidence – they would have operated on the belief that the majority would take their interests into account and that any such problems would be readily and civilly ironed out. Ironically, often these understandings are not documented, let alone spelt out in legal terms, as it might be perceived that the very documentation of the understanding might betray a lack of trust. This might seem naïve but unfortunately this behaviour is not infrequent, even today, in commercial dealings; relationships thin in words but thick in trust underpinned by the implicit belief that each will do right by the other without the need to spell out in embarrassing detail what is expected or needed. Second, the reality of the nature of a closed company makes it susceptible to exploitative conduct by the majority simply because the minority has no obvious legal remedies spelt out in the memorandum and articles of association. At the risk of stating the obvious, it bears mention that minority shares in private companies are often difficult to dispose of, and even if there was a market for them they would often have to be sold at a substantial discount]

• “Legitimate expectations” based on the informal understanding

  ▪ The nature of informal understandings suggests that in most cases they are limited to “quasi-partnership” arrangements
  ▪ For a company to be classified as a “quasi partnership” it should in most cases have at least one or more of the following features:
    o A personal relationship between the shareholders that involves mutual confidence (this normally exists where a pre-existing partnership has been incorporated);
    o An agreement that all or some of the shareholders will participate in the conduct of the business; and/or
    o A restriction on the transfer of shares

• NB: The Court of Appeal in Over v Over suggests that this last criteria is not important in establishing whether a company is a quasi-partnership


[Excerpt: Although we generally support the Court of Appeal’s quasi-contractual approach [in Over & Over], we respectfully question one of the critical steps identified by Justice Rajah in applying this approach. Justice Rajah suggests that a preliminary step in evaluating a s 216 oppression claim is to determine whether the company in question is a quasi-partnership. As mentioned above, this determination is important because in quasi-partnerships it is more
likely that the understandings of shareholders will be informal (rather than formal) in nature. In addition, Justice Rajah suggests that in the context of quasi-partnerships, courts should apply “a stricter yardstick of scrutiny” (Over & Over at [83]) because minority shareholders are more vulnerable due to the relative informality of understandings and illiquidity of shares in such companies. Up to this point, we agree with Justice Rajah’s approach. However, Justice Rajah goes on to find that in the process of determining whether a company should be classified as a quasi-partnership, the court should not consider whether there is a restriction on the transfer of the company’s shares (“share transfer restriction”). We respectfully disagree with this point. We submit that there are at least three important reasons why the court should consider the existence of a share transfer restriction when determining whether a company is a quasi-partnership. First, a hallmark of the corporate form, which distinguishes it from a general partnership, is that it facilitates the free transfer of an investor’s economic interest through the transferability of shares. As such, restricting the transferability of shares removes one of the key distinctions between the corporate form and general partnership which arguably makes a company more “partnership-like”. Second, restricting the transferability of shares increases the likelihood that shareholders will base their relationships on informal understandings because there is a greater certainty that all of the shareholders will remain familiar to one another – which is a hallmark of quasi-partnerships. Third, by definition, a restriction on the transferability of shares reduces the liquidity of shares which is a primary reason that Justice Rajah provides for treating quasi-partnerships as a special class of companies in the first place. In sum, as share transfer restrictions make companies more “partnership-like” and support several features that distinguish quasi-partnerships from other companies, we submit that they should be considered by the court in evaluating a company’s quasi-partnership status. This is not to say that a “quasi-partnership” company cannot arise in the absence of share transfer restrictions but that the existence of such a restriction is an important factor to be taken into consideration.

- It should be noted that although most “quasi-partnerships” are private companies it is possible for a public company to be classified as a “quasi-partnership”—but such a classification is extremely unlikely in the case of listed public companies.

- In cases where legitimate expectations are based on an informal understanding between the parties, the parties must have explicitly communicated the understanding to each other.

> **Thio Keng Poon v Thio Syn Pyn [2010] 3 SLR 143** (Court of Appeal, Singapore)

[Summary: In this case, the appellant was the founder, director, managing director and chairman of a number of highly successful companies in the dairy business (“Group Companies”). Over several years, the appellant transferred his shares in the Group Companies to his wife and six children for no consideration. The share transfers ultimately resulted in the appellant’s wife and children holding a majority of the shares in the Group Companies. The appellant claimed that the impetus for gifting his shares to his family members was to provide them with an economic stake in the group companies, financial security after his death and to minimise estate duty fees. The legal battle between the appellant and his family arose out of an external audit of the group companies which revealed that the appellant had been “double-claiming” for a number of business related travel expenses. The appellant provided an explanation for his “double-claims” and insisted that he had not claimed more than the rules permitted. However, based on the external audit and without any notice to the appellant, the appellant’s oldest son called a board meeting at which the appellant was removed from his director, managing director and chairman positions (“management positions”). The appellant’s removal from his management positions was ratified at annual general meetings of the group companies in which the appellant’s family members exercised their majority voting power. The appellant challenged his removal on several grounds including claiming that it amounted to oppression under s. 216 of the Companies Act (Cap 50, 2006 Rev Ed). The central argument of the appellant’s s. 216 claim was that the share transfer to his family members was undertaken based on the informal understanding that he would retain his management positions. According to the appellant, this informal understanding gave rise to a “legitimate expectation” which was breached when he was removed by his family members from his management positions. Over & Over 68]
positions. In turn, the appellant claimed that his family’s act of removing him from management amounted to oppression under s. 216 of the Act. The Court of Appeal, upholding the trial judge’s decision, found that there was no evidence of any understanding between the appellant and his family members that the appellant would maintain his management positions after the share transfers. As such, the appellant’s s. 216 claim for oppression was rejected. In arriving at this decision, Judge of Appeal Chao Hick Tin (delivering the judgment of the Court of Appeal) placed an important limitation on the scope of s. 216 by clarifying that a shareholder’s unilateral belief – even if that belief is reasonable – is insufficient to give rise to a “legitimate expectation”. In other words, for a legitimate expectation to arise under s. 216 it must be based on an understanding between all of the shareholders. Applying this principle to the case at hand, Justice Chao noted that the appellant indeed believed that the share transfers were undertaken based on the understanding that his family members would allow him to retain his management positions. Moreover, the appellant’s belief appeared to be grounded in the “implicit trust which the appellant had in his wife and children”. However, Justice Chao went on to find that the appellant’s belief did not amount to a legitimate expectation because it existed only “in the appellant’s mind” and “there was no way his family members could have known about it”: Thio Keng Poon v Thio Syn Pyn [2010] 3 SLR 143 at [34]. In short, the appellant’s “unilateral assumption or belief” was not an understanding between all of the shareholders and therefore could not be used to support his s. 216 oppression claim.

[Excerpt: In relation to…[the Minority Oppression issue], the Judge held that the Understanding did not in fact exist. It was purely something that existed in the Appellant’s own mind. Indeed, the Appellant’s evidence was that he never discussed the Understanding with any of his children, although he alleged that he had discussed it with his wife. In essence, the Understanding was unspoken and therefore, there was no way his family members could have known about it or of what he had in mind. The Judge noted that the Appellant was unable to specify precisely the terms of the Understanding. Moreover, the Appellant had also failed to mention the Understanding to the Respondents when on numerous occasions it would have been appropriate and advantageous to have brought it up….After a careful examination of the evidence the Judge held that the Appellant had failed to prove, on a balance of probabilities, that there was such an Understanding. There is hardly any basis for us to disagree with such a finding of fact by the Judge….We do not see any merit in the Appellant’s arguments that he had “legitimate expectations arising from the terms of the Understanding”. On the evidence before the court, the Understanding was simply not proved to have existed. If the Understanding was proved on a balance of probabilities to have existed, then there would have been a basis for the Appellant to argue that he had legitimate expectations arising out of it. Indeed, the main plank in the Appellant’s case was that “[i]n breach of the Appellant’s legitimate expectations arising from the Understanding, the Respondents had conducted the affairs of both Malaysia Dairy and Modern Dairy in a manner oppressive to the Appellant” [emphasis added]. Unfortunately for the Appellant, his failure to prove the existence of the Understanding must necessarily mean that his s 216 claim would also fail. Indeed, the Appellant accepted under cross-examination that if the Understanding did not exist, “the rest of [his] family members can get together at any time and remove [him]”]


[Excerpt: We respectfully submit that the Court of Appeal’s decision [in Thio Keng Poon v Thio Syn Pyn [2010] 3 SLR 143] to limit the scope of legitimate expectations to understandings between all of the shareholders in a company makes sense. Expanding the scope of legitimate expectations to include the unilateral beliefs of individual shareholders would open a Pandora’s Box for the oppression remedy in Singapore – even if those unilateral beliefs were reasonable. Such an expansion would allow an individual shareholder to use s 216 to effectively enforce “secretly held terms” on all other shareholders (ie. terms which the other shareholders neither agreed to nor were unaware of). This would introduce a significant amount of uncertainty into shareholder relationships in Singapore which would discourage equity investment. In addition, creating a situation where the enforceable relationship between shareholders is based on what exists solely in the minds of individual shareholders would create an evidentiary nightmare in s 216 oppression cases. Our strong support for the Court of Appeal’s clear limitation on s 216 claims does, however, give rise to a query about how the limitation was specifically applied in this case. Based on the trial judge’s findings, the Court of Appeal held that “the [appellant’s] understanding was unspoken and therefore, there was no way his family members could have known about it”: Thio Keng Poon v Thio Syn Pyn at [34]. We submit that merely because a shareholder’s understanding is “unspoken” does not axiomatically mean that it cannot be known to (or shared by) the other shareholders. In fact, considering business and cultural norms in Singapore, it seems plausible that when a founding patriarch gifts his shares to his family, out of
respect for the patriarch, there is an understanding that he will maintain a management position in the company. One could reasonably argue that such an understanding would exist even if it was not specifically articulated to his family members at the time of the share transfer. If such a general unspoken understanding indeed exists in Singapore, then there may have been a legitimate expectation that the appellant not be removed from his management positions. However, even if the court would have found such an unspoken legitimate expectation, it may not have changed the outcome of this case because the appellant’s double-claiming behavior may have ultimately fallen beyond the scope of protection provided by the unspoken legitimate expectation.

- Where the parties have sought professional advice and negotiated the terms of the articles in question it is unlikely legitimate expectations will arise based on informal understandings

- **Over & Over Ltd. v Bonvest Holdings Ltd [2010] 2 SLR 776** (Court of Appeal, Singapore)

  [Summary: The Court of Appeal found that the JV Company in question was formed as a quasi-partnership and that the agreement between the parties of how the JV Company would be managed rose to the level of legitimate expectations—the breach of which was held to amount to oppression under s. 216 (See above, for more detailed facts)]

  [Excerpt: Distinctly, another principle that should be remembered…is that courts, in deciding whether to grant relief under s 216 of the Companies Act, must take into account both the legal rights and the legitimate expectations of members. While these legal rights and expectations are usually enshrined in the company’s constitution in the majority of cases, a special class of quasi-partnership companies form an exception to this rule (emphasis added by the Court of Appeal).…It appears quite plain to us that the circumstances under which [the JV Company] was incorporated suggest that it was founded upon a relationship of mutual trust and confidence between the [appellant-plaintiff and respondent-defendant].…This failure to record essential terms of their agreement in writing can only be rationalised and explained on the basis that the [appellant and respondent] had consciously chosen to enter into a relationship implicitly based on mutual trust and good faith with respect to the conduct of the affairs of [the JV Company] in the future…Such an “understanding” would be consistent with a finding of [the JV Company] being a quasi-partnership company…We are, however, unimpressed by [the] submissions that the existence of “restricted exit options” indicates a greater likelihood of [the JV Company] being ab initio a quasi-partnership. Pre-emption rights with respect to share transfers, like those enshrined in Article 30 of Richvein’s Articles of Association, are a common feature of many modern company articles and/or shareholder agreements, and on their own do not carry much weight in establishing the existence of any quasi-partnership]

- **Tan Choon Yong v Goh Jon Keat [2009] 3 SLR(R) 840** (High Court, Singapore)

  [Summary: In this case, the two defendants incorporated a start-up consultancy business (the “Company”) to provide a range of services in the engineering and construction industries. After incorporation, the two defendants asked the plaintiff, who was a successful managing director of an established consultancy firm, to resign from his current position and join their Company based on a mutual understanding that he would be the CEO, a director and play a major role in running the Company. As agreed, the plaintiff was appointed as the Company’s CEO, a director (along with his wife and the two defendants) and allocated 25.3% of the Company’s shares (with the plaintiff’s wife receiving 0.8% and the two defendants each receiving 25.3% of its shares). To raise additional capital, the Company listed itself on Phillip Securities’ Over-The-Counter Capital (“OTC Capital”). As part of OTC Capital’s listing requirements, the Company produced a disclosure document which, in order to attract investors, specifically highlighted the plaintiff’s consultancy experience and the leadership role he would play in the Company. As a result of the listing, the Company raised $3,816,800 from the placement of 19,084,000 shares. Within weeks after listing, the Company became dysfunctional. Although the plaintiff was crucial to the Company’s business, the defendants planned to get rid of him. The plaintiff complained that he faced numerous obstructions in running the Company. He was denied access to important Company records and, despite repeated requests, was never shown the defendants’ generous employment contracts which they allegedly had signed with the Company. The plaintiff was also denied sufficient co-operation from the defendants to address OTC Capital’s serious concerns about how the Company had utilized investors’ funds. After considerable discord, the defendants used their majority voting power to appoint two new directors to gain control of the Company’s board and summarily dismissed the
plaintiff from his CEO position. This was done in spite of the fact that there was no mention of the CEO’s removal on the agenda for the board meeting at which he was dismissed and in the face of an existing court injunction prohibiting the plaintiff’s removal as CEO. To add insult to injury, the Company directed the accounting firm KPMG to investigate unsubstantiated claims that the plaintiff had defrauded the Company.

At the Company’s next annual general meeting, the defendants again used their majority power to ensure that the plaintiff was not re-elected to the board. Throughout this series of events, the defendants utilized the Company’s funds to pay for legal advice to assist them in their battles with the plaintiff. The plaintiff claimed that the defendants’ actions amounted to oppression and sought a remedy under s. 216 of the Companies Act. The court held that the actions of the defendants amounted to oppression and ordered that the defendants purchase the plaintiff’s shares at a price to be determined by the parties within 30 days of the judgment—failing which the Company would be wound up]


[Excerpt: There are a few observations that may be made from the *Tan Choon Yong v Goh Jon Keat* decision above which relate to the court’s finding that the plaintiff had a “legitimate expectation” to be a director and the CEO of the Company. This case is somewhat unusual as it involved the finding of a legitimate expectation [based on an informal understanding] in a public company with listed shares. The vast majority of cases in which courts have found [such a] legitimate expectation involve private closely held companies. This is understandable considering that in most cases legitimate expectations are based on an informal understanding or agreement between the shareholders, which is obviously much more likely to arise in the context of a private closely held company. Even though this case involved a public company, based on the current case law, evidence of an understanding between the plaintiff and defendant provides *prima facie* support for the court’s finding that the plaintiff had a legitimate expectation that he would be a director and the CEO of the Company. However, two points, which have not yet been fully explored in the case law, may be worth examining as they suggest that the scope or existence of the plaintiff’s “legitimate expectation” may have been different than what the court ultimately found in this case. First, one might argue that even with an agreement between the parties, by virtue of s. 152 of the Companies Act—which provides shareholders in public companies with the right to remove any director by way of ordinary resolution notwithstanding any agreement to the contrary—a member can never have a legitimate expectation not to be removed by majority vote as a director in a public company. In addition, although there was an understanding between the plaintiff and defendants, it might be queried as to whether the Company’s issuance of a large number of shares to outside investors changed or destroyed the legitimate expectation of the plaintiff as it was no longer based upon an understanding between all of the members]

- *Re a Company (No 00477 of 1986)* [1986] BCLC 376 (Chancery Division, UK)

[Excerpt: The interests of a member are not necessarily limited to his strict legal rights under the constitution of the company. The use of the word “unfairly” in section 459 [of the UK *Companies Act* 1985], like the use of the words ‘just and equitable’ in [the UK equivalent of section 254(1)(i) of the Companies Act] enables the court to have regard to wider equitable considerations…In the case of a small private company in which two or three members have invested their capital by subscribing for shares on the footing that dividends are unlikely but that each will earn his living by working for the company as a director…The member’s interests as a member who has ventured his capital in the company’s business may include a legitimate expectation that he will continue to be employed as a director and his dismissal from that office and exclusion from the management of the company may therefore be unfairly prejudicial to his interests a party to relieve him from the bargain he made]

- *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14 (Court of Appeal, UK)

[Excerpt: I have in the past ventured to borrow from public law the term “legitimate expectations” to describe the correlative “right” in the shareholder to which such relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will
also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend]

- **O'Neill v Phillips** [1999] 1 WLR 1092 (House of Lords, UK)

[Excerpt: …It was probably a mistake to use (“legitimate expectation”), as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was “correlative” to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable constraint. The concept of legitimate expectations should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application…The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness…To take the shareholdings first, the Court of Appeal said that Mr O'Neill had a legitimate expectation of being allotted more shares when the targets were met. No doubt he did have such an expectation before [the acrimonious meeting in November 1991] and no doubt it was legitimate, or reasonable, in the sense that it reasonably appeared likely to happen. Mr Phillips had agreed in principle, subject to the execution of a suitable document. But this is where I think that the Court of Appeal may have been misled by the expression “legitimate expectation.” The real question is whether in fairness or equity Mr O'Neill had a right to the shares. On this point, one runs up against what seems to me the insuperable obstacle of the judge’s finding that Mr Phillips never agreed to give them. He made no promise on the point. From which it seems to me to follow that there is no basis, consistent with established principles of equity, for a court to hold that Mr Phillips was behaving unfairly in withdrawing from the negotiation. This would not be restraining the exercise of legal rights. It would be imposing upon Mr Phillips an obligation to which he never agreed. Where, as here, parties enter into negotiations with a view to a transfer of shares on professional advice and subject to a condition that they are not to be bound until a formal document has been executed, I do not think it is possible to say that an obligation has arisen in fairness or equity at an earlier stage. The same reasoning applies to the sharing of profits. The judge found as a fact that Mr Phillips made no unconditional promise about the sharing of profits. He had said informally that he would share the profits equally while Mr O'Neill managed the company and he himself did not have to be involved in day-to-day business. He deliberately retained control of the company and with it, as the judge said, the right to redraw Mr O'Neill’s responsibilities. This he did without objection in August 1991. The consequence was that he came back to running the business and Mr O'Neill was no longer managing director. He had made no promise to share the profits equally, Mr O'Neill managed the company and he himself did not have to be involved in day-to-day business. He deliberately retained control of the company and with it, as the judge said, the right to redraw Mr O'Neill’s responsibilities. This he did without objection in August 1991. The consequence was that he came back to running the business and Mr O'Neill was no longer managing director. He had made no promise to share the profits equally in such circumstances and it was therefore not inequitable or unfair for him to refuse to carry on doing so. The Court of Appeal seems to have contemplated that Mr Phillips might have been entitled to do what he did if he had given Mr O'Neill notice of his intentions and treated him more politely at the meeting on 4 November 1991. But these matters cannot affect the question of whether a change in the profit-sharing arrangements was a breach of faith]

- **Ng Sing King v PSA International Pte Ltd** [2005] 2 SLR 56 (High Court, Singapore)

[Excerpt: The court, in assessing all the relevant facts, may consider whether the legitimate expectations of the plaintiffs have been disregarded...“Legitimate expectations” may arise from informal or implied understandings between shareholders. It must be recognised, however, that the legitimate expectations in a quasi-partnership or family company would vastly differ from those in any other company...even in the absence of a quasi-partnership, the interests of a member are not necessarily confined to his legal rights. Yet he qualified that members of a company do not normally have legitimate expectations going beyond the constitution of the company...Where, however, the acquisition of shares in a company is one of the results of a complex set of formal written agreements it is a question of construction of those agreements whether any such superimposed legitimate expectations can arise. In **Re a company** (No 005685 of 1988), **ex parte Schwarz** (No 2) [1989] BCLC 427, Peter Gibson J expressed similar sentiments. He noted...that the parties had spelt out in detailed agreements all matters which were to govern their relationship, and thus rejected the petitioners’ claim that their legitimate expectations were not limited to their rights under a written service agreement. In the facts before me, the parties dealing at arms’ length had entered into the Agreement, which comprehensively laid down the rights of each shareholder. To my mind, it is difficult to find that any legitimate expectations apart from those contained in the Agreement were created]
Ebrahimi v Westborne Galleries Ltd [1973] AC 360 (House of Lords)

[Summary: Lord Wilberforce classified the company in question as a “quasi-partnership”]

[Excerpt: It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations [i.e., to classify it as a “quasi-partnership”] requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be “sleeping” members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere]

• “Legitimate expectations” based on implied understandings

  ▪ Implied understandings arise based on the nature and commercial purpose of the corporate structure
  ▪ It allows courts to find “legitimate expectations” which are not specifically provided for in the written documents but nevertheless reflect the shareholders’ interests and expectations in the corporate relationship
  ▪ Examples of implied understandings:
    o The constitution and Companies Act would be complied with, to the best of the abilities of the management and the administration, with leeway given for the occasional lapse (but not when substantial injustice is caused)
    o Corporate participants in directorial positions would not use their position to defraud other participants, contrary to their duties in statute (e.g., ss. 156 and 157), common law or equity

  ➢ Low Peng Boon v Low Janie [1999] 1 SLR 761 (Court of Appeal, Singapore)

  [Summary: The majority shareholder-director caused the company to pay low dividends to increase the company’s profits. The majority shareholder-director benefited personally from this because his annual bonus was based on the amount of profits of the company. The majority-director was also alleged to have used the company’s funds for personal expenses. The court found that the actions of the majority amounted to unfair oppression under s. 216]

  ➢ Re Gee Hoe Chan Trading Co Pte [1991] 3 MLJ (High Court, Singapore)

  [Summary: The directors had been paying themselves directors’ fees and salaries but not declaring any dividends. The business had begun as a family business but as the two founding members died, two factions developed. One faction held about 60% of the shareholdings as well as the majority of positions on the board of directors. The other faction held a minority shareholding of around 40%. The minority shareholders were aggrieved because not only did the majority exclude the minority from directorial positions, the majority also voted themselves onto the board and paid themselves generous salaries, and did not affect any declaration of dividends. In an application under s. 216 of the Companies Act, the court held that it was grossly unfair.

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75 This reflects Chew’s approach which is supported by local case law. However, as indicated in Woon at p. 181, Prof. Davies’ approach of “reasoning by analogy” can be used to make sense out of a number of cases that cannot be justified by the “legitimate expectation based on informal understandings” doctrine. Although, Prof. Davies’ approach has merit, it is my view that Chew’s concept of “legitimate expectations based on implied understandings” largely makes Prof. Davies’ approach redundant and is more logically consistent as it is merely an extension of the widely accepted contractual approach. However, students should nevertheless be aware of and understand Prof. Davies’ approach set out in Woon.
inequitable that the majority shareholders should make use of their controlling power in both the
general meeting and the director’s meeting to adopt a policy which benefited only themselves
and gave hardly any benefit to the minority shareholders]

○ There is an implied understanding that in quasi-partnerships there is a higher
standard of corporate governance that must be observed by the controllers vis-
à-vis the minority

➢ Over & Over Ltd. v Bonvest Holdings Ltd [2010] SGCA 7 (Court of Appeal, Singapore)

[Excerpt: In the context of quasi-partnerships, therefore, the courts have consistently applied a
stricter yardstick of scrutiny because of the peculiar vulnerability of minority shareholders in
such companies]

➢ Eng Gee Seng v Quek Choon Teck and others [2010] 1 SLR 241 (High Court, Singapore)

[Summary: The plaintiff was a minority shareholder and director in a quasi-partnership which he
started with the two defendants. The quasi-partnership was incorporated based on an oral
agreement or mutual understanding between the parties that they would all have equal
shareholding and ownership, equal rights of management, and equally share in the profits of the
quasi-partnership. In breach of this understanding, the plaintiff was removed as a director and
subsequently did not share equally in the profits of the company as he was denied directors’ fees,
salary and dividends. The plaintiff brought an action claiming that the breach of the informal and
implied understandings between the partners amounted to oppression under s 216. The High
Court found in favour of the plaintiff and ordered the defendants to buy out the plaintiffs shares
at a price determined by an independent valuator]

[Excerpt: ...I am of the view that it should not ordinarily be easy to establish the existence of
such an informal understanding or expectation. I am mindful of the danger of the court
rewriting the terms and understandings underpinning the formation of any company and I am
not alone in this concern. In Ng Sing King v PSA International Pte Ltd [2005] 2 SLR(R) 56,
MPH Rubin J took the view at [95] that it was “difficult to find that any legitimate expectations
apart from those contained in the Agreement were created”. The Court of Appeal also took a
similar stance in Borden at [82], as quoted in the preceding paragraph. Quasi-partnerships,
however, are formed based on mutual trust and confidence, and their controllers ought to
govern with a certain degree of integrity. Accordingly, a higher standard of governance is
expected of them as compared with controllers of ordinary companies. Therefore, there should
be greater leeway for finding informal understandings and expectations. This view has been
clearly elucidated in cases such as Sim Yong Kim v Evenstar Investments Pte Ltd [2006] 3
SLR(R) 827 (“Sim Yong Kim”) and Borden. Sim Yong Kim was a case concerning a quasi-
partnership decided under s 254. Applying the reasoning of Re A Company, Re Saul D Harrison
& Sons plc and O’Neill, it is also applicable in the present instance. There, the Court of Appeal
distinguished between situations involving ordinary companies and that involving quasi-
partnerships, implying that the court would be more willing to find informal understandings and
expectations which could triumph over the formal documents in the latter situation when
equitable considerations make it unfair for those conducting the affairs of the company to rely
upon their strict legal powers. First, it said at [14] that: “... Whilst we agree that a company’s
memorandum of association is conclusive evidence of its objects vis-à-vis third parties, it is not
necessarily so as between shareholders, such as the brothers here, who have entered into what is
substantially a quasi-partnership using the company merely as a vehicle for an agreed
object. ...” It then quoted Lord Hoffmann in O’Neill (at 1101), who in turn relied on Parker J’s
judgment in Re Astec (BSR) plc [1998] 2 BCLC 556 at 588: “[In] order to give rise to an
equitable constraint based on ‘legitimate expectation’ what is required is a personal relationship
or personal dealings of some kind between the party seeking to exercise the legal right and the
party seeking to restrain such exercise, such as will affect the conscience of the former,
[emphasis added]”. The Court of Appeal then stressed at [41] on the fact that notwithstanding
the existence of a legitimate expectation, there must additionally be “instances of unfairness
resulting from [these] breaches of promises that would be unfair for a member to ignore”. At
[40], it quoted Lord Hoffmann in O'Neill who said: “This is putting the matter in very traditional language, reflecting in the word ‘conscience’ the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? ... In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because of a third party) it would not be enforceable in law.” [Court of Appeal’s emphasis in Sim Yong Kim].

Turning to Borden ([7] supra), a case also involving a quasi-partnership, the Court of Appeal laid out at [82] principles similar to that of Sim Yong Kim and then said that the courts will insist upon a “high standard of corporate governance” on the part of the controllers at [83]: “It bears repeating that in a case such as the present where a company has the characteristics of a quasi-partnership and its shareholders have agreed to associate on the basis of mutual trust and confidence, the courts will insist upon a high standard of corporate governance that must be observed by the majority shareholders vis-à-vis the minority shareholders”. [emphasis added].

Read with the distinction drawn in Sim Yong Kim between ordinary companies and quasi-partnerships, I am of the view that our law requires controllers of quasi-partnerships to demonstrate a higher level of governance as compared with those of ordinary companies. Borden touches on two aspects of corporate governance in particular. The first concerns the issue of disclosure. Borden appears to impose upon controllers in a quasi-partnership a duty to explain or justify their management decisions to non-executive minority shareholders (see [44] and [51]). The second concerns situations where there exists a conflict of interest. Borden appears to suggest that even if a particular course of conduct would not amount to unfair conduct in the context of an ordinary company, such conduct might well be regarded as unfair in the case of a quasi-partnership. In the context of quasi-partnerships, therefore, the courts have consistently applied a stricter yardstick of scrutiny because of the peculiar vulnerability of minority shareholders in such companies]

- Margaret Chew, Minority Shareholders’ Rights and Remedies, 156-57 (2nd ed, LexisNexis, 2007)

[Excerpt: Indeed, the case of Lim Swee Khiang v Borden Co (Pte) Ltd [2006] SGCA 33 (Court of Appeal) appears to suggest that there exists a set of implied understandings for quasi-partnerships, based on equitable principles, and extending beyond traditional company law approaches to directors’ and shareholders’ duties. The Court of Appeal acknowledged that under traditional legal principles, a person may be a shareholder in two competing companies and that a shareholder does not owe any duty not to own other shares. However, the court underlined that the company in question was not an ordinary company but a quasi-partnership where the shareholders ‘repose trust and confidence in one another,’ and shareholders, therefore, owed equitable duties to one another. One of the controllers in Lim Swee Khiang v Borden Co (Pte) Ltd owned shares in an overseas company controlled by her son that was engaged in a competing business, and this was held to amount to a conflict of interest in equity which could be impeached under section 216]

- It is extremely difficult to establish unfairness based on “legitimate expectations” in a listed company
  - Section 216 applies to listed and unlisted companies. However, it remains to be seen whether it is useful for shareholders in listed companies
  - The expectations of shareholders in listed companies are different from unlisted companies
- Shares in listed companies are liquid which allow for easy exit when a shareholder is displeased with management
- Listed companies are more heavily regulated as a result of securities’ laws and listing requirements which provides another layer of shareholder protection
- Listed companies involve a greater number of dispersed investors which necessitates that the company’s constitution and applicable laws are the totality of shareholder rights vis-à-vis internal corporate affairs
- Any legitimate expectation in a listed company will therefore likely be based on an implied (rather than an informal) understanding

- O’Neill v Phillips [1999] 1 WLR 1092 (House of Lords, UK)
  [Excerpt: So I agree with Jonathan Parker J. when he said in re Astec (B.S.R.) Plc. [1998] 2 B.C.L.C. 556, 588: “in order to give rise to an equitable constraint based on ‘legitimate expectation’ what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.” …I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed]

- It is not enough for the plaintiff shareholder to only demonstrate a breach of the written or informal agreement to establish unfairness. Many other factors will be considered—most importantly, showing that the breach prejudiced the plaintiff shareholder

- Ng Sing King v PSA International Pte Ltd [2005] 2 SLR 56 (High Court, Singapore)
  [Excerpt: It does not necessarily follow, however, that breach of any expectations enshrined in the Agreement is tantamount to oppressive conduct. Admittedly, breach of these terms would disappoint the shareholders’ expectations. Nonetheless, many other factors have to be considered to ascertain whether the breach resulted in unfairness, such as whether the breach was deliberate, whether it was a significant breach in disregard of a major expectation and whether any detriment was caused to the aggrieved shareholder. Above all, the plaintiffs have the onus of showing that the breach prejudiced their interest in some way. In this respect, Jonathan Parker J in Re Blackwood Hodge plc [1997] 2 BCLC 650 underscored the importance of satisfying the court that harm has been caused by the breach. The following pronouncement…is especially apposite: [T]he petitioners must establish not merely that the [company] directors have been guilty of breaches of duty in the respects alleged, but also that those breaches caused the petitioners to suffer unfair prejudice in their capacity as preference shareholders. As Neill LJ said in Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 at 31: The [relevant] conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests …On the facts of this case, the court decided that the petitioners did not show that they had suffered any unfair prejudice by reason of the breaches of duty by the directors. In the same vein, the presence or absence of loss is a significant factor to be taken into account in relation to the alleged breaches of the Agreement. In short, there can be no precise guidelines stipulated as to whether there were unfair dealings by the strategic shareholders. The question is far more complicated than merely ascertaining whether the Agreement was violated. The expectations of the plaintiffs must also be considered against the backdrop of commercial realities. It is my opinion that the strategic shareholders’ conduct, seen in light of all the relevant circumstances, did not lack probity. I shall now consider each of the plaintiffs’ allegation to explain how I have arrived at this decision]
• It is clearly not enough to demonstrate majority rule to establish unfairness
  
  > Ng Sing King v PSA International Pte Ltd [2005] 2 SLR 56 (High Court, Singapore)
  > [Excerpt: There is a fine distinction, in this regard, between the legitimate rule of the majority, and tyranny of the majority. As Lord Wilberforce elaborated in Re Kong Thai Sawmill (Miri) Sdn Bhd, the mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the complainant does not agree, is not enough. I fully concur, as majority rule is now the norm in many companies and the exercise of this majority power will inevitably cause dissatisfaction amongst the minority shareholders. The court cannot intervene in the face of mere disagreement amongst the shareholders, for it does not act as a supervisory board over the decisions made by shareholders: Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821. Section 216 should therefore not be invoked by the court to interfere with the internal management of a company by directors who are acting honestly and not seeking to advance their interests or the interests of others at the expense of the company or contrary to the shareholders’ interests: Re Bright Pine Mills Pty Ltd [1969] VR 1002. This principle is of particular relevance to the present facts. The plaintiffs might understandably feel aggrieved or even feel that they have been treated unfairly. Nonetheless, that sentiment alone is an insufficient basis for a successful application under s 216]

• Commercial unfairness may be established based on a single act or multiple acts. However, in both cases the important question is whether the act or acts “offends the standards of commercial fairness and is deserving of intervention by the courts”
  
  ▪ In the case of multiple acts, when the first act occurs it need not be pursued in court at the time of the first act—but may be relied on later to show that all of the acts combined amount to s. 216 oppression
  ▪ It should be noted that most of the s. 216 oppression cases involve multiple acts (not single acts)
  
  > Over & Over Ltd. v Bonvest Holdings Ltd [2010] SGCA 7 (Court of Appeal, Singapore)
  > [Summary: In this case the Court of Appeal found that both singular acts and the combination of multiple continuous acts amounted to oppression (See above, for more detailed facts)]
  > [Excerpt: Based on a plain reading of s 216(1) itself, therefore, it appears that either a course of conduct or even a single act could theoretically amount to oppression. It has been noted, however, that the majority of the cases that have been decided by the courts pertain to minority complaints under limb (a) above, viz, oppression manifesting itself in the extended abuse in the conduct of the company’s affairs (see Victor Yeo and Joyce Lee, Commercial Applications of Company Law in Singapore (CCH Asia Pte Ltd, 3rd Ed, 2008) at p 282. Nonetheless, the following passage from Minority Shareholders’ Rights and Remedies correctly encapsulates the position on what might be said to single distinct acts of unfair behaviour (at pp. 228–229): It is recognised, however, that a past oppressive act, although remedied, may belie a risk of future oppressive acts and may have continuing oppressive effects. Therefore, the fact that an excluded director has been reinstated or that a diversion of monies has been repaid may not mean oppression of the minority has necessarily ceased….In the same vein, an isolated act may amount to oppression and a course of conduct need not be shown. For example, a singular dilution of the minority’s shares by the majority contrary to an informal understanding, or a clear and egregious misappropriation of monies contrary to an implied understanding, would suffice as oppressive conduct. However, a singular assertion of excessive remuneration or inadequate dividend payment perhaps may not….Nonetheless, this is not to say that a past and singular act may not amount to oppression under section 216 of the Companies Act. In the words of Derrington J in Re Norvabron Pty Ltd (No 2):…A single act in the past may not be so serious as to support the remedy or having been corrected may not support it … but of course everything depends upon the circumstances of the particular case… Accordingly, while we do not find that a case of oppression made out on this aspect of [the appellant-plaintiff’s] claim, this does not mean that the lack of prejudice precludes further consideration]
of...earlier conduct when it comes to assessing holistically the entire manner in which the affairs of [the JV Company] have been conducted…]

❖ **Question:** What would the problem be with allowing the court to find oppression on the basis of the majority consistently using their voting power to outvote the minority?

- In most cases, informal or implied understandings are relied on to subject the actions of the majority to greater scrutiny (i.e., to create obligations that go beyond the majority’s obligations under the written agreement between the members). However, it is possible for informal or implied understandings to prevent the minority from complaining about matters in which they have informally or implicitly given the majority *carte blanche* to carry out

  ➢ *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 (High Court, Singapore)

> [Summary: In this case, the main defendant, Neo, was the controlling mind, 99.11% shareholder and a director of Chip Hup Holding Pte Ltd (“CHH”). Tan held the remaining 0.89% of CHH’s shares and was a director of CHH and a director (with Neo) of other related group companies which included CHKC (the “Companies”). Tan became a director of the Companies and a shareholder in CHH as a result of being recommended for the position by his brother-in-law, Lim, who was at the time the Managing Director of CHKC. Although Tan was a director and shareholder of the Companies, he did not participate in managing the Companies. To the contrary, Tan’s sole responsibility was to periodically sign documents in his capacity as a director of the Companies—including documents that made him (and Neo) guarantors for a number of the Companies’ legal obligations. In return for Tan’s role as a “rubberstamping director”, he received between $1,200 to $4,000 per month, which exceeded his other combined monthly income. Although the Companies were very successful, in 2006, Lim and Neo had a falling out over money and became embroiled in litigation—which unsurprisingly soured the relationship between Tan and Neo. Shortly thereafter, Neo removed Tan from all of his director positions as Neo believed that he could no longer trust Tan due to his family ties with Lim. In response, Tan filed an action claiming that Neo’s act of removing him and Neo’s misappropriation and misuse of the Companies’ funds prior to his removal amounted to oppression under s 216. Based on Neo’s alleged misconduct, Tan also requested that the High Court wind up CHH. The High Court found that Neo’s act of removing Tan as a director of the Companies amounted to oppression under s 216 as it breached an informal understanding between Neo and Tan that Tan would receive his director’s remuneration in consideration for the liabilities that he assumed as a guarantor for the Companies. As such, pursuant to s 216(2), Quentin Loh J ordered Neo to buy out Tan’s shares. It is noteworthy, that Loh J also found that Tan’s claims that Neo had misappropriated and misused the Companies funds for his own purpose could not amount to oppression because there was an informal understanding between Tan and Neo that the latter could run the Companies as he saw fit—which prevented Tan from complaining about Neo’s management of CHH. Tan’s request to wind up CHH was also denied by the High Court]

> [Excerpt: It is clear from the authorities that what constitutes unfair conduct may be assessed with reference to the legitimate expectations of minority shareholders, which may in turn arise from informal or implied understandings *vis-à-vis* the majority shareholders: *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR(R) 56 at [95]; *Eng Gee Seng* at [11]; *Over & Over* at [84]. While such informal or implied understandings are usually relied on to subject the actions of the majority to greater scrutiny, they can conversely also be used to prevent the minority from complaining about matters in which they had given the majority *carte blanche*. The present case is one such example. Since the understanding between Tan and Neo was that Neo could run the Chip Hup Group as his personal fiefdom, Tan cannot be heard to complain now that Neo had been manipulating CHH and its subsidiaries for his own personal gain. It did not matter that Tan was unaware of and could not acquiesce to the *specific* acts Neo had done throughout this period]
5.3 “Commercial unfairness” under s. 216 is determined on an objective standard

- Unfairness may be established even if the alleged wrongdoer did not intend to harm the complainant-member or did not believe the action to be wrong
- However, what the “objective standard” is will depend on the context in which the dispute occurs

- **Re a company (No 005134 of 1986) ex parte Harries** [1989] BCLC 383 (Chancery Division, UK)
  
  [Excerpt: (1) The test of unfair prejudice is objective. (2) It is not necessary for the petitioner to show bad faith. (3) It is not necessary for the petitioner to show a conscious intention to prejudice the petitioner. (4) The test is one of unfairness, not unlawfulness. Counsel for the respondent, however, has submitted that because the test is objective it was irrelevant that the respondent may have acted for an improper motive. I do not doubt that if the objective bystander observes unfairly prejudicial conduct by a respondent the fact that the respondent had a proper purpose and a proper motive will not prevent that conduct from falling within the section. But if the objective bystander observes that the conduct of the respondent was for an improper purpose or with an improper motive, that may well be a relevant consideration in determining whether the conduct is unfairly prejudicial]

- **Re Saul D Harrison & Sons plc** [1995] 1 BCLC 14 (Court of Appeal, UK)
  
  [Excerpt: Its merit is to emphasise that the court is applying an objective standard of fairness. But I do not think that it is the most illuminating way of putting the matter. For one thing, the standard of fairness must necessarily be laid down by the court. In explaining how the court sets about deciding what is fair in the context of company management, I do not think that its helps a great deal to add the reasonable company watcher to the already substantial cast of imaginary characters which the law uses to personify its standards of justice in different situations. An appeal to the view of an imaginary third party makes the concept seem more vague than it is real…[it would be] more useful to examine the factors which the law actually takes into account in setting the standard…[In deciding what is fair or unfair] it is important to have in mind that fairness is being used in the context of a commercial relationship]

- **O’Neill v Phillips** [1999] 1 WLR 1092 (House of Lords, UK)
  
  [Excerpt: Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (“it’s not cricket”) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important]

5.4 “Commercial unfairness” under s. 216 may be avoided by an offer to purchase the minority’s shares

- A “fair offer” by the majority to purchase the shares of the minority may prevent the conduct of which the plaintiff complains from being unfair under s. 216
- An offer will likely be considered to be “fair” if it includes the following terms:
  - To purchase the minority’s shares at fair value and without a minority discount
  - The fair value of the minority shares, if not agreed, will be determined by a competent expert

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76 The standard of fairness has not been specifically considered by Singaporean courts. Therefore, the UK case law is persuasive. Chew, *supra* note 1, at 137.
Both parties will have equal access to relevant company information concerning the value of the shares and an equal opportunity to make submissions to the expert; and,

- If the offer is not provided in a reasonably timely manner after the legal process has been commenced then a reasonable amount for legal costs must be provided in the offer.

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**O’Neill v Phillips** [1999] 1 WLR 1092 (House of Lords, UK)

[Excerpt: If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer. In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding… The Law Commission (paragraphs 3.57-62) has recommended a statutory presumption that in cases to which the presumption of unfairly prejudicial conduct applies, the fair value of the shares should be determined on a pro rata basis. This too reflects the existing practice…Secondly, the value, if not agreed, should be determined by a competent expert…Thirdly, the offer should be to have the value determined by the expert as an expert. I do not think that the offer should provide for the full machinery of arbitration or the half-way house of an expert who gives reasons… Fourthly, the offer should…provide for equality of arms between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself. Fifthly, there is the question of costs. In the present case, when the offer was made after nearly three years of litigation, it could not serve as an independent ground for dismissing the petition, on the assumption that it was otherwise well founded, without an offer of costs. But this does not mean that payment of costs need always be offered. If there is a breakdown in relations between the parties, the majority shareholder should be given a reasonable opportunity to make an offer (which may include time to explore the question of how to raise finance) before he becomes obliged to pay costs. As I have said, the unfairness does not usually consist merely in the fact of the breakdown but in failure to make a suitable offer. And the majority shareholder should have a reasonable time to make the offer before his conduct is treated as unfair. The mere fact that the petitioner has presented his petition before the offer does not mean that the respondent must offer to pay the costs if he was not given a reasonable time]

5.5 Evidence of oppression may in some circumstances be derived from the activities of the oppressor in other companies

- Evidence of the conduct of the oppressor can be drawn from their conduct in another company if it can be shown that the affairs of the company which is the subject of the action are related to the affairs of the other company
- Such a relationship may exist in a parent-subsidiary situation or where the companies have similar shareholders and/or directors and are essentially being run as a single business unit
- The onus of proof is on the party claiming oppression to demonstrate that oppressive conduct in a related company had an oppressive affect in the company that is the subject of the action for oppression

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**Lim Chee Twang v Chan Shuk Kuen Helina** [2010] 2 SLR 209 (High Court, Singapore)

[Summary: The court found that evidence of oppressive conduct in one group company could be used as evidence of oppression in another group company if the company’s affairs are demonstrated by the plaintiff to have affected one another (See above, for more detailed facts)]
[Excerpt: The question to be asked is: what is the mischief that the courts set out to remedy in s 216 action? The obvious case is where the majority shareholder(s) are guilty of unfairly prejudicial conduct in the affairs of a company to the detriment of the minority shareholder(s). In *Kumagai* our Courts, like the English and Australian courts, are willing to intervene where the unfairly prejudicial conduct in one company, a subsidiary, affects the affairs of the holding company and thereby also becomes the affairs of the holding company. The converse also holds true where the facts warrant it. Another situation where the courts will be willing to consider that conduct in the affairs of Company A will affect the affairs of Company B must be those special cases where the court is willing pierce or lift the corporate veil, eg, where there is fraud….In the final analysis, under s 216, why are the affairs of one company, the subsidiary, also the affairs of another company, the holding company? The answer must be because the plaintiff was able to show, on the facts, that the affairs of the subsidiary actually affected or impacted the holding company. It is based on purpose of the section, the mischief it intends to address and why on certain facts, the separate legal entity principle must give way but only in so far as it is necessary, to fulfil the purpose of and policy behind that provision. Margaret Chew, Minority Shareholders’ Rights and Remedies (LexisNexis, 2nd Ed, 2007), which has been cited with approval in a number of cases, argues at p 122 that a compendious interpretative approach with an emphasis on the rationale and purpose of s 216 should be adopted. The starting point must be that the onus of proof is on the party alleging the affairs of Company A are also the affairs of Company B. If a party can show it does, then in my view, the courts can intervene on that basis, but subject to the limitations of s 216….Just because Company A is a subsidiary or parent of Company B per se too would also not be sufficient….The complainant must be able to show something more, including how the conduct of the affairs of Company A are affecting the affairs of Company B. If the position were otherwise, there will be a serious gap in the remedies available to an aggrieved minority shareholder….Conduct which is clearly oppressive and commercially unfair in the “group” can be shielded from a s 216 action by ensuring the profits and assets of the local company are stashed away in the foreign company. This can be done legally, without wrongful conduct…These can be perfectly legal and tax planning arrangements. The local company just about breaks even or books a small and sustainable loss each year. The majority shareholder then refuses to declare dividends in the foreign company, removes the minority shareholder as a director of the foreign company and terminates his employment in the foreign company but otherwise leaves the minority shareholder untouched in the local company. In such a situation if there are the same two shareholders in the foreign company and the local company and the same two persons are also the only directors in both the foreign and local company, does the minority shareholder have no remedy in Singapore? Does he have to take his dispute to another jurisdiction? ….There is no doubt that on the facts, Ms Chan is the mind and directing those special cases with the facts of the holding company. In *Sim City Technology Ltd v Ng Kek Wee* [2013] SGHC 216, the plaintiff was a company that was a majority shareholder in a holding company (“Holding Company”). The Holding Company, through its subsidiary companies (“Subsidiary Companies”) and in co-operation with a number of other companies, was part of a group of companies that carried on a single business (“Corporate Group”). The plaintiff brought an action for oppression under s 216 against the managing director of the Holding Company (“defendant”) who, although only a minority shareholder of the Holding Company, managed to exercise effective day-to-day control over it and the Corporate Group. The High Court allowed the plaintiff’s s 216 claim and ordered the defendant to return moneys, shares and other properties that he had misappropriated from some of the companies in the Corporate Group. In addition, under s 216, the High Court ordered the defendant to buy out the plaintiff’s shares in the Holding Company based on their value after the defendant had returned the moneys, shares and other properties to the relevant companies in the Corporate Group…. the High Court continued its pragmatic and expansive approach towards the oppression remedy by allowing the plaintiff to use evidence of oppressive behaviour from other Group Companies to establish oppression in the Holding Company (which was the only company in which the plaintiff owned shares). In arriving at this finding, Lai J reasoned that oppressive conduct in the other companies was relevant because the affairs of the other companies had an effect on the affairs of the Holding Company. In particular, her Honour stressed that the affairs in the Subsidiary Companies had a direct effect on the value (or lack thereof) of the Holding Company. This fact justified the principle of separate legal personality giving way to protection for the minority shareholders from commercial unfairness under s 216.]

5.6 It is possible to succeed in oppression even if the party claiming oppression has breached the duties they owe as a director to the company

- Although in many cases the party accused of oppressive behaviour may also be in breach of the duties they owe as a director to the company, if the oppressed party breaches their director’s duties it does not foreclose them from succeeding in a s 216 oppression claim. This makes sense as the two actions (i.e., oppression and a derivative action) while often overlapping are distinct

  ➢ Spectramed Pte Ltd v Lek Puay Puay and others and another suit [2011] SGHC 43 (High Court, Singapore)

  [Summary: This case involved a quasi-partnership company (“Company”) with two majority-shareholder-directors who collectively held 52% of the Company’s shares and a third minority-shareholder-director who held 48% of the Company’s shares. In the initial suit, the Company—at the behest of the two majority-shareholder-directors—brought an action against the minority-shareholder-director for breaching her director’s duties. The Company claimed that the minority-shareholder-director had breached her fiduciary duties by diverting the Company’s business to and assisting a competitor company that was wholly owned by the minority-shareholder-director’s husband. In response to the initial lawsuit, the minority-shareholder-director filed an action under s 216 against the two majority-shareholder-directors claiming that they had conducted the Company in a manner that was oppressive by breaching an informal understanding that she would be able to run the business without the majority-shareholder-directors’ interference and would receive a share of profits in proportion to her shareholdings. In a combined hearing, the High Court held the minority-shareholder-director liable for breaching her director’s duties and ordered her to either account for profits or pay damages (at the election of the Company). The High Court further granted the minority-shareholder-director’s s 216 claim for oppression on the basis that the two majority-shareholder-directors had breached informal understandings that were the basis for the quasi-partnership Company. In turn, Lai Siu Chiu J ordered, under s 216(2)(d), the majority-shareholder-directors to buy out the minority-shareholder-director’s shares]

5.7 An oppression claim will fail if the relief sought is not an appropriate remedy

- Even if there is a valid claim for oppression, relief may still be denied if the remedy sought is inappropriate for the case
- The rationale for this is that the court should not grant a remedy when granting it would be incongruent with the court’s primary objective when exercising its broad discretion under s 216(2), which is to make such orders as it thinks fit with a view to bringing an end to the dispute between the parties
- However, refusing relief appears to be a disproportionately harsh result since the court could simply fashion its own remedy in order to give effect to the primary objective of s 216(2)
  - In fact, there are a number of s 216 cases in which the court has chosen to grant relief but had done so based on a remedy that it crafted rather than by ordering the remedy the complainant sought


[Excerpt: In Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] 4 SLR 193, the Court of Appeal dealt with two related appeals concerning a number of complex contract law and company law issues involving the management of a joint venture company (“JVC”). One of the grounds of relief sought by the JVC’s minority shareholders was for a declaration under s 216 that a number of resolutions passed by the JVC’s majority shareholder-controlled board be invalidated. The Court of Appeal rejected this claim on the basis that the
relief sought by the minority shareholders (ie, invalidating the board resolutions) did not provide an “appropriate remedy in this case”. In delivering the judgment of the court, Sundaresh Menon CJ reasoned that considering the acrimonious relationship between the parties, granting the relief sought by the minority shareholders would likely result in future disputes between the parties. This would be incongruent with the court’s primary objective when exercising its broad discretion under s 216(2): to make such orders as it thinks fit with a view to bringing an end to the dispute between the parties. The authors respectfully agree with the Court of Appeal’s general approach to how the court should exercise its broad remedial discretion under s 216(2) of the Act. Specifically, it seems to make economic sense for the court to fashion its relief in a way that brings an end to the dispute between the parties. The authors are respectfully more hesitant, however, about the Court of Appeal’s finding that a s 216 claim should be rejected solely based on the fact that the remedy sought by the complainant is inappropriate. If the primary objective of the remedial power under s 216(2) is to bring to an end the dispute between the parties, then it would seem to be more effective for the court to fashion its own remedy in cases where the remedy sought is inappropriate. Indeed, there are a number of s 216 cases in which the court has chosen to grant relief but had done so based on a remedy that it crafted rather than by ordering the remedy the complainant sought. This approach is respectfully preferred because it allows the court, with the benefit of the information accumulated at trial, to fashion the most effective remedy to bring to an end the dispute between the parties. In addition, it avoids rejecting claims of oppressed parties based solely on a technical pleading error in the relief sought. In this case, however, it is important to note that even if the Court of Appeal did not reject the claim based on the inappropriateness of the remedy sought, the outcome would have been the same as the court went on to find in obiter (ie, after rejecting the claim based on the inappropriate nature of the remedy) that there was no oppression in the first place. Accordingly, it is submitted that the Court of Appeal’s rejection of the claim based only on the inappropriateness of the remedy being sought ought to be construed in light of this.

5.8 Examples of commercial unfairness under s. 216

- It is useful to examine the types of cases that tend to amount to commercial unfairness. However, it must be stressed that commercial unfairness is a malleable concept that must be proven in each individual case. The fact that a particular case appears to fit into one of the categories below may be a “red flag” for oppression—but is by no means determinative.

- Dominant members advancing their own interests
  - Relief may be obtained under s. 216 where directors or majority shareholders pursue a course of conduct that advances their own interests at the expense of the company or minority shareholders.
  - Commonly, such conduct takes the form of the majority shareholders (who are most often also directors) using their power to divert corporate assets and/or opportunities to themselves or parties in which they have an interest.
  - The diversion of corporate assets or opportunities normally constitutes a breach of a director’s common law, fiduciary and statutory duties. However, breach of a director’s duty is neither sufficient nor necessary for a claim to succeed under s. 216.
  - A director may enter into a competing business and take up rejected opportunities of the company where she is able to have her proposed actions approved by the majority. However, the same action may amount to a breach under s. 216 if there were legitimate expectations that directors would not compete.
  - At common law, shareholders do not owe duties to each other. However, under s. 216 a shareholder may be able to challenge the actions of another shareholder if they

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77 Chew, supra note 1, at 164-217.
amount to unfairness. Specifically, shareholders in quasi-partnerships may have a duty to disclose conflicts of interest and refrain from voting on the same

- **Lim Swee Khiang v Borden Co (Pte) Ltd** [2006] SGCA 33 (Court of Appeal, Singapore)
  
  [Summary: It was accepted by the parties that the company was a quasi-partnership. The main grievance of the minority shareholders was that opportunities and assets belonging to the company were essentially given to another company which was controlled by the son of one of the majority shareholders and in which the same majority shareholder also owned shares. The Court of Appeal found the acts of the majority oppressive under s. 216 and held that shareholders in quasi-partnerships will be held to a higher standard of corporate governance. Specifically, the court suggested that in a shareholders’ meeting that involved a decision on questionable transactions the majority shareholders with a conflict of interest should have refrained from voting. In addition, the majority shareholders should have disclosed their conflict of interest]

- **Low Peng Boon v Low Janie** [1999] 1 SLR 761 (Court of Appeal, Singapore)
  
  [Summary: The shareholder-director used company funds to pay for his personal travelling expenses and this was held to be oppressive conduct]

- **Re Kong Thai Sawmill (Miri) Sdn Bhd** [1978] 2 MLJ 227 (Privy Council on appeal from Malaysia)
  
  [Summary: The shareholder-directors used company funds to purchase and outfit a motor yacht for their personal use. The Privy Council did not consider the extravagance on the part of the shareholder-directors as amounting to oppression of the minority shareholders. The court noted that the complainant had received from the company sums of over 250% of the nominal value of his shares over the four years of shareholdings. In addition, the complainant who held 2.43% of the shares in the company was not supported by other shareholders who held 20% of the company and who were unrelated to the impugned shareholder-directors. Also, the complainant had rejected an offer purchasing his shares and was insisting that the company be wound up]

- **Abuse of voting powers**
  - The use of voting powers may amount to unfairness under s. 216 when the majority shareholders (especially when they are also directors) cause harm to the minority by using their voting power in bad faith, for a collateral purpose and/or in a manner inconsistent with the spirit of the articles

  - **Re SQ Wong Holdings (Pte) Ltd** [1987] 2 MLJ (High Court, Singapore)
    
    [Summary: Two directors of the company had deliberately refused to make dividend payments on their shares. This policy was motivated by a desire to preserve their dominance in, and control over, the company. Since, pursuant to the terms of the articles, their shares could not be voted if dividends were paid. To ensure that they maintained management control, they had to embark upon a policy of non-payment of dividends on their own shares. It was held by Chan Sek Keong JC that the non-payment was motivated by self-interest and the directorial discretion not to pay dividends had been used for a collateral purpose, thereby amounting to oppressive conduct under s. 216]

    [Excerpt: In ordinary circumstances, a preference shareholder in a company expects a company to pay the contracted dividend on his shares in accordance with the contract amongst the shareholders as set out in the Article of Association. The directors are expected to act honestly and diligently in taking the necessary steps to effect payment of such dividend where the financial condition of the company does not justify a refusal to pay. In law, the directors have a discretion whether or not to recommend a dividend, even on the preference shares, but this discretion must be exercised fairly and honestly in the interest of the company. They would not be acting honestly or fairly if the discretion were exercised to deny the preferential shareholder their right for a collateral purpose. Article 5 was never intended to enable the holders of the preference shares, other than Dato Wong, to assume control in order not to pay the cumulative fixed dividends accrued and accruing to them in order to maintain control of the company.]
The intention of the Article 5(ii) was not to give permanent control of the company to such shareholders but to give them control for the purpose of correcting any circumstances or situation (e.g., An inability to pay the dividends for lack of profits or some other reason) which may have resulted in the non-payment of the cumulative dividends, and, if that cannot be done without further prejudice to their rights as preference shareholder, to wind up the company in order to salvage what there is by way of return of their capital in the company.

- **Exclusion from management**
  - Where a shareholder has a legitimate expectation (i.e., an understanding which exists between all of the parties) of being involved in the management of a company, to exclude her, even if done entirely in accordance with the articles of association, may on its own, amount to unjust conduct justifying the court’s intervention under s. 216
  - The plaintiff must establish a “legitimate expectation” of management participation—which will most often arise in quasi-partnerships
  - It normally will be extremely difficult to establish a “legitimate expectation” of management participation in a public company (especially in a listed public company) because a public company can always remove a director regardless of the articles (s. 152) and will likely have liquid shares
  - Even if a legitimate expectation of management participation is established one party may be “fairly” excluded from management if the circumstances warrant it (e.g., irretrievable breakdown in the relationship) and fair compensation is provided
  - If a person assumes liabilities for the company in exchange for being appointed to a management position, this will likely create a legitimate expectation that the person cannot be removed from the management position unless they are released from such liabilities

- *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840 (High Court, Singapore)
  
  [Summary: The court found that the plaintiff in a public listed company had a “legitimate expectation” to be a director and the CEO of the Company and that exclusion from this role amounted to oppression (See above, for a detailed summary)]
  
  [Excerpt: After taking all circumstances into account, I find that there was an understanding between all parties concerned that Dr Tan would, without more, play a major role in the running of the company, not only as a director but also as its CEO. As Dr Tan had a legitimate expectation that he would be the company's director and CEO, attempts by Mr Goh and Ms Tan to renege on this arrangement without just cause may, in line with *Kitnasamy*, be regarded as oppressive conduct that cannot be countenanced]

  
  [Excerpt: There are a few observations that may be made from the [*Tan Choon Yong v Goh Jon Keat* decision—see summary above] which relate to the court’s finding that the plaintiff had a “legitimate expectation” to be a director and the CEO of the Company….one might argue that even with an agreement between the parties, by virtue of s 152 of the Companies Act – which provides shareholders in public companies with the right to remove any director by way of ordinary resolution notwithstanding any agreement to the contrary – a member can never have a legitimate expectation not to be removed by majority vote as a director in a public company]

- *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (Court of Appeal, Singapore)
[Summary: The appellant-plaintiff challenged his removal on several grounds including claiming that it amounted to oppression under s. 216. The central argument of the appellant’s s 216 claim was that the share transfer to his family members was undertaken based on the informal understanding that he would retain his management positions. According to the appellant, this informal understanding gave rise to a “legitimate expectation” which was breached when he was removed by his family members from his management positions. In turn, the appellant claimed that his family’s act of removing him from management amounted to oppression under s. 216 of the Act. The Court of Appeal, upholding the trial judge’s decision, found that there was no evidence of any understanding between the appellant and his family members that the appellant would maintain his management positions after the share transfers. As such, the appellant’s s. 216 claim for oppression was rejected. In arriving at this decision, Judge of Appeal Chao Hick Tin (delivering the judgment of the Court of Appeal) placed an important limitation on the scope of s. 216 by clarifying that a shareholder’s unilateral belief – even if that belief is reasonable – is insufficient to give rise to a “legitimate expectation”. In other words, for a legitimate expectation to arise under s. 216 it must be based on an understanding between all of the shareholders. Applying this principle to the case at hand, Justice Chao noted that the appellant indeed believed that the share transfers were undertaken based on the understanding that his family members would allow him to retain his management positions. Moreover, the appellant’s belief appeared to be grounded in the “implicit trust which the appellant had in his wife and children”. However, Justice Chao went on to find that the appellant’s belief did not amount to a legitimate expectation because it existed only “in the appellant’s mind” and “there was no way his family members could have known about it”: In short, the appellant’s “unilateral assumption or belief” was not an understanding between all of the shareholders and therefore could not be used to support his s. 216 oppression claim. It should be noted that even if the court would have found such a legitimate expectation that the plaintiff-appellant maintain his management position until retirement, it may not have changed the outcome of this case because the appellant’s double-claiming behavior (i.e., claiming twice for travel expenses) likely would have ultimately fallen beyond the scope of protection provided by the unspoken legitimate expectation]

- Lim Swee Khiang v Borden Co (Pte) Ltd [2006] SGCA 33 (Court of Appeal, Singapore)

[Summary: It was accepted by the parties that the company was a quasi-partnership. The minority shareholder plaintiff was an executive director but was stripped of his executive powers at a shareholders’ meeting when it was proposed and resolved that directors were not to hold executive positions. However, several months later, at a directors’ meeting, two members of the majority shareholding faction were appointed as executive directors. The minority director maintained his director position but was “kept out entirely” from the affairs of the company. The court held that the treatment was unfairly discriminatory and oppressive under s. 216]

- Ng Sing King v PSA International Pte Ltd [2005] 2 SLR 56 (High Court, Singapore)

[Summary: Minority shareholders complained of their removal from management. The court held that there was no legitimate expectation in having an entrenched position in a company’s management or that they would be represented in the management team. There was a comprehensive shareholders agreement, concluded at arm’s length, which had provisions relating to the appointment and approval of the chief executive officer. This was held to preclude any informal understandings]

- Kitnasamy v Nagatheran [2000] 2 SLR 598 (Court of Appeal, Singapore)

[Summary: The applicant successfully asserted a legitimate expectation to remain a director of the company under s. 216. The appellant was instrumental in securing the main contract for which the company was established and had invested money and effort to do so. His investment in money and effort could only be preserved if he remained director as the contract would be jeopardized by his removal. In addition, his position as a director was necessary to protect his investment as the other shareholder-directors were keen on drawing out moneys received by the company]

- Re a Company (No 04377 of 1986) [1987] BCLC 94 (Chancery Division, UK)

[Excerpt: I cannot accept that if there is an irretrievable breakdown in relations between members of a quasi-partnership, the exclusion of one from management and employment is ipso facto unfairly prejudicial conduct which entitles him to petition under [the UK equivalent to s. 216]]. It must depend on whether, if there is to be a parting, it is reasonable that he should leave rather than the other member or members and on
the terms he is offered for his shares or in compensation for his loss of employment….I therefore do not consider that in the normal case of the breakdown of a corporate quasi-partnership there should ordinarily be any “legitimate expectation” that a member wishing to have them valued by the court rather than the auditors pursuant to the articles]

- Tan Yong San v Neo Kok Eng and others [2011] SGHC 30 (High Court, Singapore)

[Summary: Tan was made a director and minority shareholder of a number of group Companies in exchange for periodically signing documents in his capacity as a director—several of which made him a guarantor for a number of the Companies’ legal obligations. In return for Tan’s role as a “rubberstamping director”, he received director’s fees. Tan was summarily removed from his director positions but maintained his position as the Companies’ guarantor. The High Court found that Tan’s removal amounted to oppression under s 216 as it breached an informal understanding that Tan would receive his director’s remuneration in consideration for the liabilities that he assumed as a guarantor for the Companies (See above, for a detailed summary)]

[Excerpt: On the evidence available, I find that when Tan was removed as a director of CHH and CHKC, he had not done anything to suggest that he was acting against the interests of both companies. Neo simply wanted him out because Neo believed he was aligned with Lim. Whether that suspicion was subsequently justified did not change the fact that there was no good reason for removing Tan at the time. Moreover I find that Tan received his Director’s remuneration in consideration of inter alia, his personal liabilities under the numerous counter-indemnities that he signed. So long as any of these counter-indemnities remained alive, he would have been entitled to his Director’s remuneration….Considering all the circumstances, I am satisfied that Tan has made out a case of oppression justifying relief under s 216(2) of the Companies Act, but only on the grounds that he had been wrongfully ousted as a director of all five companies in the Chip Hup Group and subsequently denied access to their accounts]

- Serious mismanagement
  - The mere disagreement of the minority with a business decision of the majority will clearly not support a s. 216 action
  - Where mismanagement is merely unfortunate commercial judgment by the company’s controllers this has been said not to be actionable under s. 216
  - There is arguably an implied legitimate expectation that the majority directors will not use their powers in a manner that breaches their duty of care, skill and diligence—if they do it may amount to commercial unfairness
  - The court may be more willing to grant a claim based on mismanagement under s. 216 where the controllers have acted in a manner that is self-serving (although self-serving conduct is not a prerequisite)
  - In a quasi-partnership, the controllers may have a positive duty to explain business decisions to minority shareholders in cases where the decisions do not ostensibly further the interests of the company

- Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 (Privy Council on appeal from Malaysia)

[Excerpt: The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority…that the section can be invoked]

- Re Tri-Circle Investment Pte Ltd [1993] 2 SLR 523 (High Court, Singapore)

[Summary: The minority complainant claimed that the majority had insisted on carrying on a loss making business. However, it was shown that the majority was confident that the business could make a profit. The court was of the view that the majority’s decision to continue to carry on the business, regardless of the
minority’s objections, was not oppressive since it was “the prerogative of the majority as long as it was not a prerogative exercised in bad faith or wilfully disregarding the minority’s interests for ulterior purpose”]

- **Lim Swee Khiang v Borden Co (Pte) Ltd** [2006] SGCA 33 (Court of Appeal, Singapore)

[Summary: The court held that the failure to explain business decisions, which on their face did not appear to be in the interest of the company, could lead to an inference that the controllers were not acting in the interests of the company and thereby acting oppressively under s. 216]

[Excerpt: Finally, although the respondents’ failure to explain why they did nothing to terminate PT Eagle’s licence is not, in itself, oppressive conduct, it is the consequences of the failure that have resulted in the commercial interests of the appellants as members of Borden being diminished in value. This amounts to a disregard of their interests in terms of s 216 of the CA unless the respondents’ conduct can be otherwise explained. Given the nature of the relationship between the members of Borden, as agreed by them, SKL’s claims of oppression or disregard of the appellants’ interests required an explanation from the respondents. In cases of this nature, where the members have agreed to associate together in trust and confidence in one another, we are of the view that a failure to explain amounts to an inability to explain or to justify why they did what they did. We are not here concerned with an ordinary trading company, where the shareholders have agreed to accept majority control and decision-making. In the absence of any explanation, the respondents must be deemed to have intended the consequences of their acts and omissions]

- **Re Macro (Ipswich) Ltd** [1994] 2 BCLC 354 (Chancery Division, UK)

[Summary: This is the first English case to hold that minority shareholders were unfairly prejudice by the majority’s serious mismanagement. In this case the acts of mismanagement clearly included numerous breaches of the duty of care and skill and were self-serving. However, the court did not hold that breaches of duty and self-serving conduct were prerequisites for succeeding in a claim of oppression]

[Excerpt: The question whether any action was or would be “unfairly prejudicial” to the interests of the members has to be judged on an objective basis. Accordingly it has to be determined, on an objective basis, first whether the action of which complaint is made is prejudicial to members’ interests and secondly whether it is unfairly so. Based on the findings of fact that I have made, I am satisfied that the companies suffered prejudice in consequence of failure to have a planned maintenance programme, the failure to supervise repairs, the failure to inspect properties regularly, the failure to let on protected shorthold tenancies, the taking of commissions from builders doing work for the companies by employees of Thompsons, the charging of excessive management charges and secretarial salary and the mismanagement of litigation. The absence of an effective system to prevent excessive amounts being retained on Thompsons’ client account instead of paying it over to the companies is also in my judgment likely to cause loss to the companies in the future. All of these matters are within the responsibility of Thompsons as the companies’ managing agent but they are attributable to the lack of effective supervision by Mr Thompson on behalf of the companies. It is this conduct of the companies’ affairs by Mr Thompson which, in my judgment, is prejudicial in the respects I have mentioned. As the conduct is prejudicial in a financial sense to the companies, it must also be prejudicial to the interests of the plaintiffs as holders of its shares... “I do not doubt that in an appropriate case it is open to the court to find that serious mismanagement of a company’s business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders. But I share Peter Gibson J’s view that the court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. Two considerations seem to me to be relevant. First, there will be cases where there is disagreement between petitioners and respondents as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal relating to the conduct of the company’s business is commercially sound... In my view, it is not for the court to resolve such disagreements on a petition under s 459 [the equivalent to Singapore’s s. 216]. Not only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of the company’s affairs taking a different view from theirs on such matters. Secondly, as was persuasively argued by [counsel for the respondents], a shareholder acquires shares in a company knowing that their value will depend in some measure on the competence of the management. He takes the risk that that management may prove not to be of the highest quality. Short of a breach by a director of his duty of skill and care (and no such breach on the part of either Mr Purslow or Mrs Purslow was alleged) there is prima facie no unfairness to a shareholder in the quality of the management turning out to be poor. It occurred to me during the argument that one example of a case where the court might none the less find that there was unfair prejudice to minority shareholders...
would be one where the majority shareholders, for reasons of their own, persisted in retaining in charge of the management of the company's business a member of their family who was demonstrably incompetent.” The example given in the last sentence was only an example but it is not without parallel here where the acts of mismanagement were carried out by Thompsons, Mr Thompson's firm. In view of Mr Thompson’s control and personality, there has since the 1969 reconstruction been no realistic possibility of the appointment of alternative property managers. However, this is not a case where what happened was merely that quality of management turned out to be poor (cf Re Elgindata Ltd [1991] BCLC 959 at 994-1000). This is a case where there were specific acts of mismanagement by Thompsons, which Mr Thompson failed to prevent or rectify. Moreover, several of the acts of mismanagement which the plaintiffs have identified were repeated over many years, as for example in relation to the failure to inspect repairs. In my judgment, viewed overall, those acts (and Mr Thompson's failures to prevent or rectify them) are sufficiently significant and serious to justify intervention by the court under s 461

- **No or inadequate dividends (and/or excessive director compensation)**
  - As a general rule a shareholder normally has no right to compel a company to declare dividends as it is a business decision of the board of directors. Typically, the directors recommend a dividend and the shareholders declare it (Art. 98, Table A)
  - Therefore, even in a quasi-partnership, minority shareholders normally have no “legitimate expectation” of a dividend. Thus, a failure to recommend or declare a dividend will not normally alone be enough to establish unfairness
  - When the court finds commercial unfairness based in whole or in part on claims of inadequate dividends it is normally in cases where:
    - The minority had an informal legitimate expectation that profits would be distributed to all of the shareholders but in fact profits were only distributed (normally as directors fees) to the majority shareholders; and/or
    - There was a significant gap (on a pro-rata basis) between the financial benefits received by the majority and minority—which is normally contrary to an implied legitimate expectation of a relatively equal sharing of profits on a pro-rata basis (especially in a quasi-partnership)

  ➢ *Re Sam Weller & Sons Ltd [1990] BCLC 80* (High Court, England)

  [Summary: The petitioners, who held 42.5% of the issued share capital, alleged that their interests as members of the company had been unfairly prejudiced by the payment (on the insistence of the person in control of the company) of the same dividend for many years. Under s 459(1) of the English Companies Act 1985, relief will be granted if it is shown that the “company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of some part of the members”. The court there held that there could be such unfair prejudice to the petitioners even though as members of the company those responsible for the conduct complained of had also suffered the same or even greater prejudice. It also held that non-payment of dividend or the payment of low dividend could amount to conduct which was unfairly prejudicial to some members of the company]

  [Excerpt: I do not intend to suggest that a shareholder who does not receive an income from the company except by way of dividend is always entitled to complain whenever the company is controlled by persons who do derive an income from the company and when profits are not fully distributed by way of dividend. I have no doubt that the court will view with great caution allegations of unfair prejudice on this ground. Nevertheless, concerned as I am with an application to strike out, I must be satisfied, if I am to accede to the application, that the allegations in the petition relating to the payment of dividends are incapable of amounting to unfair prejudice to the interests of some part of the members, including the petitioners. For the reasons that I have given, I cannot be so satisfied]

  ➢ *Re Gee Hoe Chan Trading Co Pte [1991] 3 MLJ 137*(High Court, Singapore)
[Summary: The directors had been paying themselves directors’ fees and salaries but not declaring any dividends. The business had begun as a family business but as the two founding members died, two factions developed. One faction held about 60% of the shareholdings as well as the majority of positions on the board of directors. The other faction held a minority shareholding of around 40%. The minority shareholders were aggrieved because not only did the majority exclude the minority from directorial positions, the majority also voted themselves onto the board and paid themselves generous salaries, and did not affect any declaration of dividends. In an application under s. 216 of the Companies Act, the court held that it was grossly inequitable that the majority shareholders should make use of their controlling power in both the general meeting and the director’s meeting to adopt a policy which benefited only themselves and gave hardly any benefit to the minority shareholders]

[Excerpt: What I saw in this case was that for five years from 1984 to 1988 (and many years before that) the respondents had lined their pockets with the profits of the company in the form of either salaries and bonuses (for four of the five respondents) and/or directors’ fees. Up to the AGM of 1988, Mdm Tan Ah Huan (fourth petitioner) was the only petitioner who obtained any benefits from the company by way of directors’ fees. The benefits which the respondents had obtained from the company were out of all proportion to the benefits which the petitioners had gained. In fact, at the time of the filing of this petition, the petitioners were getting nothing at all either in terms of directors’ fees or dividends. In my judgment, the respondents had acted in the affairs of the company in their own interest rather than in the interest of the members as a whole. If this was not ‘oppression’ or ‘in disregard’ of the interest of the petitioners, I did not know what was]

- **Low Peng Boon v Low Janie** [1999] 1 SLR 761 (Court of Appeal, Singapore)

[Summary: The majority shareholder-director caused the company to pay low dividends to increase the company’s profits. The majority shareholder-director benefited personally from this because his annual bonus was based on the amount of profits of the company. The majority-director was also alleged to have used the company’s funds for personal expenses. The court found that the actions of the majority amounted to unfair oppression under s. 216]

[Excerpt: It seems to us that the conduct of LPB and LKG looked at as a whole falls short of the standards of fair dealings. LPB’s use of ECPK (HK)’s funds for his personal travels; his continued acceptance of the practice of retaining profits of ECPK (HK) year after year and their placement in fixed deposits with banks which resulted in enhancement of his bonuses and which denied the other shareholders the benefit of any distribution of those profits and his resistance to any suggestion for distribution of those profits; his approval of the accounts of ECPK and its subsidiaries which were shown to him to have contained improper items of expenses charged to those accounts; his failure to direct necessary rectifications or adjustments to be made to those accounts; and his repeatedly dismissive treatment of the legitimate queries made on behalf JL, in our judgment, constitute a clear decision to override the interest of a minority shareholder and amount to an oppression of JL and a disregard of her interest in ECPK. According to LKG, LPB was a typical elderly patriarch and was autocratic and would stand no dissension from any of his children and saw no need to answer to any of his children. It seems to us that having co-founded ECPK and having built it up into a prosperous company which has benefitted his children including LKG and JL, LPB probably felt that he was entitled to some privileges. Throughout the years he must have been accustomed to doing things in the way as he saw fit and as he pleased including dealing with the company’s assets, and felt that he was entitled to treat the company and its subsidiaries as his and their assets as his own. His actions stemmed from a deep-seated but misguided belief that having by his efforts and labours built up ECPK and its subsidiaries, he was entitled to treat the company and its subsidiaries as if they were under his sole proprietorship and use their funds for his own purposes. Nonetheless, having set up the corporate structure in which there are minority shareholders whose interests must also be reckoned, he cannot treat the company and the subsidiaries as his own and use the corporate funds and assets for his own purposes and disregard the interests of the minority shareholders as he did. He owed a fiduciary duty to the company]

- **Loss of substratum**
  - The substratum of the company refers to the fundamental basis upon which the parties enter into the corporate relationship
  - A loss of substratum could occur when the business objective for which the company was formed cannot be met
This may result in a just and equitable winding up under s. 254(1)(i) or a winding up under s. 216(2)(f)

- *O’Neill v Phillips* [1999] 1 WLR 1092 (House of Lords, UK) [Sealy, 11.25]
  
  [Excerpt: I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: *non haec in foedera veni*. It is well recognized that in such a case there would be power to wind up the company on the just and equitable ground (see *Virdi v. Abbey Leisure Ltd.* [1990] B.C.L.C. 342) and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459. But this form of unfairness is also based upon established equitable principles and it does not arise in this case]

- *Over & Over Ltd. v Bonvest Holdings Ltd* [2010] SGCA 7 (Court of Appeal, Singapore)
  
  [Excerpt: In many ways, this resembles the “loss of substratum” that Margaret Chew refers to in Minority Shareholders’ Rights and Remedies ([71] supra) at p 205: Where it can be shown that the new or proposed business venture is not one that had been contemplated or agreed upon by the parties upon incorporation, this conduct on the part of the majority may amount to oppressive conduct under section 216 of the Companies Act, since it effectively forces the minority to participate in a corporate venture that he had not expected. His monies are locked into a company with commercial objectives he never considered investing in. …]

- *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56 (High Court, Singapore)
  
  [Summary: The court held that there was no oppression under s. 216, but proceeded to wind up the company on just and equitable grounds under s. 254(1)(i) on the basis that there was a loss of substratum. Neither party was blamed for the dismal state of the company]

### 5.9 Remedies available under s. 216(2)

- The **conduct of the applicant** may reduce or eliminate the remedy awarded
  
  - There is **no requirement** that the applicant must come with “clean hands”\(^78\)
  
  - However, objectionable conduct by the applicant may affect the remedy awarded in the following manner:
    - It may justify prejudicial conduct by the majority—leading the court to deny a remedy\(^79\)
    - It may result in the court reducing the amount of relief awarded\(^80\)

- **Such an order as “the court thinks fit”**
  
  - Once s. 216(1) is established, the court may—with a view to bringing to an end or remediying the matters complained of—make such orders “as it thinks fit”
  
  - The court’s extremely wide discretion under s. 216(2) even allows it to compensate the company (and not just the member) for damages suffered (e.g., in cases where there is a breach of directors’ duties)

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\(^78\) *Re London School of Electronics Ltd* (1986) 10 ACLR 692

\(^79\) *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 (High Court, England)

\(^80\) *Richards v Lundy* [2000] 1 BCLC 376 (High Court, England at 398)
However, it appears that under s. 216 the court is likely only willing to provide relief to companies (as opposed to members) in rare cases where damages to the company can conveniently be dealt with as one component of the shareholders’ more general “commercial unfairness” claim. In other words, where there is purely a corporate wrong (and not a personal wrong), a derivative action—not a s. 216 action—should be commenced. This approach is supported by the same policy rationale derived from Foss for limiting derivative actions.

Despite the court’s wide remedial powers, in most cases it either orders the majority to purchase the minority’s shares or a winding-up because this is the most efficient way to “end the matters complained of.”

- **Kumagai Gumi Co Ltd v Zenecon Pte Ltd** [1995] 2 SLR 297 (Court of Appeal, Singapore)

  [Summary: The Court of Appeal held that it might be appropriate to order the oppressor to compensate the company for any loss caused to it, without the necessity of a separate derivative action. Low was held to have oppressively used the company’s funds to invest in shares for his own personal benefit (in order to enhance his voting power in the companies in whose shares he had caused the company to invest). These investments were reported in the provisional liquidator’s report as having caused the company loss. The judge at first instance in the application under s. 216 ordered Low to compensate the company for the loss alleged to have resulted from the said investments without a separate derivative action. The Court of Appeal did not uphold this order, on the grounds that there was insufficient evidence before the judge to determine the causation and the quantification of the loss. Much of what was stated in the report of the provisional liquidator was hearsay and the provisional liquidator had not been called to give any evidence on the loss, and therefore, was not subject to cross-examination. In the circumstances, the Court of Appeal held that the order, that Low compensate the company for any losses suffered by the company in respect of the said share transactions, ought not to have been made. However, the Court of Appeal accepted ‘in principle’ the possibility of making such an order and indeed ordered that the company should be compensated for the use of various items of equipment belonging to the company. It should be noted that the claim for corporate damages was one component of the claim and could conveniently be dealt with in the context of the shareholders’ more general claim of commercial unfairness under s. 216]

- **Low Peng Boon v Low Jane** [1999] 1 SLR 761 (Court of Appeal, Singapore)

  [Summary: In a s. 216 claim, the court ordered the errant director to make restitution to the company of the unauthorized travelling expenses and bonuses he received. The claim for corporate damages was one component of the claim and could conveniently be dealt with in the context of the shareholders’ more general claim of commercial unfairness under s. 216]

- **Kung v Kou** (2004) 7 HKCFAR (Court of Final Appeal, Hong Kong)

  [Excerpt: 27. Having noted the observations in Gower and Davies and in Palmer cited above and having examined the foregoing cases, I now answer the question of law in this appeal. Is there jurisdiction to make, on an unfair prejudice petition presented by a shareholder, an order for the payment of damages or compensation, or for the grant of restitution, to the company itself? I would not say that there is no such jurisdiction in the theoretical sense of the type of case that the court is capable of entertaining. And even in the practical sense of the circumstances in which it is proper for the court to entertain the case or to make a particular order, I stop short of saying that there is absolutely no such jurisdiction. I would not rule out the possibility of circumstances in which it can be seen that such an order could properly be made. But such]
circumstances, even if they can arise, would in any case of complexity be rare and exceptional... 62. As a general rule, in my opinion, the court should not in a s.168A [which is similar to s. 216 of the Singapore Companies Act] petition make an order for payment to be made by a respondent director to the company unless the order corresponds with the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company). If the order does not so correspond then, either the company will have received less than it is entitled to, in which case it will be entitled to relitigate the issue in an action against the director for the balance, or the company will have received more than it was entitled to, in which case a clear injustice to the director will have been perpetrated. Nor, in my opinion, should the court allow a prayer in the petition for payment by the respondent director of compensation or of restitution to the company to stand unless it is clear at the pleading stage that a determination of the amount, if any, of the director's liability at law to the company can conveniently be dealt with in the hearing of the petition. In any other case, in my opinion, if the allegations against the director are proper to be relied on as evidence of unfairly prejudicial conduct, the appropriate relief to be sought would be an order... for a derivative action to be brought for the recovery of the sum legally due. It would be proper for the company to express its views as to whether it would be in its interests for such an action to be brought... 63. Moreover, the use of a s.168A petition in order to circumvent the rule in Foss... is, in my opinion, an abuse of process. In Prudential... a personal action by a shareholder against the allegedly delinquent directors for the diminution in the value of the shareholder's shares attributable, it was said, to the loss that had been caused to the company by the alleged wrongdoing, had been commenced. In the personal action the same allegations were made against the directors as were made in the accompanying derivative action brought by the same shareholder in the name of the company to recover for the company the amount of its loss. The Court of Appeal said this, at pp 223-224: “The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action as a means of circumventing the rule in Foss v Harbottle. The plaintiffs succeeded. A personal action would subvert the rule in Foss v Harbottle and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity.” In expressing their conclusions on the many issues raised by the Prudential case the Court of Appeal said that: “The problems involved in this case were caused by the fact that the Prudential [The shareholder] were the wrong plaintiffs”. The circumvention of the rule in Foss v. Harbottle by the inappropriate use of an unfair prejudice petition would be open to the same objections. In Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 at p. 18, Hoffmann LJ said that: “Enabling the court in an appropriate case to outflank the rule in Foss v. Harbottle was one of the purposes of [s. 459].” The outflanking would not, in my opinion, be appropriate unless the criterion suggested in para. 62 were met.

- **Buyout orders and winding up under ss. 216(2)(d) and (f)**
  - Section 216(2)(d) allows the court to make an order for the purchase of shares (i.e., a buyout order) by the members or by the company itself. Section 216(2)(f) allows the court to order that the company will be wound-up.
  - A “buyout order” is normally the most reasonable remedy because it allows the minority to realize the value of their interest in the company and puts an end to the unfairness—but does not destroy the company.
  - Due to the harsh and drastic nature of a winding up, the court considers it as a last resort and has sometimes been reluctant to find oppression where the only order sought is a winding-up.
  - However, if the majority has insufficient resources for a buyout the court may provide the majority with the option of a buyout (failing which the company will be wound up) or simply order a company to be wound-up.
  - Where a company has been severely mismanaged there may be grounds to order a winding-up.

  - *Over & Over Ltd. v Bonvest Holdings Ltd* [2010] SGCA 7 (Court of Appeal, Singapore)
[Summary: The Court of Appeal allowed the appeal finding that the plaintiff had suffered oppression under s. 216 and ordered that the respondent-defendant purchase the appellant-plaintiff’s shares at fair market value (i.e., without a minority discount) (See above, for more detailed facts)]

[Excerpt: There is obviously no residual goodwill or trust left between the parties and therefore we do not think it would be right for [the appellant-plaintiff’s] shareholding to remain tied up with the company in a broken and bitter relationship. Nor do we think it would be appropriate for us to attempt to regulate future conduct of the company’s affairs. The appropriate relief in this case is to permit [the appellant-plaintiff] to realise the value of its shares at a fair value pursuant to s 216(2)(d) of the Companies Act… In the event [the respondent-defendant] elects not to purchase [the appellant-plaintiffs] shares in [the JV Company], then [the respondent-plaintiff] may proceed to wind up [the JV Company] and appoint an independent liquidator to realise and distribute its assets. The costs of the liquidation, if this happens, are to be paid from the assets of [the JV Company]]

- **Lim Swee Khiang v Borden Co (Pte) Ltd [2006] SGCA 33 (Court of Appeal, Singapore)**

  [Summary: The court awarded a buyout remedy in a successful appeal even where the remedy sought and clearly desired was a winding-up]

  [Excerpt: If the state of affairs in a particular case can be remedied by an order other than a winding-up, there is no reason for a court to wind-up the company. Further, we are of the view that winding-up should only be ordered if, having taken into account all the circumstances of the case, it is the best solution for all the parties involved. In general, the courts are not minded to wind-up operational and successful companies unless no other remedy is available]

- **Re Gee Hoe Chan Trading Co Pte [1991] 3 MLJ 137 (High Court, Singapore)**

  [Summary: The majority had insufficient resources for a buyout. Therefore, the court decided to order a winding-up]

- **Tan Choon Yong v Goh Jon Keat [2009] 3 SLR(R) 840 (High Court, Singapore)**

  [Summary: The court held that the actions of the defendants amounted to oppression and ordered that the defendants purchase the plaintiff’s shares at a price to be determined by the parties within 30 days of the judgment – failing which the Company would be wound up]

- **The valuation of shares is normally a contentious and complex issue when a buyout is ordered**
  - The overriding principle that guides the court when determining the share value is “what is fair and just in the particular circumstance” (i.e., considering all the circumstances what price would fairly and justly compensate the oppressed shareholder for the unfairness suffered)
  - The court may be assisted by professional valuers but ultimately it is the judge’s decision to determine what value should be paid for the shares
  - The shares are normally valued at either the date the buyout order is made or the date the s. 216 proceeding is commenced— with the trend in the case law generally preferring the former approach
  - As a general rule, in the case of a quasi-partnership the court should not value the shares based on a discount to reflect the minority’s lack of control. However, the general rule may not apply:
    1. When the petitioner acquired her stake as an investment; and/or

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82 Re Elgindata Ltd [1991] BCLC 959 at 1007 (High Court, England).
(2) When the petitioner voluntarily severed her connection with the company (as opposed to being forced out)\textsuperscript{83}

\begin{itemize}
\item The share price set in a buyout order may be reduced if the applicant does not come with “clean hands” or her conduct partially justifies the prejudicial conduct\textsuperscript{84}
\item The court does not have discretion under s. 216(2) to award pre-judgment interest. However, the court can enhance the price of the buyout for the interim period (i.e., the period from the valuation date to the date of the order) if during the interim time the petitioner was denied the benefit of her shareholdings
\end{itemize}

\begin{itemize}
\item \textit{Over & Over Ltd. v Bonvest Holdings Ltd [2010] SGCA 7} (Court of Appeal, Singapore)
\end{itemize}

[Summary: The Court of Appeal allowed the appeal finding that the appellant-plaintiff had suffered oppression under s. 216 and ordered that the respondent-defendant purchase the appellant-plaintiff’s shares at fair market value (i.e., without a minority discount) (\textit{See above, for more detailed facts})]

[Excerpt: As the breakdown in the relationship between the parties was entirely precipitated by [the respondent-defendant’s] inappropriate conduct we do not think that it would be fair for [the appellant-plaintiff’s]…to sell its shares in [the JV Company]…at a discount on the basis of its minority stake. It is to us a crucial consideration that there are also no other minority interests involved…In the light of this, we are of the view that the appropriate order is to have the fair market value of [the JV Company] ascertained by an independent valuer. The parties are to agree on the appointment of an independent valuer and if they are unable to do so within 14 days from the date hereof they are to write to this court to appoint same. The independent valuer is to assess the value of [the JV Company] on the basis of the fair market value of its assets \textit{as of the date of this decision}…]

\begin{itemize}
\item \textit{Tullio v Maoro [1994] 2 SLR 489} (Court of Appeal, Singapore)
\end{itemize}

[Excerpt: Thus in our view there is ample persuasive authority for departing from what might be thought to be a general rule to value the shares as at the date of the order. The question we have to face is whether the value must be subject to a valuation. Although in the case of a company which has always been active a valuation would produce the fairest result, it would not necessarily be so where, as in this case, the company had been inactive and was being resuscitated by the injection of fresh capital. Each case must depend on its own particular facts. On the facts of this case a valuation as at the date of the court’s order or at the date of the presentation of the petition or a valuation at an earlier date or any valuation at all could not produce a fair result. Fairness, in our judgment, could only be achieved in this case by ordering the respondent to purchase the shares at the price at which the respondent sold them to the appellant in the first place. We felt confident in so ordering as it was evident to us that the learned trial judge had applied what she thought was the general rule and which would produce a fair result. She had not exercised her discretion in all the circumstances of the case and the facts which she found]

\begin{itemize}
\item \textit{Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd [1999] 2 SLR 129} (Court of Appeal, Singapore)
\end{itemize}

[Excerpt: In our opinion, it was clear that the determination of share value need not be in accordance with strict accounting principles. The role of the court was merely to determine a price that is fair and just in the particular circumstances of the case. As stated by von Doussa J in Coombs at p 102: “… In the present instance the valuation of the shares is a complex issue having regard to the competing arguments as to the way in which the injections of money into Dynasty by way of capital subscription and distributions, and expense items such as the consultancy fees and legal costs, are to be reflected. The valuation exercise is not merely one of accounting, but one of deciding the competing arguments on these issues. That is a function which the court should perform…The court must fix a price that represents a fair value in all the circumstances of the case”…In this case, the learned judge had considered all the relevant factors including

\textsuperscript{83} \textit{Re Phoenix office Supplies Ltd [2002] EWCA Civ 1740; [2003] 1 BCLC 76.}
\textsuperscript{84} \textit{Richards v Lundy [2000] 1 BCLC 376 (High Court, England) at 398.}
the projections of the merchant bankers when the company sought listing on the SES in 1990 as well as the
economy of Singapore. He was of the view that it was “abundantly clear” that Yeo had suffered unjustly
under Poon’s oppression and decided to make an adjustment to the share price. In our view, the learned judge
did not err in doing so. Accordingly this appeal was also dismissed by us. The respondents quite correctly
pointed out that unless s 216 of the Companies Act or any other statute empowers or grants jurisdiction to a
Singapore Court to order payment of prejudgment interest in a minority oppression case, it has no power or
jurisdiction to do so. In respect of the question of awarding interest, Parliament has by statute given the court
the power or the jurisdiction to grant pre-judgment interest (from the date when the cause of action arose
until the date of judgment) on “debt or damages” only. There is nothing in s 9 of the Civil Law Act and/or
para 6 of the First Schedule of the Supreme Court of Judicature Act which allows the court to award pre-
judgment interest on sums of money which are neither debts or damages. Since the current action is not one
for either debts or damages, it seemed clear to us that this court does not have the power to award interest in
this case for the period prior to the order for purchase of shares. In our view, there was clearly no
statutory jurisdiction given to the court to award interest in this case... In summary, we were of the view that the appeal
should be dismissed on the ground that the court had no jurisdiction to award pre-judgment interest in this
case. Counsel for Yeo argued eloquently that s 216 of the Companies Act is wider than the equivalent Irish
 provision in that it not only allows the court to “bring an end” to the matters complained of, but allows the
court to “remedy” the matters complained of. However, it has to be noted that Chao Hick Tin J had already
more than effectively remedied the situation when he ordered the respondents to purchase Yeo’s shares at a
fair value. Not only that, he incorporated an element of compensation by adjusting the fair value of the
shares upwards by 5% per year for a period of seven years. This seemed to us to be more than an adequate remedy.
Yeo’s contention, however, was that an award of interest was critical to remedy the matters complained of.
We did not see any reason why this was so and as such dismissed the appeal]

- *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024 (Court of Appeal, England)

[Excerpt: In our view this court should resolve the matter on the basis of what we have called the core of
undisputed fact. The starting point should in our view be the general proposition stated by Nourse J in re
London School of Electrics Ltd [1986] Ch 211, 224: “Prima facie an interest in a going concern ought to
be valued at the date on which it is ordered to be purchased.” That is, as Nourse J said, subject to the
overriding requirement that the valuation should be fair on the facts of the particular case. The general trend
of authority over the last 15 years appears to us to support that as the starting point, while recognising that
there are many cases in which fairness (to one side or the other) requires the court to take another date]

- **Derivative actions under s. 216(2)(c)**
  - Where oppression has been established, the court has the remedial power to authorize the
    complainant to commence a derivative action
  - An action in which the relief sought is solely for the company should be brought as a
    derivative action (s. 216A or common law) on behalf of the company (not under s.
    216 which is a personal action by a member) (See, explanation in this section above)
  - However, in cases where relief is sought for both the member and company relief by
    way of a derivative action may be sought under s. 216(2)(c)
  - This strategy may be particularly useful for Singapore companies that are listed in
    Singapore (i.e., they do not have the benefit of a s. 216A statutory derivative action
    but have access to s. 216) which are unable to establish “fraud on the minority” for a
    common law derivative action
  - However, the practical importance of the derivative action remedy (and derivative
    actions generally) has been diminished due to the Court of Appeal’s statement in
    *Kumagai* that “in principle” corporate damages can be awarded under s. 216 (without
    the necessity of a separate derivative action)
    - In *Sim City Technology Ltd v Ng Kek Wee* [2013] SGHC 216, the High Court
      applied this principle by requiring the defendant to return moneys, shares and
other properties that he had misappropriated from some of the companies in the corporate group. Essentially, the High Court granted relief for wrongs suffered by the company through an oppression claim without requiring a separate derivative action to be launched.

- **Kumagai Gumi Co Ltd v Zenecon Pte Ltd [1995] 2 SLR 297 (Court of Appeal, Singapore)**
  
  [Summary: The Court of Appeal held that it might be appropriate to order the oppressor to compensate the company for any loss caused to it, without the necessity of a separate derivative action]


  [Excerpt: In *Sim City Technology Ltd v Ng Kek Wee* [2013] SGHC 216, the plaintiff was a company that was a majority shareholder in a holding company (“Holding Company”). The Holding Company, through its subsidiary companies (“Subsidiary Companies”) and in co-operation with a number of other companies, was part of a group of companies that carried on a single business (“Corporate Group”). The plaintiff brought an action for oppression under s 216 against the managing director of the Holding Company (“defendant”) who, although only a minority shareholder of the Holding Company, managed to exercise effective day-to-day control over it and the Corporate Group. The High Court allowed the plaintiff’s s 216 claim and ordered the defendant to return moneys, shares and other properties that he had misappropriated from some of the companies in the Corporate Group. In addition, under s 216, the High Court ordered the defendant to buy out the plaintiff’s shares in the Holding Company based on their value after the defendant had returned the moneys, shares and other properties to the relevant companies in the Corporate Group.

  The authors respectfully applaud the High Court’s decision in this case for three reasons. First, this decision reinforces the trend in Singapore of awarding damages to the company in oppression actions when doing so is economically pragmatic. In this case, Lai Siu Chiu J could have bowed to the pressures of doctrinal purity and required that direct and/or derivative actions be brought for each of the aggrieved companies to recover the damages that they had suffered as a result of the defendant breaching his directors’ duties. If the court had made such an order, however, the oppressed plaintiff would have been forced to expend a considerable amount of additional time and resources to achieve exactly the same result as what was ordered ultimately under s 216 by the High Court – unjustifiable solely for doctrinal purity. … It is also noteworthy that by allowing a s 216 claim in a holding company to provide an effective remedy for breaches of directors’ duties in its subsidiary, the High Court has potentially created a functional solution to a problem that has been addressed in other jurisdictions by the multiple derivative action: controlling shareholders of holding companies abusing their power to wrongfully extract personal benefits from their subsidiaries. The fact that the multiple derivative action has not yet been explicitly accepted in Singapore makes this most recent expansion of s 216 welcome and potentially fills a lacuna in Singapore’s current shareholders’ remedies regime.]

**Question:** Considering the *Kumagai* decision, what purpose (if any) do the statutory and/or common law derivative actions serve?
VI. JUST AND EQUITABLE WINDING-UP

6.0 Winding-up under s. 254

- The most common reason a company is wound-up is because it is unable to pay its debts. Members may also choose to wind-up a company voluntarily because they believe the company no longer serves a purpose
- Section 254 deals generally with circumstances under which a company may be wound-up by the court
- Typically, minority shareholders do not have the voting power to secure a special resolution to effect a winding-up (ss. 254(1)(a) and 290(1)(b))
- However, minority shareholders can seek a winding-up on “just and equitable” grounds under section 254(1)(i)
- The “just and equitable grounds” test provides the court with extremely wide discretion (but an extremely narrow remedy)

6.1 The consequences of commencing a s. 254(1)(i) application

- An application for winding-up must be advertised
- The presentation and advertisement of a winding-up petition usually results in the company’s credit drying up. Banks will freeze the company’s account and creditors will deal only on cash terms. In addition, the presentation of a winding-up petition against the company is often an event of default in loan agreements and guarantees
- However, since an application under s. 216 is not a winding-up petition it does not have to be advertised and thus does not have the negative effects of commencing a s. 254(1)(i) winding-up
- Therefore, particular care should be taken before commencing an application under s. 254(1)(i)

6.2 Who is permitted to bring a winding-up under s. 254(1)?

- The persons who may apply for a company to be wound-up under s. 254(1) are set out in s. 253(1)
- Section 253(1)(c) provides that a “contributory”—which is defined in s. 4(1) and has been interpreted to include all members—may apply for a winding-up if
  - The shares were originally allotted to the member OR
  - The shares are held by the member for at least six months of the 18 month period before making the application

85 Chew, supra note 1, at 253-92.
86 Technically past/former members may qualify as contributories but for practical purposes will never be able to receive a just and equitable winding up.
The person is holding the shares as a result of them being transferred through death or bankruptcy of the former holder (s. 253(2)(a)(ii)).

A person with an interest in the shares of a company, but who is not a registered member, will also likely be considered to be a “contributory” and can bring an action under s. 254(1).^87^ Section 253(1) also includes a number of other people that may make an application for a winding-up under s. 254(1) including the company and creditors.

Section 254(1) likely only applies to Singapore incorporated companies and not “foreign incorporated” corporations—as the section uses the term “company” and not “corporation” throughout.

Lim Chee Twang v Chan Shuk Kuen Helina [2010] 2 SLR 209 (High Court, Singapore)

[Excerpt: Section 216 clearly provides, inter alia, remedies for shareholders or debenture holders of “a company”. Under s 4 of the Act, this is defined to mean “a company incorporated pursuant to the Act or pursuant to any corresponding written law”. In Ting Sing Ning v Ting Chek Swee [2008] 1 SLR(R) 197, the Court of Appeal held that a foreign company (in that case incorporated in Hong Kong) was not entitled to relief under s 216A of the Act. By a parity of reasoning, neither would s 216 apply to BVI and Consultants HK. It is therefore not surprising that Lim never served the writ on BVI or Consultants HK even though they are named defendants]

However, s 351(1)(c)(iii) appears to provide a “just and equitable” winding-up remedy for members in “foreign incorporated” corporations. As this section has been virtually unused, it is difficult to know how it will be applied by the court. That being said, it is likely that the court would apply this section in a similar manner as s. 254(1)(i).

6.3 The relationship between s. 254(1)(i) and s. 216(2)(f) winding-up

The courts have traditionally taken a restrictive view of their discretion to wind-up a solvent company because of the potential hardship for various stakeholders.

The reluctance of courts to exercise their discretion for a “just and equitable” winding-up led to the development of the oppression remedy.

There is an overlap between a s. 254(1)(i) winding-up based on “just and equitable” grounds and a s. 216(2)(f) winding-up to remedy “commercial unfairness” as they both provide the court with jurisdiction to remedy any form of unfair conduct against a minority shareholders.

However, a Court of Appeal decision (Sim Yong Kim v Evenstar Investments Pte Ltd [2006] 3 SLR 827) is clear that the circumstances in which a minority may succeed in an application for winding-up under s. 216(2)(f) and s. 254(1)(i) are distinct. Therefore, the two minority remedies should be considered independently.

A successful oppression action may not result in the court granting a winding-up—as a winding-up order under s. 216 is seen as a remedy of last resort. On the other hand, it may be “just and equitable” to wind-up a company where there is no oppression or commercial unfairness—especially in a “fault neutral” irretrievable breakdown of a quasi-partnership.

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6.4 Strategic considerations when choosing between s. 254(1)(i) and s. 216(2)(f)

- Especially in the case of a successful company or where the “non-complaining” minority shareholders may suffer losses from a winding-up, the flexibility of a s. 216 (as opposed to s. 254(1)(i)) winding-up may make it easier for an aggrieved minority to receive some remedy. Indeed, the court may reject a s. 254(1)(i) petition if it is seen as an attempt to bypass the more appropriate and moderate remedies under s. 216.
- However, a s. 254(1)(i) petition may be more appropriate in cases where an aggrieved minority is intent on winding-up the company and/or the facts point to a “fault neutral” breakdown of a quasi-partnership (which may lack oppression).
- Where there is the possibility of both actions succeeding, an aggrieved minority may choose to concurrently pursue an application under s. 216(2)(f) and s. 254(1)(i).
- An important consideration when deciding to commence a s. 254(1)(i) application is that it has potentially crippling effects on the company (which is not the case in a s. 216(2)(f) application). The courts do not (See below, handout) look kindly on a minority who uses this power for the purpose of improving their bargaining position.

- Sim Yong Kim v Evenstar Investments Pte Ltd [2006] 3 SLR 827 (Court of Appeal, Singapore)

[Summary: The company was a quasi-partnership in which two brothers held all of the shares. The petitioner, who was a minority shareholder, entered into the company pursuant to his brother’s promise that he would buyout the petitioner’s shares should the petitioner exit the company. The Court of Appeal held that the terms of the promise were too vague to form a contract, but nevertheless amounted to a “legitimate expectation” which was breached when the majority brother refused to purchase the petitioner’s shares for a reasonable price. The Court ordered a just and equitable winding up under section 254(1)(i).]

[Excerpt: In or view, the provisions of our [Company Act] do not support any suggestion that the “just and equitable” jurisdiction under section 254(1)(i) is necessarily a subset of the “oppression” jurisdiction under section 216 for the following reasons...both section 254(1)(i) and section 216 of our [Companies Act] empower a court to wind up the company. These two provisions should therefore be treated as prescribing different grounds to warrant winding up, rather than raising the threshold of the “just and equitable” jurisdiction to allow winding up as a higher order remedy for more severe “oppression” cases...Secondly, equating the scope of section 254(1)(i) with that of section 216 would be inconsistent with the express language used in the two sections; a plain reading of sections 254(1)(i) and 216 necessitates the conclusion that relief under the two sections is founded on different bases...[T]he jurisdiction under section 254(1)(i) may in some cases be broader than that under section 216. The most obvious example of this would be in cases involving deadlock between equal shareholders; whilst it may be difficult to attribute oppressive or unfairly discriminator conduct on either party in such cases, the courts have, nevertheless, been ready to grant winding-up orders pursuant to their “just and equitable” jurisdiction...The inequity justifying a winding-up order in such situations does not lie in the oppressive or wrongful conduct of the other shareholders in the management of the company or the conduct of its affairs, but in the shareholder’s insistence on locking the applicant shareholder in the company despite the stalemate they have reached concerning the conduct of the company’s business...One might wonder whether the state of the law would allow a malicious shareholder to try to wind up his company under section 254(1)(i) and to bypass the more appropriate and moderate remedies available under section 216. In our view, a shareholder who prefers a section 254(1)(i) remedy to harass the company will risk having his application struck out as being vexatious. As I stated in [another decision] “There is no reason to believe that where a company is a ‘going concern’, an aggrieved minority member would want to wind up the company if the real relief he seeks can be satisfied]
without a winding up. In other words, unless motivated by spite, he will not ask for a winding-up order except as a last resort”

- **Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd [2007] 1 SLR 46 (High Court, Singapore)**

  [Summary: The petitioner company (“Summit”) petitioned to have the respondent company (“Pacific”) wound up under s 254(1)(i) of the *Companies Act*. Summit maintained it was just and equitable to wind up Pacific as the relationship between itself and the majority shareholder (“PPPL”) had irretrievably broken down and, additionally, or in the alternative, the substratum of the enterprise had disappeared. Pacific disagreed that the underlying facts of the case supported the bases for the winding up argued by Summit. The operations of Pacific were on-going in that it had not ceased business. It was also contended that Summit was, by the petition, seeking to exit at will from Pacific and that itself was not a case for relief under s. 254(1)(i) of the Act. In addition, it was submitted that the petition ought to be dismissed because the petition was initiated in bad faith and in order to bring about an improper or collateral purpose to force PPPL to buy over Summit’s shareholding on the latter’s terms. The court dismissed the petition for a winding-up under s. 254(1)(i) of the *Companies Act*]

  [Excerpt: Finally, a shareholder who tries to wind up the company under s 254(1)(i) in order to bypass the more appropriate and moderate remedies under s 216 of the Act is at risk of having his petition being struck out]

### 6.5 Determining when a winding-up is “just and equitable”

- “Fairness” is the primary litmus test that the court uses to decide whether to grant a just and equitable winding-up under s. 254(1)(i)
- The court will balance the unfairness caused to the aggrieved minority as a result of the failure to order a winding-up with the unfairness caused to the other corporate stakeholders as a result of ordering a winding-up
- In determining what is “fair” the court will consider “legitimate expectations” of the members—similar to those considered under s. 216
- Unfairness will be determined objectively and the facts and circumstances supporting such a claim must still be present at the time when the winding-up order is made
- The court will normally not see it as “fair” to allow the minority to create conductions that justify the company being wound-up and then to use those same self-induced conditions as a justification for a s. 254(1)(i) winding-up
- Even in a small private or quasi-partnership company mere disagreements between shareholders will not be sufficient to establish grounds for a just and equitable winding-up

- **Sim Yong Kim v Evenstar Investments Pte Ltd [2006] 3 SLR 827 (Court of Appeal, Singapore)**

  [Excerpt: Section 254(1)(i) of the *Companies Act* calls for the application of equitable principles to determine whether a winding-up order should be made in the circumstances of each case. There are two aspects to this jurisdiction: first, whether there is sufficient cause to order a “just and equitable” winding up, and second, whether the winding-up order resulting in the destruction of the company is just and equitable: in other words, whether the cure is worse than the illness, as the winding up might result in loss for all parties... We accept that the notion of unfairness lie at the heart of the “just and equitable” jurisdiction in s 254(1)(i) of the [Act] and that that section does not allow a member to “exit at will”, as is plain in its express terms. Nor does it apply to a case where the loss of trust and confidence in the other members is self-induced. It cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will. However, unfairness can arise in different situations and from different kinds of conduct in different circumstances. Cases involving management deadlock or loss of mutual trust and confidence where the “just and equitable” jurisdiction under s 254(1)(i) has been successfully invoked can be re-characterised as cases...
of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholder. Unfairness can also arise in the loss of substratum cases.

- **Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd** [2007] 1 SLR 46 (High Court, Singapore)

  [Excerpt: The authorities cited by the parties serve to illustrate the application of the legal principles to the findings of fact by the court there. I need only refer to the recent decision of the Court of Appeal in *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 (“Evenstar”) which approved Lord Wilberforce’s well-known exposition of the meaning of “just and equitable” in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 and concluded that the notion of fairness was the touchstone by which to decide whether the court should grant relief under s 254(1)(i) of the Act... The test for unfairness is an objective one. The test was stated by Nourse J in *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 290, quoting the dictum of Slade J in *re Bovey Hotel Ventures Ltd* (31 July 1981) as being “whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interests”. Notably, the facts and circumstances making it just and equitable to liquidate the company must subsist at the time the order is made]

- **Chow Kwok Chuen v Chow Kwok Chi and another** [2008] 4 SLR(R) 362 (Court of Appeal, Singapore)

  [Summary: The appellant Chuen, and respondent, Chi, along with their third brother, Ching, were co-directors of three family companies set up by their late father Mr Chow to hold the assets which he had accumulated over the years (the “Companies”). The three brothers’ sister was not a director and had no direct shareholding in the Companies, but had an interest as a beneficiary of part of their late mother’s estate. After Mr Chow’s death in 1997, the Companies continued their usual business of leasing out commercial properties with three management staff running their day-to-day affairs. Unfortunately, the brothers’ relationship became increasingly acrimonious over the years and they were unable to agree on how to manage the Companies. Ching was usually in the minority and eventually commenced suits against Chi and Chuen for oppression, seeking compulsory winding up of each of the Companies. Mr Chow’s estate owed substantial sums to the Companies at the time of his death. However, it was unable to pay back these debts because the estate’s principal assets comprised its shares in the Companies themselves, and the brothers were also unable to agree on how these debts should be settled. With the three brothers at a stalemate on matters relating to the Companies as well as the administration of Mr Chow’s estate, Chi brought applications to wind-up the Companies in the court below. Ching and Chuen opposed the applications unsuccessfully and Chuen appealed. The Court of Appeal upheld the decision of the High Court that the Companies should be wound-up]

  [Excerpt: In the light of the general language of s 254(1)(i) of the Act and the court’s just and equitable jurisdiction, the present inquiry boils down to a determination of whether there existed unfairness which warranted a winding-up order...First, the character of a company being small or private is not of itself sufficient to constitute a “just and equitable” basis to wind up a company. Something more must be present.... Understandably, the recourse to wind up a company under s 254(1)(i) should not be readily available to a minority shareholder on the ground that he does not see eye to eye with the majority. The memorandum and articles of association of a company provide the framework within which the shareholders and directors should operate. Lord Wilberforce alluded to this in *Ebrahimi* when he said that a party should not be allowed to “disregard the obligation he assumes by entering a company, nor [should] the court [be entitled] to dispense him from it” (see [16] above). Caution must therefore be exercised before a winding-up order is made. In each instance where a winding-up order is sought, there must be sufficient grounds before the court makes the order as that would have the effect of dispensing the petitioner from complying with the scheme of things provided in the memorandum and articles of association]
Chow Kwok Chuen v Chow Kwok Chi and another [2008] 4 SLR(R) 362 (Court of Appeal, Singapore)

[Excerpt: Section 254(1)(i) of the Act merely provides that the court “may order the winding up if the Court is of opinion that it is just and equitable that the company be wound up”. The Act does not define or set any parameters for determining what would constitute “just and equitable”. However, as early as in 1916, in In re Blériot Manufacturing Aircraft Company (Limited) (1916) 32 TLR 253, Neville J said at 255: “The words ‘just and equitable’ are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances” While case law has established that certain grounds would be sufficient to constitute ‘just and equitable’, such grounds are not a closed list. As Lord Wilberforce stated unequivocally in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (“Ebrahimi”) at 374–375: “[T]here has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.” Lord Wilberforce further elaborated at 379: “The ‘just and equitable’ provision does not … entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough….The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some … of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members’ interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.” Two things should be noted about these passages in Ebahim. First, the character of a company being small or private is not of itself sufficient to constitute a “just and equitable” basis to wind up a company. Something more must be present. Second, the elements which his lordship listed which could make it just and equitable to wind up the company were nothing more than just examples or illustrations. By using the expression “typically may include” he clearly recognised that there could be other elements or situations and there was no reason why such other elements or situations had to be of the same nature or genre as those listed. The concept of “just and equitable” is a dynamic one and we should not circumscribe its scope by reference to case law when the cases themselves do not seek to do more than just apply the concept of “just and equitable” to the circumstances of each case]

- Irretrievable breakdown
  - In the case of a private closely held company or a quasi-partnership, a just and equitable winding-up may be ordered where there is an irretrievable breakdown in the relationship between the director-shareholders, even though oppressive conduct cannot be squarely pinned on one party
  - However, a complainant cannot succeed in a s. 254(1)(i) application where she is the cause of the irretrievable breakdown
  - Traditionally, there were cases in which “technical procedural deadlocks” resulted in winding up, but this is now rare as most companies have procedures for resolving procedural deadlocks (e.g., casting votes, Arts. 53 and 80, Table A)
  - However, even when a “technical procedural deadlock” does not exist the court can order a winding-up based on a functional deadlock of a private closely held company or a quasi-partnership as the unfairness of locking a minority-shareholder into such a functionally deadlocked company may outweigh the unfairness caused by winding-up the company
Ng Sing King v PSA International Pte Ltd [2005] 2 SLR 56 (High Court, Singapore)

[Summary: The oppression action under s. 216 of the Companies Act was dismissed, but the company in question was wound up on the just and equitable ground under s. 254(1)(i) on the basis that there had been an irretrievable breakdown in the relationship amongst the shareholders. It is interesting to note that the company in question was not a quasi-partnership but a joint venture company with a detailed shareholders agreement that was negotiated at arm’s length. The Court was of the opinion that although no party could be blamed for the breakdown, the parties could nevertheless no longer work together. This was coupled with the fact that the company was not profitable and had a loss of substratum (See above, for more detailed facts)]

[Excerpt: It is patently obvious from the evidence considered above that there are irreconcilable differences and that the shareholders can no longer work together. The degree of acrimony amongst them is readily apparent from their conduct at the board meetings. These meetings were disorderly and acrimonious and the disputes amongst the shareholders hampered the calm discussion of urgent issues on the agenda. The fifth board meeting on 21 February 2002 is most illustrative of the tension. At this juncture, the plaintiffs had found out about Ladd’s involvement in the new eModal. The strategic shareholders discovered that the plaintiffs’ directors were tape-recording the proceedings and took issue with this. After a vote was taken against having a verbatim record of the meeting, there was a dispute over the presence of the plaintiffs’ solicitors, Lee & Lee, at the meeting. A heated argument ensued over this matter, as well as other contentious issues like the accuracy of the minutes of earlier board meetings. Incidentally, the latter issue was a perennial point of contention amongst the shareholders. The last set of agreed board meetings was for the fourth meeting on 3 August 2001. Thereafter, there were incessant disputes about whether the minutes accurately reflected what each shareholder had said. The strategic shareholders have characterised the meetings as fiery and replete with even shouting and crying. I cannot see how future board meetings can be constructive in any way given the tension between the parties, which is likely to be further exacerbated by these legal proceedings. It is noteworthy that Ng himself admitted that by 26 March 2002, his relationship with the other board members had deteriorated considerably. While he was being cross-examined on a correspondence exchange, I asked him whether the relationship between the shareholders had soured. He confirmed that at this stage, they had reached a point of no return. Indeed, there were many unpleasant clashes amongst them by this date. Ng did not have a good working relationship with Owen, a POAP secondee. Barely four months after Owen commenced work in eLogicity, Ng had confiscated his laptop computer and then made serious allegations against him. PAOP eventually agreed that Owen would leave eLogicity. Disputes were also rife in the Executive Committee. Due to problems in the relationship between Latta and Ng, it had to be dissolved in September 2001 and reconstituted in March 2002 without Latta. These incidents indubitably show that the relationship between the parties was seriously strained...It is my opinion that eLogicity’s business has been crippled by endless disputes between the shareholders, and that they will not be able to work together in the future. I therefore have no doubt that on the ground of irretrievable breakdown of relationship alone, winding up of the company is just and equitable]

Chow Kwok Chuen v Chow Kwok Chi and another [2008] 4 SLR(R) 362 (Court of Appeal, Singapore)

[Summary: The Court of Appeal upheld the High Court’s decision to order a winding-up in a closely held family company (which was not a quasi-partnership) as a result of a breakdown in the management of the Companies (See above, for more detailed facts)]

[Excerpt: However, the respondents submitted that there was a practical deadlock in the management of the Companies and that this was a sufficient ground for winding-up because the Companies were private companies in the fullest sense, with very few shareholders and directors, upon whose harmonious relations the functioning of the Companies depended. In particular, the Companies lacked the necessary mutual confidence between their members to operate meaningfully. There are thus two parts to the inquiry: first, whether there is in fact a deadlock, and second, if so, whether the deadlock should be regarded as a ground upon which winding up of a family company can be made even though it is not a quasi-partnership...Lord Wilberforce held in Ebrahim (at 376) that “deadlock” was to be understood in a general rather than a technical sense, and that “just and equitable” need not and should not be confined to situations of true or absolute deadlock ...While the odd number of three directors may suggest that the board of directors should in theory be able to arrive at a decision by majority, that does not necessarily follow if there is total mistrust among the directors as is the position here. The net result which we see is that no decision could be made because any proposal by one brother would be shot down by the other two. This is a case of a three-way impasse. The Companies are just limping along with the three employees managing the daily affairs with no
leadership provided from the board of directors. Accordingly, we would agree with the Judge that there is a case of real deadlock amongst the three brothers-directors. The management of the Companies is at a stalemate... In Everstar ([31] supra), which concerned a case of corporate partnership, this court held (at [36]) that there was obvious unfairness in the opposing shareholder’s insistence on locking the petitioning shareholder in the company despite the stalemate reached in running the company. In the same vein, the insistence by Chuen not to have the Companies wound up, and instead to continue to lock in the interests of the other two brothers (and their sister) in the Companies, is itself a form of unfairness]

- **Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd** [2007] 1 SLR 46 (High Court, Singapore)

[Excerpt: In my judgment, this is not a case where as a result of a breakdown of the relationship between shareholders, the minority shareholder’s director was removed from the company or excluded from management. Notably, Ong is still a director of the Company and, under the MOU, day-to-day management of the Company was by agreement assumed by PPPL. Nothing has been said about the relationship of the directors (ie, Lloyd and Ong) and it was not the relationship of the directors that has broken down. Lloyd in the witness box said that it was Joseph whom he did not get along with. Indeed, the lines of communication between Ong and Lloyd were opened and there were instances where Ong was asked to speak to Lloyd. One such occasion in September 2004 was where Lloyd withdrew the notice of termination of the MOU after Ong had, what Dan described as, “a heart-to-heart talk” with Lloyd. It is evident from Dan’s answers in cross-examination (see [30] to [33] below), and I so find, that this is not a case where there has been an irretrievable breakdown in the conduct and management of the affairs of the Company]

- **Lawrence v Lawrich Motors (Pri) Ltd** [1948] SALR 1029 (Local Division, South Africa)

[Summary: One of the two shareholder directors of the company had an affair with the other’s wife. The husband of the unfaithful wife petitioned to wind up the company on just and equitable grounds. The court found that there was a tension or resentment between the quasi-partners, which rendered continued cooperation impossible. There was no need to attach blame for the breakdown]

- **Loss of substratum**
  - Where a company has a main or primary objective, and it can no longer be achieved, it may be just and equitable to wind up the company—even when there is no issue of oppression

- **Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd** [2007] 1 SLR 46 (High Court, Singapore)

[Excerpt: The additional or alternative ground relied upon by Summit that winding up is just and equitable is the loss of substratum of the Company. From the time Summit pulled out of the logistics business, the picture was not of a company in hiatus. A substitute warehouse and distributor was found so that business could continue with as little interruption as possible. Dan’s e-mail of 19 May 2004 assured Lloyd of Summit’s logistical support until a substitute was found. At the time of the hearing, the Company has not ceased to trade. It is not to be overlooked that the Company is still engaged in business activities and has employees. Mr Fong submits that the Company has a niche business with a unique licence for importing a number of drugs like Thymoglobulin, an anti-rejection drug for transplant patients, Thyrogen, a drug for use in thyroid cancer patients on a named-patient basis and, Agrippal and Fluad which are influenza vaccines. These are matters that are also to be weighted in the balance in exercise of the court’s jurisdiction. It was mainly contended that despite the terms of the MOU that all lines of PPPL were to be transferred to the Company, that was not the case with the Spirig line of skin products which was billed by the principals of Spirig to PPPL who subsequently billed the Company. Lloyd said Ong was happy with that arrangement so long as the Spirig product was distributed by Summit through the Company. He had earlier explained to Ong that PPPL’s agreement with Spirig was for the Asia-Pacific region and it was for PPPL to then appoint sub-distributors in the region and the sub-distributor for Singapore was the Company and the sub-distributor in Malaysia was Summit Malaysia Sdn Bhd. Ong did not testify at the hearing nor was an alternative view put forward to challenge Lloyd’s testimony. I find the assertion that the non-transfer of the Spirig lines was a loss of the substratum of the Company to be untenable. It was to me yet another complaint dragged into issue to bolster the petition. The petitioner has to show that the substratum of the business of the Company has gone or, in the words of Lord Justice Bagallay in In re German Date Coffee Company (1882) 20 Ch D 169 at 188, that there is an impossibility in carrying on the business of the company as at the date of the petition. It
is, in my view, difficult to see how it can be said on the evidence before me that at the date of the petition it was impossible for the business to continue]

➢ *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56 (High Court, Singapore)

[Excerpt: This is an additional ground to fortify my conclusion that winding up is just and equitable. I believe that the company is no longer viable and it would thus be pointless for the shareholders to continue flogging a dead horse. After the downsizing of eLogicity, Corcoran, the acting CEO, still encountered problems in seeking to revive the company. There were various obstacles to eLogicity’s progress, including the lack of a patent for the eSeal, the lack of a contract with EJB for the supply of the eSeal and the failure to have a working system for the tracing of vehicles. The last problem caused Ford, a major customer, to refuse to allow eLogicity to perform any more proofs of concept. Due to these problems, it was resolved by the Board on 5 March 2003 that the company should continue to employ skeletal staff and minimise its business activities. The company only has a part-time secretary at the moment. The plaintiffs have pointed out that eLogicity still has TAAs with various companies. Childs also gave evidence that Corcoran had managed to secure various contracts. However, it remains doubtful to me whether the company, after such a long hiatus, can operate profitably. I also consider it pertinent that PSA and P&O, the parent companies of the strategic shareholders, have proceeded to work with SAVI in the SST, which seems to have a relatively wide global influence. I do not see how the strategic shareholders would have any more motivation to seek to advance eLogicity’s main business of providing global track and trace services, as it would be in direct contradiction with what their parent companies are now seeking to achieve. In the premises, I will allow POAP’s winding up petition]

- **Fraudulent inception and purpose**
  - A company which was fraudulent at its inception may be wound up on just and equitable grounds

➢ *Re Thomas Edward Brinsmead & Sons* [1897] 1 Ch 406 (Court of Appeal, UK)

[Summary: The Company had been formed to carry out the business of manufacturing pianos to pass off as the products of another firm. The company had little capital and offered shares to the public to raise capital. Many shareholders who had subscribed for shares had brought actions to remove their name’s from the company’s register and to have their money returned, upon the ground that they had been defrauded into becoming shareholders of the company by fraudulent misstatements in the prospectus. The Court of Appeal ordered a just and equitable winding-up]

[Excerpt: If ever there was a case in which it was just and equitable that a company should be wound up by the court, we cannot doubt that that case is this case]

6.6 **Deferring a s. 254(1)(i) winding-up order**

- The court can use its discretion under s. 257(1) to defer the winding-up to provide the parties with the opportunity to reach a compromise
- This is a way in which the court can “soften” the harshness of a winding-up order and facilitate the contractual freedom of the parties

➢ *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 (Court of Appeal, Singapore)

[Excerpt: : Apart from directing how the winding up should be conducted, we are also of the view that the court’s power under s 257(1) also allows it to defer the winding up until parties have been given adequate opportunity to reach a compromise. This practice of staying a winding-up order to allow parties to reach an alternative arrangement is one which is well-established in jurisdictions such as Australia: see eg, Re Cumberland Holdings Ltd (1976) 1 ACLR 361 at 380; Bernhardt v Beau Rivage Pty Ltd (1989) 15 ACLR 160 at 166 ]
Chow Kwok Chuen v Chow Kwok Chi and another [2008] 4 SLR(R) 362 (Court of Appeal, Singapore)

[Excerpt: In Evenstar ([31] supra) at [47]–[48], this court exercised its power to wind up the company on the facts of that case. But it also left the door open for the parties to reach a mutually acceptable solution to their dispute, which they eventually did. In the present case, we propose to do the same. We affirm the Judge’s order to wind up the Companies but will suspend it from taking effect for one month to allow the parties to come to an amicable settlement to preserve the legacy of Mr Chow that one or more of the sons desired. If no settlement is reached on the expiry of suspension, the winding-up order will take effect immediately]
VII. THE RELATIONSHIP BETWEEN THE FOUR MAIN REMEDIES

7.0 Summary of the four main mechanisms for the protection of minority shareholders

(1) Common law derivative action

- **Nature of the mechanism**
  - Procedural (standing)
    - A common law derivative action allows an individual member to bring an action, for the benefit of the company, based on the company’s cause of action

- **Legal test**
  - The company is *prima facie* entitled to the relief claimed
  - “Fraud on the minority”
    - Benefit to the wrongdoing director(s)
    - Detriment to the company
    - Wrongdoer control (that stifles the company from commencing an action itself)

- **Disadvantages**
  - Procedural uncertainty (no particular procedure in the *Rules of Court*)
  - The company receives the benefits but the costs are by default paid by the plaintiff
  - Does not apply to “pure negligence” (i.e., where the directors’ negligently damage the company but they do not benefit)
  - Difficult to establish wrongdoer control

- **Advantages**
  - Prevents majority shareholder directors from escaping liability
  - Available in the case of foreign incorporated companies

(2) Statutory derivative action (s. 216A)

- **Nature of the mechanism**
  - Procedural (standing)
    - Section 216A allows an individual member\(^{88}\) to bring an action in the name of the company based on the company’s cause of action

- **Legal test**
  - The test is set out in s. 216A
    - Proper notice

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\(^{88}\) In addition to a member, the Minister of Finance (in the case of a declared company) or any other person who the court deems “proper” can bring a s. 216A statutory derivative action.
Good faith
  - In the interests of the company
    - Prima facie a reasonable chance the action will succeed
    - Interests of the company from a broad commercial perspective

- **Disadvantages**
  - Only for Singapore incorporated/non-Singapore-listed companies
  - The company receives the benefits but the costs are by default paid by the plaintiff

- **Advantages**
  - Prevents majority shareholder directors from escaping liability
  - Makes procedure for establishing standing and indemnification of shareholder’s costs clear
  - Can be used in the case of “pure negligence” (where the directors’ negligently damage the company but they do not benefit)
  - No need to establish wrongdoer control

(3) **Oppression remedy (s. 216)**

- **Nature of the mechanism**
  - Substantive right (not merely procedural)
    - Section 216 provides a right to minority members\(^9\) to be granted a remedy for majority abuse that amounts to “commercial unfairness”

- **Legal test**
  - Commercial unfairness arises when there is a
    - A breach of the written contract and/or legitimate expectations (informal/implied) between the shareholders
    - The breach (or in most cases breaches) must rise to the level of causing “commercial unfairness” to the aggrieved shareholder

- **Disadvantages**
  - Corporate damages may not be available without bringing a derivative action—especially when the core claim is a breach of directors’ duties (i.e., only a wrong/harm to the company and not the individual member)
  - Only available for Singapore incorporated companies

- **Advantages**
  - Enforces agreement between the parties
  - Extremely flexible remedies to put an end to the “commercial unfairness”—including the possibility of awarding damages to the company for breaches of directors’ duties

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\(^9\) In addition to a member, a person who (although not a member) has shares transmitted to her by operation of law, a debenture holder of the company or the Minister (in the case of a declared company) may bring a s. 216 oppression claim.
when they are part of a shareholder’s s. 216 claim, the right to bring a derivative action, a buyout and winding-up

(4) Just and equitable winding up (s. 254)

- **Nature of the mechanism**
  - Substantive right (not merely procedural)
    - Section 254(1)(i) provides individual members (who fall under the definition of “contributory”)
      with a remedy to apply to the court for the company to be wound-up

- **Legal test**
  - Just and equitable test
    - “Fairness” is the primary litmus test for determining whether to grant a just and equitable winding-up
    - The court will balance the unfairness suffered by the aggrieved minority of the failure to order a winding-up with the unfairness that will be caused to the other corporate stakeholders by ordering a winding up
    - “Legitimate expectations” of the members will be considered when determining “fairness”

- **Disadvantages**
  - It provides a single remedy with dramatic consequences
  - Only available for Singapore incorporated companies—however, for foreign companies s. 351(1)(c)(iii) may provide a similar remedy

- **Advantages**
  - Allows minority shareholders a way to exit where it would be unjust to force them to continue in the company

7.1 The overlap among the four mechanisms

- The same wrongful acts undertaken by a majority shareholder director can support a personal action based on commercial unfairness (s. 216 or s. 254(1)(i)) and/or a derivative action based on a breach of director’s duties
- Potential remedies in a successful oppression claim (s. 216) include a winding-up (the same as in s. 254(1)(i)) and a derivative action (the same as s. 216A and the common law derivative action)
- In some cases, the court may order compensation for damages to the company as a remedy for oppression (s. 216) which would be the same as those ordered for a derivative action (either s. 216A or common law)

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90 See section 6.1 above for the definition of “contributory” and for a list of other people who are eligible to bring a claim under s. 254(1)(i).
7.2 The uniqueness of the four mechanisms

- The common law derivative action is the only commonly used remedy available for foreign incorporated companies (although the rarely used s. 351(1)(c)(iii) may allow foreign companies access to a just and equitable winding up)
- It is possible to meet the test for a just and equitable winding up (s. 254(1)(i)) without establishing oppressive conduct under s. 216 (e.g., deadlock between the shareholder directors in a quasi-partnership)
- In most successful s. 216 oppression cases the court will not award a winding-up as it is normally the remedy of last resort (e.g., when a company is large and/or thriving)
- Oppression and a s. 254(1)(i) just and equitable winding up can be established without a breach of the articles and without conduct amounting to a breach of directors’ duties (e.g., removal of director contrary to legitimate expectations)
- In cases which are entirely based on breaches of directors’ duties the aggrieved shareholder may be unable to bring a personal action (either s. 216 or s. 254(1)(i)) and instead must bring a derivative action (either common law and s. 216A)
- A minority shareholder cannot receive personal/direct relief in a derivative action
- As opposed to the statutory derivative action (s. 216A), there is no defined procedure and/or legal test for bringing a common law derivative action and it requires the aggrieved shareholder to establish wrongdoer control
- As opposed to the common law derivative action, the statutory derivative action (s. 216A) cannot be brought by members in listed or non-Singapore corporations

7.3 The practical result of the overlap and uniqueness of the four mechanisms

- The broad scope of wrongdoer behavior (“commercial unfairness”) and flexible (“court thinks fit”) direct remedies for minority shareholders have led to the expansion of the oppression remedy (s. 216) and rendered the other remedies less important—but not irrelevant
- Different mechanisms may be used simultaneously (but beware of the notice requirement for s. 216A)
- The predictable procedure/legal test and absence of the requirement to prove wrongdoer control, limits the usefulness of the common law derivative action to Singapore-listed and non-Singapore companies for bringing a derivative action
- The only commonly used remedy available for foreign incorporated companies is the common law derivative action
VIII. SOME PROPOSED AMENDMENTS

After considering a wide scope of feedback, the Steering Committee for Review of the Companies Act have proposed a large number of amendments to Singapore’s shareholder remedies regime. Here are a few of the more interesting proposals:

- **Recommendation 2.26:** Section 254(1)(i) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

- **Recommendation 2.29:** Section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

- **Recommendation 2.30:** Section 216A should be amended such that the statutory derivative action in section 216A is applicable to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

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[Excerpt: Singapore’s statutory derivative action, however, is somewhat idiosyncratic in that it does not currently apply to foreign-incorporated companies or companies listed on a Singapore exchange. Hence, the common law derivative action – and, in turn, the much criticised fraud on the minority test – still remains very much alive in Singapore (see, eg, *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1; *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197). This idiosyncrasy, however, will soon be significantly reduced as the Ministry of Finance has recently announced that the Act will be amended to extend the statutory derivative action to cover all Singapore-incorporated companies whether they are listed or unlisted ([Review of the Singapore Companies Act, Ministry of Finance’s Responses to the Report of the Steering Committee for Review of the Companies Act](3 October 2012) at pp 37–38). Unfortunately, however, the proposed amendment does not appear to extend s 216A to foreign-incorporated companies. As such, even after the Act is amended, it appears that the common law derivative action – and, in turn, the much criticised fraud on the minority test – will still have some relevance as it will be the only avenue for shareholders in foreign-incorporated companies to pursue a derivative action in Singapore. It is noteworthy that the possibility of shareholders in foreign-incorporated companies wanting to pursue a derivative action is far from remote. In fact, Singapore’s two leading cases on the common law derivative action were both brought by shareholders in foreign-incorporated companies (see, eg, *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1; *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197). The authors agree with the Ministry of Finance’s recommendation to expand s 216A to all Singapore-incorporated companies as s 216A provides a much better filter than the fraud on the minority test. We, however, would suggest that further expanding s 216A to cover all Singapore and foreign-incorporated companies would be desirable as it would put to rest the much criticised fraud on the minority test and allow the courts to focus on fine-tuning the s 216A filter]
IX. RELEVANT SECTIONS OF THE COMPANIES ACT

Personal remedies in cases of oppression or injustice

216. —(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;
(b) regulate the conduct of the affairs of the company in future;
(c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;
(d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
(e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company’s capital; or
(f) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to subsection (2) (f), the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon an application duly made to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company’s memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power, without the leave of the Court, to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) A copy of any order made under this section shall be lodged by the applicant with the Registrar within 14 days after the making of the order.

(6) Any person who fails to comply with subsection (5) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000 and also to a default penalty.

(7) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transmitted by operation of law as it applies to members of a company; and references to a member or members shall be construed accordingly.

[UK, 1948, s. 210; Aust., 1961, s. 186]
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.

(5) In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interests of justice, including (but not limited to) the following:

(a) an order authorising the complainant or any other person to control the conduct of the action;
(b) an order giving directions for the conduct of the action; and
(c) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action.

(6) Where the action has been commenced or is to be brought in the subordinate courts, an application for leave under subsection (2) shall be made in a District Court.

Evidence of shareholders’ approval not decisive — Court approval to discontinue action under section 216A

216B. — (1) An application made or an action brought or intervened in under section 216A shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company has been or may be approved by the members of the company, but evidence of approval by the members may be taken into account by the Court in making an order under section 216A.

(2) An application made or an action brought or intervened in under section 216A shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given upon such terms as the Court thinks fit and, if the Court determines that the interest of any complainant may be substantially affected by
such stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) In an application made or an action brought or intervened in under section 216A, the Court may at any time order the company to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be accountable for such interim costs upon final disposition of the application or action.

[Canada, 1985, s. 242]

DIVISION 2 — WINDING UP BY COURT
Subdivision (1) — General

Application for winding up
253. —(1) A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the application —

(a) of the company;

(b) of any creditor, including a contingent or prospective creditor, of the company;

(c) of a contributory or any person who is the personal representative of a deceased contributory or the Official Assignee of the estate of a bankrupt contributory;

(d) of the liquidator;

(e) of the Minister pursuant to section 241 or on the ground specified in section 254 (1) (d) or (l);

(f) of the judicial manager appointed pursuant to Part VIIA;

(g) in the case of a company which is carrying on or has carried on banking business, of the Monetary Authority of Singapore established under the Monetary Authority of Singapore Act (Cap. 186); or

(h) of the Minister on the ground specified in section 254 (1) (m), or of any 2 or more of those parties.

[49/73;15/84;13/87;42/2005]

(2) Notwithstanding anything in subsection (1) —

(a) a person referred to in subsection (1) (c) may not make a winding up application on any of the grounds specified in section 254 (1) (a), (b), (c), (e) or (i), unless —

(i) the company has no member; or

(ii) the shares in respect of which the contributory was a contributory or some of them were originally allotted to the contributory, or have been held by him and registered in his name for at least 6 months during the 18 months before the making of the winding up application or have devolved on him through the death or bankruptcy of a former holder;

Circumstances in which company may be wound up by Court
254. —(1) The Court may order the winding up if —

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) default is made by the company in lodging the statutory report or in holding the statutory meeting;

(c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;
(d) the company has no member;

(e) the company is unable to pay its debts;

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members;

(g) an inspector appointed under Part IX has reported that he is of opinion —

i) that the company cannot pay its debts and should be wound up; or

ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up;

(h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, happens on the occurrence of which the memorandum or articles provide that the company is to be dissolved;

(i) the Court is of opinion that it is just and equitable that the company be wound up;

(j) the company has held a licence under any written law relating to banking, and that licence has been revoked or has expired and has not been renewed;

(k) the company is carrying on or has carried on banking business in Singapore in contravention of the provisions of any written law relating to banking;

(l) the company has carried on multi-level marketing or pyramid selling in contravention of any written law that prohibits multi-level marketing or pyramid selling; or

(m) the company is being used for an unlawful purpose or for purposes prejudicial to public peace, welfare or good order in Singapore or against national security or interest.

Powers of Court on hearing winding up application

257. —(1) On hearing a winding up application, the Court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of an application by a contributory that there will be no assets available for distribution amongst the contributories.

Division 5 — Winding up of unregistered companies

Definition of unregistered company

350. —(1) For the purposes of this Division, “unregistered company” includes a foreign company and any partnership, association or company consisting of more than 5 members but does not include a company incorporated under this Act or under any corresponding previous written law.

Provisions of Division cumulative

(2) This Division shall be in addition to, and not in derogation of, any provisions contained in this or any other written law with respect to the winding up of companies by the Court and the Court or the liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies.

[UK, 1948, ss. 398, 404; Aust., 1961, s. 314]
Winding up of unregistered companies

351. — (1) Subject to this Division, any unregistered company may be wound up under this Part, which Part shall apply to an unregistered company with the following adaptations:

(a) the principal place of business of such company in Singapore shall for all the purposes of the winding up be the registered office of the company;
(b) no such company shall be wound up voluntarily;
(c) the circumstances in which the company may be wound up are —
   (i) if the company is dissolved or has ceased to have a place of business in Singapore or has a place of business in Singapore only for the purpose of winding up its affairs or has ceased to carry on business in Singapore;
   (ii) if the company is unable to pay its debts;
   (iii) if the Court is of opinion that it is just and equitable that the company should be wound up.

Injunctions

409A. —

(1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of this Act, the Court may, on the application of —

   (b) any person whose interests have been, are or would be affected by the conduct, grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that he is required by this Act to do, the Court may, on the application of —

   (b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing, grant an injunction requiring the first-mentioned person to do that act or thing.

(3) Where an application is made to the Court for an injunction under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in subsection (1) pending the determination of the application.

(4) The Court may rescind or vary an injunction granted under subsection (1), (2) or (3).

(5) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the power of the Court to grant the injunction may be exercised —

   (a) if the Court is satisfied that the person has engaged in conduct of that kind — whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or
   (b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will engage in conduct of that kind — whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(6) Where an application is made to the Court for a grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised —

   (a) if the Court is satisfied that the person has refused or failed to do that act or thing — whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or
(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will refuse or fail to do that act or thing — whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
LECTURES 6 & 7

CORPORATE CAPACITY & CONTRACTING

CORPORATE CONSTITUTION

COMPANY MEETINGS

Assistant Professor Umakanth Varottil
CORPORATE CAPACITY & CONTRACTING

Some of the cases cited below can be found in Sealy & Worthington Cases and Materials in Company Law (8th edn, 2008) (S&W), or David Kershaw Company Law in Context: Text and Materials (2009)

A. Overview

In this part of the course we look at how a company enters into a contract. The main difference between a company and a human being in this regard is that the former is an artificial entity. This renders corporate contracting more complicated than the making of contracts by a human being in two aspects: a company by necessity has to act through natural persons, and the capacity of a company, unlike a natural person, has historically been held to be limited.

As a company can only act through natural persons, the law must devise rules to stipulate the circumstances under which an act of natural persons may be regarded as binding on the company. A company principally acts in 2 ways; it can act through its organs or its agents.

- The two organs of the company are its members in general meeting and its board of directors. When a company acts through its organs, the act is regarded as the act of the company itself.

- More commonly, a company acts through its agents who may be employees of the company or who may be independent contractors engaged to act on the company’s behalf in specific transactions. This part of the course will focus on the latter.

Natural persons normally have full legal capacity, for example, to make a contract or a gift. English courts in the nineteenth century developed the doctrine that a company, unlike a natural person, does not enjoy full legal capacity. The legal capacity of a company was limited by its objects, and a company was required to include objects clauses in its memorandum of association. Under this doctrine, if a company acted outside of its objects clauses, the act was said to be ultra vires and void. The ultra vires doctrine used to be extremely important in company law, but that has ceased to be so in Singapore and England.

B. The Objects Clause and Corporate Capacity

The ultra vires doctrine is concerned with the capacity of a company to do an act, not the authority of its agents. Unfortunately, some old cases used the term ‘ultra vires’ to mean not the lack of corporate capacity but the lack of authority by an agent to act on behalf of the company. Such liberal usage of the term has been rejected in the following cases.
Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1984] BCLC 466, per Browne Wilkinson, LJ:

In my judgment, much of the confusion that has crept into the law flows from the use of the phrase "ultra vires" in different senses in different contexts. The reconciliation of the authorities can only be achieved if one first defines the sense in which one is using the words "ultra vires." Because the literal translation of the words is "beyond the powers" there are many cases in which the words have been applied to transactions which, although within the capacity of the company, are carried out otherwise than through the correct exercise of the powers of the company by its officers: indeed, that is the sense in which the judge seems to have used the words in this case. For reasons which will appear, in my judgment, the use of the phrase "ultra vires" should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void.

A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void. But the objects of a company and the powers conferred on a company to carry out those objects are two different things: .... If the concept that a company cannot do anything which is not authorised by law had been pursued with ruthless logic, the result might have been reached that a company could not (ie had no capacity) to do anything otherwise that in due exercise of its powers. But such ruthless logic has not been pursued and it is clear that a transaction falling within the objects of the company is capable of conferring rights on third parties even though the transaction was an abuse of the powers of the company: .... It is therefore established that a company has capacity to carry out a transaction which falls within its objects even though carried out by the wrongful exercise of its powers.

Banque Bruxelles Lambert v Puvaria Packaging Industries (Pte) Ltd [1994] 2 SLR 35

(citing Rolled Steel with approval)

The ultra vires doctrine has been rendered almost obsolete in Singapore due to the following developments.

- First, section 25 of the Companies Act provides that an act shall not be invalid by reason only of the fact that the company was without capacity to do such an act. Any lack of capacity is relevant only within the company itself. A contract that is ultra vires the company is thus binding on the company provided the other rules on corporate contracting are satisfied.

- Secondly, a company now has full capacity to carry on or undertake any business or activity, do any act or enter into any transaction, and for those

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1 That is, in proceedings against the company by a member of the company, in proceedings by the company against an officer of the company, or in an application by the Minister to wind up the company.
purposes, full rights, powers and privileges: section 23(1). This turns the ultra vires doctrine on its head. However, a company may still choose to restrict its capacity: section 23(1B). A company may do this by stating in the objects clauses in its memorandum that it is not to enter into a particular business. If so, a contract made by the company that infringes the prohibition will be ultra vires; but the effect of that is as stated in the preceding paragraph.

C. Corporate Contracting

1. Introduction

A company may enter into a contract through its organs; ie, its board of directors or, more rarely, members in general meeting, acting within the spheres of their respective competences. Most contracts are however made at a lower level in the corporate hierarchy, through a managing or executive director, or senior employee. The legal concepts governing the making of contracts by an individual on behalf of a company are drawn from the law of agency.

It is necessary to delve into some fundamental rules of agency law, which play an important role in the functioning of a company. In any event, some of the leading cases in agency law involved companies, and they are included below.

The challenge here is to apply the general law of agency in a corporate context. It bears repeating that a company is an artificial entity. By its very nature a corporate principal is a very different kind of principal from a human principal. This is especially so where the company is a big organization with many employees and layers of hierarchy. It is necessary to appreciate this to understand the application of general agency law in the corporate context.

2. Outline of agency law

(a) Paradigm case

Agency is a relationship (or set of relationships), which arises when one person, called the principal authorizes another, called the agent, to act on his behalf, and the other agrees to do so. The agent may therefore acquire authority, which means a power to do acts which affect his principal’s legal position as regards a third party.

This reasoning is used mostly in the making of contracts with third parties. The essence of this paradigm is that the principal consents that the agent should act, and the agent consents to act: this is what gives the agent authority. However, it should be noted that the principal and the agent will be held to have consented if they have what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it: see Garnac Grain Co Inc v Faure & Fairclough Ltd [1967] 2 All ER 353, 358 (Lord Pearson).

The paradigm is then extended to cover other situations.
(b) Apparent (or ostensible) authority

A principal may also be held liable because a person appeared (in rare cases) to be his agent when he was not, or more commonly, while certainly being an agent, appeared to have authority to do a particular thing when he had not, for example, because the principal may have told him not to do it. Apparent authority is the authority of an agent as it appears to others. It is also called ostensible authority.

Apparent authority may be illustrated as follows:
- Where a person (P) by words or conduct, represents or permits it to be represented to a third party (T) that another person (A) has authority to act on his behalf, and
- T deals with A as P’s agent on the faith of the representation,
- P is bound by A’s acts to the same extent as if A had the authority that he was represented to have, even though he had no actual authority.

(c) Ratification

The doctrine of ratification is concerned with acts performed without authority by an agent in the name of a principal. If someone acts without the authority of a principal, either (i) because he exceeds the bounds of his actual authority, or (ii) because he was never employed as the principal’s agent in the first place, the would-be principal may nevertheless be entitled to ratify a transaction effected in his name by the agent. It is for the principal to decide whether or not to ratify such transactions. But if the principal does so, he thereby adopts the agent’s unauthorized acts and it is as though he had authorized them *ab initio*.

(d) Summary

In summary, a principal is bound by the transactions on his behalf of his agents or employees if the latter acted within either:

(i) The actual scope of the authority conferred upon them by their principal prior to the transaction or by subsequent ratification; or
(ii) The apparent (or ostensible) scope of their authority.

3. Application of agency law in corporate context

(a) Actual authority

Actual authority can be either express or implied. Express actual authority is self-explanatory. It can either be verbal or documented in writing.

Implied actual authority can arise in a variety of ways. It is usual to analyse implied authority through the following categories:
- incidental authority;
through appointment to a particular position (sometimes called usual authority, which is to be distinguished from usual authority as a species of apparent authority); and

- by acquiescence.

There can be no implied authority if the agent has specifically been told not to do the act in question. In other words, implied authority is subject to express restrictions imposed by the principal.

- Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98 (S&W [3.09] 125)
- SPP Ltd v Chew Beng Gim [1993] 3 SLR 393

(b) Apparent Authority

How is the application of ordinary agency rules on apparent authority made more complicated in the company context? The leading discussion is by Diplock LJ in Freeman & Lockyer v Buckhurst Park Properties Ltd, where a company allowed a person to act as managing director. His judgment has been cited with approval by Singaporean courts. It is however crucial to note that those parts of Diplock LJ’s judgment on corporate capacity and constructive notice do not apply to Singapore, and in fact has ceased to apply in England as well. The former has been discussed earlier. As for the latter, please see section 25A.

- Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 1 All ER 630
- Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98
- First Energy v Hungarian International Bank [1993] 2 Lloyd’s LR 194
- Skandinaviska Enskilda Banken AB (Public), S’pore Branch v Asia Pacific Breweries (S’pore) Pte Ltd [2011] SGCA 22; [2011] 3 SLR 540

(c) Ratification

Normal rules on ratification
For pre-incorporation contracts, see s 41(1) of Companies Act.

(d) Interaction between agency principles and ultra vires doctrine

This part is unique to companies and other corporate entities. Please see the discussion in Walter Woon on Company Law.

D. The Indoor Management Rule

- Royal British Bank v Turquand (1856) 6 El & Bl 327
- Mahony v East Holyford Co Ltd (1875) LR 7 HL 869
- Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146 (available at the website of the Australasian Legal Information Institute at http://www.austlii.edu.au/)
The indoor management rule (rule in *Turquand’s case*) may be stated as follows:

- Persons dealing with a company in good faith may assume that acts within the constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

For the interaction between the indoor management rule and the rules of agency, see the discussion in *Walter Woon on Company Law*.

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CORPORATE CONSTITUTION


A. Basic contents of the Memorandum & Articles of Association (M&A)

- Singapore company law generally leaves the regulation of the internal affairs of a company to the company itself through rules laid down in the M&A

- These documents are subject to the overall norms laid down in the Companies Act

1. The Memorandum

- Sets out the basic characteristics of the company as relevant to the outside world, especially third parties dealing with the company

- The memorandum must (s 22) include the
  o Company name
  o Liability of the members (limited by shares, guarantee or unlimited)
  o Names, addresses and professions of the subscribers
  o Declaration that the subscribers want to form a company and will take shares

- The memorandum may (but is not required to) include
  o The company’s objects (s 23(1A))
  o Restriction on the company’s capacity and powers (s 23(1B))
  o An entrenchment clause (s 26A)
  o Any other items

- The memorandum must be lodged with the Registry of Companies (s 19(1))

2. The Articles

- Contains the primary provisions that regulate the internal management of the company

- There are no requirements for what must be in the articles of a company limited by shares. Sufficient flexibility is available to a company to structure the articles in the manner it desires, although articles largely tend to follow a standard format
The Fourth Schedule of the Act (also known as “Table A”) will apply unless it is excluded or specifically modified by a company’s registered articles (s 36).

The articles generally deal with a wide range of matters affecting the internal governance of the company including: procedures for general meetings of the company and notices related to such meetings; the appointment, meetings and powers of directors; the issue, transfer and variation of rights attached to shares; and the regulation of dividends.

The articles may include an entrenchment clause (s 26A).

The articles of a company limited by shares may be lodged with the Registry of Companies (s 35(1))—if the articles of a company are not registered then Table A applies (s 36).

3. The relationship between the memorandum and the articles

Where the memorandum and articles conflict the memorandum takes precedence\(^2\).

B. The contractual effect of the M&A

1. The nature of the contract

Section 39 creates a statutory contract between

- The company and its members; and
- Among each of the members *inter se*

The contract is unique in that it is a public document and can bind a member and be amended without a member’s consent.

By becoming a member of a company, the person becomes subject to the rights and obligations in the M&A.

Every member has a personal right to have the terms of the M&A observed by other members and may bring an action (without joining the company) to enforce the same\(^3\).

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\(^2\) *Guinness v Land Corp of Ireland* (1882) 22 ChD 249 (Court of Appeal, England)

\(^3\) *Rayfield v Hands* [1960] Ch 1 (High Court, England); *Wong Kim Fatt v Leong & Co Sdn Bhd* [1976] 1 MLJ 140 (High Court, Malaysia)
The company can bring an action to compel its members to abide by the terms of the M&A and a member can bring an action to compel a company to abide by the M&A.\(^4\)

2. **The contractual effect of the M&A on third parties**

- The contract derived from the articles does not extend to non-members.\(^5\)
  - *Malayan Banking Bhd v Raffles Hotel Ltd* [1965-1968] SLR 85; [1966] 1 MLJ 206 (Federal Court, Malaysia)\(^6\)

- A company cannot justify a breach of contract based on the argument that it was following its articles

- An outsider can have a contract that incorporates the terms of the articles into the contract—in which case an alteration of the articles will alter the terms of the contract going forward

- Alteration of articles that violates a contractual arrangement may invite consequences of breach of such a contract
  - *Southern Foundries v Shirlaw* [1940] AC 701; [1940] 2 All ER 445 (House of Lords)

3. **The effect of the M&A on members acting “in a capacity other than a member”**

- The general rule in the UK is that a contractual right derived from the articles does not extend to a member in a capacity “other than that of a member”. In other words, the right must be *qua* member

- It is unclear in Singapore whether members acting in a capacity “other than that of a member” cannot enforce the contractual rights derived from the articles
  - *Rayfield v Hands* [1960] Ch 1 (High Court, England)
  - *Eley v Positive Government Security Life Assurance Co Ltd* (1876) 1 Ex D 88 (Court of Appeal, England)
  - *Hickman v Kent or Romney Marsh Sheepbreeders Association* [1915] 1 Ch 881 (High Court, England)

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\(^4\) *Hickman v Kent or Romney Marsh Sheepbreeders Association* [1915] 1 Ch 881 (High Court, England); *Salmon v Quin and Axtens Ltd* [1909] 1 Ch 311 (England, Court of Appeal)

\(^5\) Any person who agrees to become a member and is listed on the company’s register of members is a member of the company (s 19(6))

\(^6\) Upholding *Raffles Hotel Ltd v Malayan Banking Ltd (No 2)* [1965] 1 MLJ 262
4. Members have a membership right to require the company to act in accordance with its articles

- If this “membership right” is defined broadly (i.e., the company is required to act in accordance with *every clause in the articles*—even if it has no relationship to the choice to become a member) then this would render the “in a capacity other than a member” doctrine nugatory with respect to rights between the company and its members (although likely not members and each other)

- If this “membership right” is defined narrowly (i.e., the company can only be required by a member to act in accordance with clauses in the articles where there is a close nexus between choosing to become a member and the clause in question) then the “in a capacity other than a member doctrine” may still have some limited effect for rights far removed from being a member

  ➢ *Salmon v Quin and Axtens Ltd* [1909] 1 Ch 311 (England, Court of Appeal)

C. The procedure for altering the M&A

1. Overview of the alteration procedures

- The freedom to alter the M&A is somewhat restricted

- The procedure differs between the memorandum and articles

- The procedure differs depending on whether the clause being altered was implemented before or after 1 April 2004

2. Altering the memorandum

- As a **general rule** the memorandum may be altered by a **special resolution** (s 26(1))

- Some of the **exceptions** to this general rule are

  - If the alteration is to an **objects clause** then it must be passed by a special resolution **and** the particular requirements set out in s 33 (i.e., the notice requirements and post-resolution procedures) must be met

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7 A special resolution is a resolution that is passed by not less than three-fourths of voting members at a general meeting with proper notice (s 184)
If the clause in the memorandum is subject to an entrenchment provision\(^8\) in the memorandum (but arguably not in the articles) then the entrenchment provision must be followed or all the members must agree to remove/alter the entrenchment provision (ss 26(1A), 26A)

3. Altering the articles

- As a general rule the articles may be altered by a special resolution (s 37(1))

- Some of the exceptions to this general rule are:
  - If the clause in the articles is subject to an entrenchment provision in the memorandum or articles then the entrenchment provision must be followed or all of the members must agree to remove/alter the entrenchment provision (ss 26A, 37(1))
  - If the amendment to the articles requires a member to either subscribe for more shares, increase their liability or pay more money to the company the member must agree in writing for the alteration to be binding on them (s 39(3))
  - If the alteration effects a specific class of shareholders then the general rule does not apply and the provisions in s 74 must be followed
  - If the alteration is not one that is “bona fide for the benefit of the company as a whole” it may be successfully challenged—but the court is normally reluctant to interfere (and the oppression remedy normally provides a better option for the aggrieved minority shareholder)
    - The general rule is that when voting to alter the articles members must do so in a manner that is “bona fide for the benefit of the company as a whole”

- \(\text{Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656 (Court of Appeal, England)}\)

- \(\text{Shuttleworth v Cox Bros & Co Bros (Maidenhead) [1927] 2 KB 9 (Court of Appeal, England)}\)

\(^8\) An entrenching provision is a clause in the M&A that states that another clause may not be altered in the manner provided by the Act, or may not be altered except by a majority greater than 75%, or where other specified conditions must be met (26A(4))
Criteria for the court to ascertain the opinion of the shareholders

- Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286 (CA); [1950] 2 All ER 1120

- There is a greater likelihood of successfully challenging the alteration when it results in the compulsory transfer of the minority’s shares

  - Gambotto v WCP Ltd (1995) 182 CLR 432 (High Court, Australia)

- But, Gambotto has not received general acceptance as authority, particularly in the UK

  - Citco Banking Corp NV v Pusser’s Ltd [2007] UKPC 13; [2007] BCLC 483 (Privy Council)

- It is an unresolved question in Singapore whether an alteration of the articles which results in an expropriation of shares can only be justified if the purpose is to save the company from a detriment—and cannot be justified if the purpose is to advance the company’s interests as a commercial entity

- Simply demonstrating that the alteration prejudicially effects the minority (even when it involves a compulsory transfer of shares) is normally insufficient to successfully challenge the alteration if, from the perspective of a reasonable shareholder (not from the perspective of the court), such an alteration could provide a benefit for the company

- The member challenging the alteration has the burden of proving that the alteration was not made bona fide for the benefit of the company

  - Peter’s American Delicacy Co Ltd v Heath (1939) 61 CLR 457

- The jurisprudence concerning the alteration of articles has become less significant with the growth of the oppression remedy (s 216) which often provides a more powerful remedy for minority shareholders

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COMPANY MEETINGS


A. Introduction

- The two organs of the company are the board of directors (the directors acting collectively) and the general meeting (comprising the shareholders). Each organ normally acts by decisions (resolutions) taken at their respective meetings and those decisions are deemed to be acts of the company. This is in contradistinction with acts of an agent of a company who is either delegated with authority by the organs of the company or whose actions are later ratified by the organs of the company.

B. Distribution of Powers within the Company

- An artificial entity can only function through the medium of humans. In theory, each organ, whether the board or the shareholders, normally acts by decisions (resolutions) taken at their respective meetings.

- Note the role of the different organs at common law.

  ➢ John Shaw & Sons (Salford) Ltd v Shaw, [1935] 2 KB 113 at 134

  “A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of powers vested by the articles in the directors is by altering their articles, or if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers by which the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders. . . .”

- While shareholders may modulate the powers of the directors through amendments to the articles of association, such amendments require a special majority.

  ➢ Automatic Self-Cleansing Filter Syndicate Co Ltd v. Cuninghame, [1906] 2 Ch 34 at 42-43

  “... if it is desired to alter the powers of the directors, that must be done not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution. In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors, by the articles of association.”
The erstwhile position in Singapore too has been captured in case law.

- Credit Development Pte Ltd v. IMO Pte Ltd, [1993] 1 SLR(R) 68, at 77
  
  “In the management of the company’s business and the exercise of the powers the directors must comply with the statutes and the articles for the time being in force. They must also comply with such regulations as may be prescribed by the company in general meeting. This means that although the directors are to manage the company’s business and may exercise all the company’s powers yet the company in general meeting may at any time prescribe regulations which the directors must comply with. Such regulations can only be prescribed by passing resolutions which would include resolutions for the appointment of accountants and solicitors for the purposes set out in the requisition of IMO. When such resolutions are passed, what the company in general meeting is saying to the directors is “Appoint accountants and solicitors for these specific purposes. Subject to that you manage the company’s business and exercise all the company’s powers.””

The Singapore position has since been clarified through legislative amendments, where the statute has confirmed that management is vested in the board of directors. This is now the default position.

- See the new section 157A of the Companies Act:

  “(1) The business of a company shall be managed by or under the direction of the directors.

  (2) The directors may exercise all the powers of a company except any power that this Act or the memorandum and articles of the company require the company to exercise in general meeting.”

- Table A, article 73 (as amended) has replicated the above.

- Note that the procedure governing shareholders’ general meeting is prescribed by statute, the memorandum and articles of association and case law. However, the procedure concerning directors’ board meeting is generally regulated by the memorandum and articles of association and case law.

C. Shareholders as an organ of the Company

1. Powers to be exercised by the General Meeting

- These are stipulated in section 157A as powers either conferred on the general meeting by the Companies Act, or by the memorandum and articles of the company.
2. **Examples of instances when power is exercisable by the general meeting:**

- In the following circumstances specified in the Companies Act, the board cannot act without the approval of the shareholders in general meeting.

- **Section 160: disposal of company’s business**
  - *K.J. Kim Company (Pte) Ltd v Buck & Company (Pte) Ltd* [1997] SGHC 166, at [18]
    
    “It appears to me that the object of section 160(1) would be to prevent directors from selling off the whole or a substantial part of the company’s undertaking or the assets which allow it to carry on such business without the prior approval of the company’s shareholders. I understand “the company’s undertaking” to mean the business of the company. If directors, whose primary function is to manage the company’s business and assets, wish instead to dispose of such business or assets rather than manage them, it is only right that they should first get the approval of the shareholders who presumably became or remained as shareholders because the company was in business it was in. …”

- **Section 161: directors exercising power to issue shares**

- **Section 168(1): payment to be made to a director upon retirement or resignation**

- **Section 169: where there is a proposal to provide or improve directors’ emoluments**

3. **Existence of common law possibility**

- If there exists no competent board (e.g. deadlock or inquorate board), does power revert to general meeting?

- It has been held that where the articles of association of a company give to the board of directors the power of appointing an additional director, and owing to differences between the directors no board meeting can be held for the purpose, the company retains power to appoint additional directors in general meeting.

4. **How members make decisions**

A Quick Snapshot

- Generally, members act collectively and make decision via voting at the general meeting: *Companies Act, section 180(1)*
• The will of the members is expressed through resolutions passed at general meetings, see supra.

• Members’ meetings are regulated by the Companies Act, articles and case law.

• We shall look at the meaning of a meeting, types of meetings, procedures for convening meetings and the manner of conducting meetings (including voting and use of proxies).

• What happens when there is failure to follow the procedural rules spelt out? What is the role of the savings provision of section 392 where there is no substantial injustice caused?

• We shall also look at different types of members’ resolutions including that of the written resolution.

• Finally, we also take a look at the directors’ board meeting, which comprises the other primary organ of the company.

D. Meetings and Resolutions

1. What constitutes a meeting?

• Note the advent of technology: It has been held in England that where a meeting is held in separate rooms linked with audio-visual equipment, it would be valid.

  ➢ Byng v London Life, [1990] Ch 170 at 183

  “The rationale behind the requirement for meetings in the [UK] Companies Act 1985 is that the members shall be able to attend in person so as to debate and vote on matters affecting the company. Until recently this could only be achieved by everyone being physically present in the same room face to face. Given modern technological advances, the same result can now be achieved without all the members coming face to face: without being physically in the same room they can be electronically in each other’s presence so as to hear and be heard and to see and be seen. The fact that such a meeting could not have been foreseen at the time the first statutory requirements for meetings were laid down, does not require us to hold that such a meeting is not within the meaning of the word “meeting” in the Act of 1985. …”

  ➢ See also, Golden Harvest Films Distribution v Golden Village Multiplex [2007] 1 SLR 940, where a board meeting was held via a telephone conference call.
2. **Types of Meetings**

   a. **Statutory Meeting**: Companies Act, section 174

   b. **Annual General Meeting (AGM)**: Companies Act, section 174
      - Note Companies Act, section 175A: dispensation of AGM by private company

   c. **Extraordinary General Meeting (EGM)**:
      - All meetings of members, which are not AGMs, are EGMs.
      - See Table A, article 44 – directors can call EGM
      - Companies Act, sections 177, 176 (members can call or requisition an EGM)

   d. **Class meeting**

3. **Notice of Meetings**

   - Every member of a company has the right to attend general meetings and to speak and vote thereat: Companies Act, section 180(1); Table A, Article 111.

   - Notice of meetings (in terms of both sufficiency of time and information) is necessarily required, so that there is enough time for member to decide whether to attend based on the information provided in the notice.

4. **Notice Period**

   - Notice periods are usually provided in the articles: Table A, Article 45.

   - However, the Companies Act provides minimum periods, usually 14 days: section 177(2) for ordinary resolutions. Generally, the period varies according to whether a special resolution is proposed or not.

   - Time: section 177(2) – 14 days unless articles prescribe longer period.

   - Section 184 – Special Resolutions (2003 amendment): at least 14 days for private companies and 21 days for public companies.

   - Section 185 – Special Notice: at least 28 days notice for specific resolutions (e.g. the removal of a director of a public co or an auditor)
5. **Content of Notice**

- Sufficiency of Notice – the notice must state with sufficient particularity the matters that are going to be decided at the meeting. See Table A, articles 45, 46.

  ➢ *Tiessen v Henderson* [1899] 1 Ch 861
  ➢ *Hup Seng v Chin Yin* [1962] MLJ 371
  ➢ *Lau Ah Lang v Chan Huang Seng* [2002] 3 SLR 318

For a discussion of the three cases above, see *Walter Woon on Company Law*, pp. 222, 223 and 215 respectively.

  ➢ *Paillart Philippe Marcel v Eban Stuart Ashley* [2007] 1 SLR 132, at 147

  “I accept that the purported director’s circular resolution resolving to convene an EGM for the purpose of removing the first plaintiff from the directorship was not sent to the first plaintiff at the material time. Despite ... the memorandum and articles of association of the second defendant allowing a resolution to be passed by a majority vote, at the least the proposed resolution had to be circulated to the first plaintiff. This was not done. In my view, the purported resolution was ineffective: see *Polybuilding (S) Pte Ltd v Lim Heng Lee* [2001] 2 SLR(R) 12 (“Polybuilding”). In *Polybuilding*, the court observed that although a majority decision of the board of directors prevails, a meeting of the majority without notice to the minority is ineffective. That being so, the notice of EGM was defective.”

6. **Quorum of Meeting**

- Specified in Table A, article 47: at least 2 persons to be present to hold meetings.

- Otherwise, see Companies Act, section 179(1):

- Often, where there are groups of shareholders in a company, apart from a numerical requirement for quorum there will also be a provision in the shareholders agreement and/or in the articles of association stating that each group’s representative will have to be present in order to constitute valid quorum.

  ➢ *Chang Benety v. Tang Kin Fei*, [2012] 1 SLR 274, at 289

  “It bears noting that the quorum requirement in the present case was not merely an ordinary one specifying a minimum number as such but also one which related, in fact, to the issue of representation on the board of directors. This requirement was to ensure that parties would have their interests represented at board meetings and could thus prevent the Company from making any decision which would prejudice them.”
The importance of this requirement is evident as it was not only provided for in the articles of association but enshrined in the Shareholders’ Agreement as well. …”

- At the same time, do note Companies Act, section 392(1): a lack of quorum is considered a “procedural irregularity”. It does not invalidate a meeting: section 392(2).

- However, an “interested person” may make an application to the Court and if they can establish that the lack of quorum caused “substantial injustice that cannot be remedied by any order of the Court” then the Court can declare the meeting to be invalid: s 392(2).

- See further discussion in relation to section 392 below, where courts have expounded further on the effect of a lack of quorum.

7. Voting

(a) Who gets to vote? Section 180(2): All members can vote

(b) Number of votes: Section 179(1)(c)(ii)

- on a show of hand, each member shall have a vote;
- on a poll, each share carries one vote
- these are subject to the provisions of the articles.

In public companies and subsidiaries: section 64(1) provides that each equity share carries one vote.

(c) Manner of voting: Voting can be via show of hands or on a poll such as a written ballot.

- In absence of a contrary article, the proxy cannot vote except on poll, so a poll should be demanded.
- However, article 54 of Table A allows member to vote on show of hands either personally or through proxy.
- Articles usually spell out conditions for poll:
  - Generally, see also Table A, articles 51-54
  - Regardless of articles, Poll can be demanded: section 178(1)(b)
  - For special resolution, more relaxed condition: section 184(4)(b)
8. **Proxies**

- A member does not have to be physically present to cast his or her vote. All members have a right to vote by proxy: section 181.

- *Appointment of Proxy*: section 181
  - A proxy is a type of agent with the appointing member being the principal.
  - Section 181(1)(b): Unless the articles otherwise permit, a member can only appoint at maximum two proxies to attend and vote.
  - Article 60 of Table A: provides standard appointment of proxy form to follow.

- The invitation cannot prescribe that the proxy form must be deposited more than 48 hours before the meeting.

- A proxy’s power to vote on his principal’s behalf can be revoked before the meeting at which the vote is to be cast.

  - *Cousins v International Brick* [1931] 2 Ch 90
  - *Tong Keng Meng v Inno Pacific Holdings* [2001] 4 SLR 485

  For a discussion of the two cases above, see *Walter Woon on Company Law*, pp. 233 and 234 respectively.

9. **Procedural Irregularities – Saving Provision of CA s 392 on irregularities and defects**

- A member’s right to insist on full procedural compliance is circumscribed by the savings provision in section 392.

- However, s 392 is relevant only in face of procedural and not substantive irregularity.
10. Distinction between procedural and substantive irregularity

- This area of the law has recently received substantial attention from the courts in Singapore, and hence would require some discussion.

a. Procedural Irregularity

- Sum Hong Kum v Li Pin Furniture [1996] 1 SLR(R) 529, at 538 (where there was a lack of quorum on account of the plaintiff’s non-participation in the meetings)

  “I still come to the view that the procedural irregularity in this case, ie in proceeding with the general meeting and the second directors’ meeting in the absence of the plaintiff constituted a procedural irregularity as defined in s 392(1) and that this procedural irregularity resulted in substantial injustice to the plaintiff. The irregularity deprived him of his right under the deadlock provisions of the articles to prevent any decision from being taken by the company without his agreement. This defect is a substantial defect which cannot be cured by s 392. On the other hand, the plaintiff can come to court to ask the court to declare invalid the meetings ... which took place without his participation.”

- Golden Harvest Films Distribution v Golden Village Multiples [2007] 1 SLR 940 (where the court refused to invalidate a meeting on the ground that the substantial injustice had been perpetrated in the opposite direction by the person who failed to attend the meeting so as to not constitute a valid quorum)

For a discussion of the above case, see Walter Woon on Company Law, p. 240.

- Thio Keng Poon v Thio Syn Pyn, [2010] 3 SLR 143 (CA)

  “(at p. 166) ... It must be borne in mind that the nature and object of the requirement, which is the subject of the irregularity, would naturally vary from case to case. Some requirements which are not complied with may be so trivial that the parties have deliberately decided to overlook it and if in such a case the court is compelled to hold the proceeding to be invalid because the non-compliance was not due to inadvertence, that would seriously undermine the utility of the statutory provision. Ultimately it is the significance and the materiality of the non-compliance which should be decisive. This is where the proviso of “substantial injustice” in the provision will come into play. In our view, that is where the focus should be, and not whether the non-compliance was accidental or otherwise. Only if it is shown that the non-compliance has caused substantial injustice or prejudice to an interested party, should the proceeding be held to be invalid by the court.

  ...

  (at p. 168): It appears to be us that to determine whether a non-compliance is of a procedural or substantive nature, one must assiduously examine the aim or object of the requirement which was not complied with. The failure to serve upon the Appellant a notice to resign ... is certainly not of the same genre as
those irregularities listed in s 392(1). As we see it, the requirement of such a notice would serve two complementary purposes. [These are the options available to the director to voluntarily resign or to convince other directors so as to remain on the board] The failure to serve the Appellant with such a notice would deny him these choices. This, to our minds, can hardly be considered to be a matter of procedure. ..."

- The scope of “procedural irregularity” has been clarified in a subsequent decision of the Court of Appeal (below), where *Thio Keng Poon* has been distinguished on facts.


  “The irregularity in *Thio Keng Poon* must be viewed in the context of an irregularity regarding an attempt to remove a director. This court stated that the failure to serve a notice to resign upon that director, as required by the company’s articles of association, was certainly not of the same genre as the irregularities listed in s 392(1). In contrast, in relation to a lack of quorum *per se*, the Singapore courts have largely, in view of s 392(1)(a) ... regarded this as a procedural irregularity ...

  It follows that the Appellants’ contention that the lack of quorum in the present case must be a *substantive* irregularity merely because the parties had expressly negotiated for a deadlock right cannot be accepted. ... We ... are of the view that the lack of a quorum in the present case is a procedural irregularity. ... However, this does not mean that the Appellants’ contention was wholly without merit when viewed from the perspective of substance (as opposed to merely form) inasmuch as the court will not validate a *procedural* irregularity if to do so would be – or is likely – to cause *substantial injustice* to any person ... Put simply, such an approach would achieve, in *substance*, the *same* result which the Appellants had sought in any event provided that they could demonstrate that substantial injustice has indeed been suffered by them. ...”

b. Substantial Injustice

  ➢ *Thio Keng Poon v Thio Syn Pyn*, [2010] 3 SLR 143 (CA), at 171-172

  “The meaning of substantial injustice has been discussed by the courts in various jurisdictions on numerous occasions, and in this regard, the following principles can be distilled. First, it is axiomatic that there must a direct link between the procedural irregularity in question and the injustice suffered … Secondly, the injustice must be of a “substantial” nature. In essence what this means is that the injustice must be real, rather than theoretical or fanciful … There must, therefore, be some basis or indication on the face of the evidence before the court that the aggrieved party had suffered injustice or would suffer injustice as a result of the procedural irregularity occurring. Thirdly, the aggrieved party must show that there *may* or could have been a different result, if not for the occurrence of the procedural irregularity ... This is a fundamentally important point. In this regard, the aggrieved party does *not* need to show that there would certainly have been a different result if not for the irregularity. All he has to show is that there *may* or *could* have been a different result. This possibility, however, should not be a theoretical or
fanciful one. One must bear in mind the importance of operating in the realm of reality. …“

➢ *Chang Benety v. Tang Kin Fei*, [2012] 1 SLR 274, at 289
(where in view of the special nature of the quorum provision – discussed under the head *Quorum of Meeting* above – the court found that “there will *prima facie* be substantial injustice to the side which exercised its deadlock rights”).

(i) Where there is deliberate failure to give notice:

➢ *Welch v Britannia Industries Pte Ltd* [1992] 3 SLR(R) 64 at 77

“By reference to quorums and notices in sub-s (1), s 392 clearly covers meetings, and is not restricted to legal proceedings. I am of the view that a company’s annual general meeting comes within s 392 as it is a proceeding under s 175 of the Act.

Under that provision, a meeting would not be invalidated by a failure to issue a notice unless the failure has caused or may cause substantial injustice. [The plaintiff] did not say that any substantial injustice was caused or was likely to be caused by the alleged failure to inform him of that meeting. He knew that his group was in the minority and would not be able to prevent the majority group from approving the accounts even if he was present. He had not applied to have the meeting invalidated. ... On the evidence, there is no basis for the meeting to be impugned.”

➢ See also, *Thio Keng Poon v Thio Syn Pyn*, [2010] 3 SLR 143 (CA), and the discussion under the head *Procedural Irregularity* above.

(ii) Note a similar rule existed at common law:

➢ *MacDougall v Gardiner* (1875) 1 Ch D 13, at 25

“In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.”

11. Types of Member’s Resolutions

- **Ordinary Resolution**: not defined in statute but by case law
- **Special Resolution**: Companies Act, section 184
  - Usually, where a particular decision requires a special resolution, the relevant provision in the Companies Act would
specify as such. In all other cases, an ordinary resolution would suffice. But, attention must also be paid to the provisions in the articles of association of the company that may stipulate majority requirements.

- **Informal Decisions/Resolutions:** seen as an alternative to formal general meetings

- All members acting unanimously may assent to a decision which will be regarded as a valid resolution without the need for passing it at a general meeting. Exceptionally, a proper meeting need not be held if all the incorporators know and approve of a particular course of action. This is particularly useful rule for small companies

  ➢ *Re Express Engineering Works Ltd* [1920] 1 Ch. 466, at 471

  “I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so. In my opinion the true view is that if you have all the shareholders present, then all the requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company.”

  ➢ *Re Duomatic Ltd* [1969] 2 Ch 365, at 373 (where the principle in *Express Engineering* was followed)

  “I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.”

  ➢ *Jimat bin Awang v Lai Wee Ngen* [1995] 3 SLR(R) 496, at 503-504, 508

  “Apart from being a board meeting, the meeting ... was, *de facto*, a meeting of all the shareholders in the company. In our opinion, the appellants ... were competent to act to achieve the desired result of allotting the shares during the meeting. ... they could be said to have acted in different capacities, as shareholders to give unanimous approval and then as directors to successfully allot the shares. ... In these premises, we find that there was no contravention of s 161(1) and that the allotment of the shares was valid.

  ... We are of the opinion that the protection within s 161 is fully afforded by an informal and unanimous consent and approval of all the members of the company.”
Hup Huat Food Industries v Liang Chiang Heng [2003] SGHC 244, at [65]

“The business had always been run on an informal basis ... The shareholders had never needed to proclaim their ayes and nays formally when voting on any particular issue. It was sufficient that no one voiced opposition to the proposal to close down the business. Resolutions can be constituted by the informal assent of all members of the company regardless of whether or not there is a formal meeting or proper notice ...”

E. Board of Directors as an Organ of Company

1. Meeting of Directors
   
   (a) Board Meetings regulated by articles and not statute.

   (b) Failure to give notice of Board Meeting

   Aik Ming v Chang Ching Chuen [1995] 2 MLJ 770, at 804-805

   “Whilst particular cases may be distinguished upon their special facts, I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid, unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors.”

2. Informal Board Decisions

   Jimat bin Awang v Lai Wee Ngen [1995] 3 SLR 769 (discussed above)
LECTURE 8

SHARES AND DEBENTURES

Assistant Professor Wee Meng Seng
Shares and Debentures

I. Introduction

The purpose of this topic is to introduce you to the two ways in which a company may raise money for its business – equity financing and debt financing.

- In equity financing, the company issues shares to an investor for a sum of money or other consideration, and the investor becomes a shareholder of the company.
- In debt financing, the company borrows money from an investor who becomes a creditor of the company.

For most purposes, the law regards shareholders as the owners of the company.

- They are the residual claimants of the company, in that their claims against the company rank after the claims of the company’s creditors.
- If a company does badly and becomes insolvent, the creditors will be paid a portion of their debts in the company’s insolvent liquidation, whereas the shareholders will get nothing.
- But if the company does well, all the company’s profits belong prospectively to its shareholders, after paying off the fixed sums owed to the company’s creditors. Hence, the risks undertaken by a shareholder are higher than a creditor, but the returns are also potentially higher.

The main instrument in equity financing is the share.

- The financier provides the company with money and in exchange obtains a share, which entitles him to certain rights in the company.
- Another term which often crops up in discussions about the equity of a company is capital. We will discuss the meaning of this term in a next section.
- If a company has the necessary profit record or sufficient capitalisation, it may be listed on a stock exchange. This makes it easier for the company to raise funds from the public. The process of offering shares to the public is called a flotation.

It is important to note that in very small companies the purpose of issuing shares is usually not meant to raise capital, as depicted aforesaid, but to give the shareholders control over the company.

- In a two-person company, it is usual for the company to issue two $1 shares to the two founders of the company.
- The issue of the shares is meant to give the shareholders complete control over the company, for the shareholders will typically use their voting rights to appoint themselves as directors of the company.
- Financing for the company will come from elsewhere, including shareholder loan, bank loan and overdraft facilities secured on the controllers’ personal assets.

It is sometimes necessary for a company to borrow money to finance its expansion, to meet cash flow needs or for other business reasons. Credit is an integral part of the modern economy. A reason why the 2008 financial crisis caused so much damage was because banks refused to extend credit, making it difficult or impossible for companies or individuals to raise the requisite finance to meet their obligations.

The capital raised by a company enables it to acquire its assets and to carry on business.

- Assets of the company = Equity capital + debt capital
II. EQUITY FINANCE

General Reading: Woon, chapter 11

A. Share Capital

1. Meaning of capital

‘Capital’ is used in company law in a restricted sense which does not coincide with the broader way in which it is used in ordinary speech or even by company financiers.

- Most dictionaries would define ‘capital’ (in the financial sense) as ‘wealth available for or capable of use in the production of further wealth’.
- For company lawyers, however, capital is a measure of value and what it values is the consideration which the shareholders have provided to the company in exchange for their shares.
- Thus, if the shareholders have contributed cash and other assets to the extent of $10,000 to the company in exchange for their shares, then $10,000 is the value of the company’s issued capital, and this is also the paid-up capital.
- It is crucial to bear the above paradigm in mind. A company’s capital is not a measure of its current wealth. It is a historical measure of the amount that shareholders have contributed (ie invested) in the company. In this sense it is no different from the money that creditors have lent to the company. That is the reason why some people have argued that share capital is a form of perpetual loan with no certainty of return.
- Other than selling their shares, shareholders can only get back the capital they have invested in the company in three situations: when the company reduces its capital, when the company buys back its own shares, or when the company is wound up.

The Companies (Amendment) Act 2005 has simplified the law on capital considerably. Still, there are a few concepts that you need to know.

(a) Authorised capital (before 30 January 2006)

The “authorised capital” of a company is the pre-set maximum limit to the number of shares the company can issue.

- This is set when the company is incorporated but can be increased later: old s. 22(1)(c), 71(1)(a), 71(4).
- This was abolished by the Companies (Amendment) Act 2005. Good riddance!

The concept of authorised capital is a largely useless concept that is liable to mislead.

- A company is not required to issue all the shares it can issue.
- For eg, a company could be incorporated with an authorised capital of $10 million, divided into 10 million shares with par value of $1, but only issued two shares. The issued capital of the company would be $2. The authorised capital of $10 million would seem impressive to the uninformed, when in truth it was thoroughly misleading.
- The abolition of authorised capital means that investors can now focus on the issued capital of a company without being sidetracked by its authorised capital.
(b) Issued capital

The “issued capital” is the aggregate value of the consideration received by the company for all the shares that it has issued.
- There is no minimum capital requirement under Singapore law, except in very limited situations, for example, for banks and insurance companies.
- In practice many small companies are thinly capitalised and rely on shareholder loans for their business operations.

(c) Paid-up capital and uncalled capital

The “paid-up” capital is the amount that is paid up on the shares that have been issued.
- Shares may be issued but not fully paid up.
- Issued capital = paid-up capital + uncalled capital
- Uncalled capital may be called up by the company any time during its existence or upon liquidation. A company may therefore retain the unpaid portion on its shares as a reserve to be called up in the event it is wound up: s 65(2). A share certificate must state the amount that remains unpaid on the shares: s 123(1)(c).

It is now almost invariably the practice for shares to be fully paid up on their issuance. As such, a company’s issued capital will be the same as its paid-up capital. Uncalled capital is very much a matter of historical interest.

2. Par value (before 30 January 2006)

Par value used to be an important concept in equity finance.
- Under the old law, a share must have a nominal or face value. A company can choose whatever value it wants to be the par value. It is completely arbitrary and has no connection at all with the financial position of the company.
- A company is allowed to issue shares at more than their par value (that is at a premium), but issuing shares below par is prohibited.
- If shares are issued at a premium, the premium must be accounted for by creating a share premium account. The share premium account is treated as capital for most purposes; for eg, the company is restricted from reducing the capital in the share premium account save in certain situations: the old s.69, 69A to 69F.
- Par value and the share premium account were abolished by the Companies (Amendment) Act 2005. Section 62A(1) now states that shares of a company have no par or nominal value. Bravo!

The par value, while nominal and had no connection whatsoever with the innate worth of the share, had an effect on equity financing.
- A company generally cannot issue shares below their nominal value on terms that the shareholders have no further obligation to pay the difference: Ooregum Gold Mining Co of India v Roper [1892] AC 127.

Why was par value abolished?
- A reason given for the necessity for par value is that it protects the interests of creditors. This reason is not convincing. Par value has nothing to do with the inherent value of a company. It does not protect the interests of creditors.
- It diverts attention away from real issues. It is liable to mislead unsophisticated investors into thinking that it has some economic relevance, for eg, as an indicator of a share’s intrinsic value or the minimum value of a share.
- The rule that a company cannot issue shares at a discount to par value prevents a company from raising new funds when the market value of its shares has fallen below par value. Indeed, the case for the abolition of par value is so overwhelming that
even its birthplace for common law jurisdictions, England, was minded to abolish it but for the constraints imposed by the Second EU Company Law Directive.

B. Shares

1. Definition

Neither legislation nor cases have defined comprehensively what is a share.
- A ‘share’, according to section 4 of the Companies Act, means a share in the share capital of a corporation and includes stock except where a distinction between stock and shares is expressed or implied.
- This is hardly a definition of a share. Have the judges or academics fared better?

In *Borland’s Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279, 288 Farwell J described a share in the following terms:
- A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with [s 39(1)].
- A share is not a sum of money but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.

In *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508, Lord Hoffmann, after citing the definition in *Borland’s Trustee v Steel Brothers & Co Ltd*, said the following:
- In the case of fully paid shares, the question of liability does not arise.
- So a share is the measure of the shareholder’s interest in the company: a bundle of rights against the company and the other shareholders.
- As against the outside world, that bundle of rights is an item of property, a chose in action.
- But as between the shareholder and the company itself, the shareholder’s rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act.

2. Rights of shareholders

What are the rights of shareholders?
- It is trite law that shareholders do not have any interests in the company’s assets by virtue of their capacity as shareholders of the company. The legal rights attached to shares are broadly classifiable into 3 groups:
  - Rights in relation to the payment of dividend (income rights);
  - Rights of voting at company meetings (voting rights);
  - Rights to the return of capital on an authorised reduction of capital, share buyback, or in a winding up (capital rights).

3. Types of shares

- As you learnt earlier, the types of shares that a company may issue are not generally restricted by the Companies Act.
- A company’s shares may be divided into different classes, e.g. preference and ordinary shares, “A” and “B” types of ordinary shares and ordinary and deferred shares. What are the reasons for creating different classes of shares?
Bushell v Faith [1970] AC 1099 (it is possible to have weighted votes)

- Article 9 of the company in that case provided that on a resolution to remove a director, any shares held by the director should carry 3 votes per share. The purpose of article 9 was clearly to entrench the directors. This was arguably against the spirit of section 184(1) of the UK Companies Act 1948, which provided that a company may by ordinary resolution remove a director, notwithstanding anything in its articles.

- The House of Lords held that article 9 was valid, despite the provisions of section 184(1). This was because Parliament was only seeking to make an ordinary resolution sufficient to remove a director and had not sought to fetter a company’s right to issue a share with such rights or restrictions as it thought fit.

The rule in Bushell v Faith has been abrogated for public companies in Singapore. They are required by section 64 to have one vote attached to each share. Note however that the Steering Committee for Review of the Companies Act has suggested that this restriction be removed, and the Government has accepted the recommendation.

(a) Preference shares

The meaning of preference shares under the Companies Act is a complicated one.

- Section 4(1) defines ‘preference share’ to mean a share which has no voting right or right to share in the dividends or capital beyond a specified amount.

- But it should be noted that this definition only applies to certain provisions, ie sections 5, 64 and 180. The definition is odd because often in practice, a preference share is one which has both voting rights and a right to share in the surplus. Indeed, the definition does not apply to section 75 which requires that all rights attached to preference shares must be set out in the memorandum and articles of association.

The above definition of preference shares will be removed when the Companies (Amendment) Bill 2013 becomes law.

(b) Equity shares

The definition of equity share in the Companies Act is complicated by the definition of preference share.

- It is common to refer to equity share as ordinary share.

- Section 4(1) defines an equity share as any share which is not a preference share – presumably as defined by the section. Thus the preference share referred to in section 75 would be an equity share as defined by section 4(1)!

Under section 64 an equity share in a public company carries one vote, unless it is a management share in a newspaper company (usually called a golden share).

(c) Deferred shares

- “Deferred shares” are shares that have their right to dividends or capital deferred to those of ordinary shareholders.

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1 Which is concerned with the definition of subsidiary and holding companies.
2 An equity share in a public company can only have one vote per share, except for a newspaper company.
3 It confers rights on members at meetings.
(d) Golden shares

- Special rights may be attached to particular shares for so long as those shares are held by a named individual.
- This type of right has been included in the articles of association of some privatised companies at the time when the businesses were first transferred from state to private ownership.

Section 10 of the Newspaper and Printing Presses Act (Cap 206, 2002 Rev Ed) creates a special type of shares called management shares.

- A management share entitles the holder either on a poll or by a show of hands to 200 votes upon any resolution relating to the appointment or dismissal of a director or any member of the staff of a newspaper company.
- This makes an exception to the mandatory rule in section 64 that an ordinary share in a public company is entitled to only one vote.

4. Class rights

This is a difficult area of the law and it ties in with the right of a class of shareholders to have a say or vote when their rights are being varied.

- It is not always the case that class rights are as clearly differentiated as they are in the categories listed above.
- Sometimes, the rights are given by a company’s articles to a particular shareholder, but are not attached to any differentiated class of share as such, but the shareholder can only enforce those rights by holding shares in the company.
- These rights are still considered class rights which can only be varied in accordance with the memorandum and articles of association in Singapore (if there are any provisions governing such variation) and Companies Act section 74.
- If there is no “modification of rights clause” in the M&A, then a disgruntled shareholder who feels that its rights have been amended without either the proper separation into different classes, or the fact that the shareholders in a particular class did not vote in the best interests of that class as a whole, may be able to claim that it has been unfairly prejudiced under Companies Act s 216.

6. Ownership of shares

- A share is moveable property: s.121.

(a) Legal ownership

- Legal ownership is manifested by registration in the company’s register of members: s.190.

(b) Equitable interest

- Equitable rights cannot be similarly registered: section 195(4)
- Nevertheless, where a share is not registered in the name of the owner, the owner may still have beneficial title and the registered owner may be deemed to be a trustee.

*Hawks v McArthur [1951] 1 All ER 22

- The registered owner, M, sold shares to purchasers who paid for the full purchase price, but they did not register themselves as members. This was probably because the company’s articles imposed stringent requirements restricting the transfer of shares.
- Sometime later, the plaintiff recovered judgment against M and was granted leave to enforce the judgment against him to obtain payment. He therefore obtained a charging
order on the shares of M. The effect of the charging order was to give him an equitable right in the shares.

- A dispute thus arose between the purchasers and the plaintiff on who had priority to the shares.
- The court held that, firstly, even though the requirements of the articles with respect to transfer of shares, the pre-emption provisions, had not been complied with, the purchasers having paid to M the full consideration for the shares, had obtained equitable rights therein. The court applied the equitable maxim that equity regards as done that which ought to be done, and so although the purchasers were not legal owners of the shares, they were equitable owners.
- Secondly, the court held that, as the equitable ownership of the purchasers accrued earlier than the equitable right of the plaintiff under the charging order, their rights must prevail over the plaintiff’s claim.

**EG Tan & Co (Pte) v Lim & Tan (Pte) [1985-1986] SLR(R) 1081; [1987] 2 MLJ 149**

- The plaintiff was equitable owner of some shares.
- A rogue, Khoo, obtained the share certificate and blank transfer form from the plaintiff fraudulently. Khoo then passed the share certificate and the blank transfer form to the second defendant. After Khoo’s fraud was discovered, the plaintiffs claimed the return of the share certificate from the second defendant.
- The second defendant then sought to have the shares registered in his name but failed. He resisted the plaintiff’s claim on the ground that he had bought the shares from Khoo in good faith and for value, and therefore his interest prevails over the plaintiff’s equitable title.
- Chua J rejected the second defendant’s claim that he had bought the shares from Khoo, finding instead that he had obtained the shares from Khoo in payment of a gambling debt that Khoo owed to him. As a gaming contract is void under our statutes and generally cannot be enforced, the defendant had not provided good consideration to Khoo for the acquisition of the shares. As such, he was not a bona fide purchaser of the shares, and the court ordered him to deliver the share certificate and the transfer form to the plaintiff.
- It should be added that the second defendant’s title, at best, was only an equitable title. He failed to acquire the legal title, and thus could not have pleaded the bona fide purchaser of legal title defence to the plaintiff’s claim.

- However, there are situations where the beneficial owner may find that he cannot recover the shares if the motive for non-registration or transfer of the shares is against public policy.

### 7. Transfer of shares

#### (a) Restrictions on transferability

The rules are as follows:

- The starting point is that shares are freely transferable unless restrictions are imposed.
- The restrictions may be imposed by the memorandum or articles or by agreement between the company and the shareholder.
- A provision that restrict the right to transfer is construed strictly so that any ambiguity will be resolved in favour of the party seeking registration of the transfer.

*Pacrim Investments Pte Ltd v Tan Mui Keow Claire [2008] SGCA 16; [2008] 2 SLR(R) 898*

Share transfer restrictions are important in private companies.

- As a commercial matter, restrictions are needed in companies where the identity of members may be important. It could be a small company conducting a family
business. It could be a joint venture company formed by two giant companies. Hence the restriction may be in the interests of all the members.

- In any event, it is mandatory. One of the condition for a company to be incorporated as a private company is that its memorandum or articles must restrict the right to transfer its shares: section 18(1)(a).
- The form of the restriction is not prescribed. Commonly, this may involve giving the other members the right to buy the shares first, before shares can be transferred to persons not already members of the company (pre-emptive rights), or providing that a transfer may take place only if approved by the board of directors.

How about public companies?

- A public company may have share transfer restrictions in its memorandum or articles, but this is not mandatory.
- In the case of public companies that are listed, restrictions are generally not allowed, since the purpose of listing is to create a vibrant secondary market for the trading of the shares. Some strategic companies may have restrictions on transfer of shares to foreigners, for example, banks.

Power to refuse to register share transfer

- Directors have no discretion to refuse to register a transfer unless the articles so provide.
- If such a power is given it is, like other powers given to directors, a fiduciary one to be exercised bona fide in the interests of the company and not for a collateral purpose.
- But the court will presume that the directors have acted bona fide, and the onus of proof of the contrary is on those alleging it and is not easily discharged.

Re Smith & Fawcett Ltd [1942] Ch 304

- The company had two equal shareholders, Smith and Fawcett.
- On the death of Fawcett, his son as his executor applied to have the testator's shares registered in his name. Smith refused to consent to the registration, but offered to register some shares and to buy the rest at a fixed price.
- The executor applied to the court by way of motion that the register of members might be rectified by inserting his name as the holder of all the shares.
- The CA held, affirming the trial judge, that art 10 gave the directors the widest powers to refuse to register a transfer, and that, while such powers are of a fiduciary nature and must be exercised in the interests of the company, there was nothing to show that they had been otherwise exercised. The executor alleged that the reason for the refusal to register part of the transfer was the desire of Smith to acquire the shares at an undervalue. The court refused to give weight to that, since it was only a matter of inference.

- But the position of a transferee in Singapore is helped by section 128, which requires the directors, if they refused to register a transfer, to serve on the transferee, within one month after the date the transfer was lodged, a notice of refusal and a statement setting out the facts which are considered to justify the refusal.
- Compare this with section 771 of the UK Companies Act 2006, a new provision in English companies legislation, which requires the company to provide the transferee with such further information about the reasons for a refusal to register a transfer as the transferee may reasonably require.

*Xiamen International Bank v Sing Eng (Pte) Ltd [1993] SGHC 126; [1993] 2 SLR(R) 176
*HSBC (Malaysia) Trustee Bhd v Soon Cheong Pte Ltd [2006] SGHC 193, [2007] 1 SLR (R) 65
(b) Transfer involving share certificates

- A share certificate is prima facie evidence of title (section 123(1)) and contains a statement as to whether the shares are fully or partly paid.

- The transfer of shares that are not traded on the stock exchange is effected by the lodgement of an executed transfer form and the share certificate with the company: s.126.

- The lodgement of a transfer form carries with it an implied warranty that the form is genuine.

- Only the registered owner may execute the transfer form; a beneficial owner has no power to do so.

*Xiamen International Bank v Sing Eng (Pte) Ltd* [1993] SGHC 126; [1993] 2 SLR(R) 176

- Unless there are share transfer restrictions, upon receipt of the transfer form and the share certificate, a company must effect the transfer within a month: section 130.

(c) Scripless trading

- For stocks traded on the stock exchange, transfer forms are no longer necessary.

- Scripless trading and the creation of the Central Depository Pte Ltd (CDP) has resulted in transfers being done electronically with the CDP only being obligated to send a confirmation note to the buyer and seller: section 130I. Indeed, any transfers so effected and thus registered with the CDP are deemed to be conclusive and cannot be rectified: s.130J.
III. DEBT FINANCE

Debt financing involves the company borrowing money from the financier. This part introduces you to the debenture and the charge.

A. Debentures

General reading: Woon, pp 503-508

- The term “debenture” is defined in the Companies Act by listing instruments which are included and providing another list of instruments which are expressly excluded: s.4(1).
- However, such a laundry list definition is not meant to be exhaustive and it remains for the courts to determine the ambit of the term “debenture”.

Levy v Abercorris Slate & Slab Co (1887) 37 Ch D 260, 264 per Chitty J

Note that a company does not have to issue debentures as it can borrow commercially or issue other types of commercial papers such as promissory notes or bills of exchange.

1. Transfer of debentures

- Debentures like shares may be listed on the stock exchange but unlike shares may be issued in bearer form, that is, the title may be transferred merely by delivery.
- If it is issued in registered form, they are transferred in the same manner as shares: s.93(1).

2. Redemption of debentures

- Unlike shares, debentures may be redeemed unless they are perpetual debentures: s.95.
- The security for such perpetual debentures may, however, be enforceable by an order of the Court on the application of the holder if the Court is satisfied that certain conditions exists: s.100.

3. Reissue of debentures

- Provided that there are no contrary provisions in the M&A, debentures which are redeemed may be reissued with the same rights and priorities as if the debentures were never redeemed: s.96.
- The intention of the section is to allow a revival of the original transactions and not the creation of new ones.

4. Rights and remedies of debenture holders

- The main sources of a shareholder’s rights are the articles, Companies Act and shareholders’ agreement, if any.
- As for a debenture holder, his rights are mainly to be found in the contract constituting the debenture, and the security documents, if any.
- Where the debentures are secured, the usual remedy on default by the company is the appointment of a receiver, or where the security extends over all or substantially all the company’s assets, a receiver and manager.
B. Security: charges

General reading: Woon, pp. 521-548 (note that some parts of it are outdated)

1. Introduction to credit and security

Not many companies are so creditworthy that financial institutions will give them loans without asking for some form of security in return, although it is arguable that in theory banks should lend on a “cash-flow” basis.

Note that the meaning of security here is different from “securities” as the latter is used to refer to shares, debentures, options etc.

2. Consensual real security

There are only four forms of consensual real security known to English and Singapore law:

- Pledge;
- Contractual lien;
- Mortgage; and
- Charge.

English law, unlike American law, draws a sharp distinction between security and quasi-security.

- A quasi-security performs a security function but is not regarded as security under English law.
- Notable examples of quasi-security include the hire-purchase agreement, conditional sale, retention of title, set-off, flawed asset etc.

3. Charges

- A charge is basically a right in or over the company’s property given to a creditor as security for a loan.
- In many cases it may be difficult to distinguish a charge from a sale and buy-back arrangement.

Thai Chee Ken v Banque Paribas [1993] SGCA 38; [1993] 1 SLR(R) 871

- Pan-El needed money to pay for a tranche of shares in Orchard Hotel (Singapore) Pte Ltd. Banque Paribas was willing to lend the money but it required security. It asked for what it termed was a ‘pledge’ of the shares. Unfortunately Pan-El was not able to give a pledge, as it was prohibited from doing this by a negative pledge it had given to other creditor banks.
- To solve the problem, the transaction was structured differently, in the form of a sale and buyback. The bank would purchase the shares from Pan-El on 31/8/1985, and simultaneously Pan-El would agree to repurchase the shares from the bank at a higher price on or before 31/12/1985. The sale and purchase price bore no relation to the value of the shares. Instead they reflected the financing that Pan-El required and the interest the Bank would have earned. In economic terms the new structure was no different from the bank taking a mortgage/charge over the shares. Instead of relying on its right to sell the shares on default of Pan-El, the bank would rely on its ownership of the shares to perform a security function.
- Subsequently, Pan-El went into liquidation. Thai Chee Ken was appointed its liquidator. A liquidator, for your information, is the person appointed to conduct the affairs of a company in liquidation. He is usually an accountant. The Companies Act and insolvency legislation confer on him various powers to set-aside transactions entered into by the company before it is wound up, and Thai sought to rely on one of the provisions, section
131(3), which imposed registration requirements on certain charges created by a company. Thai argued that the transfer of the shares to the bank was not a sale, but a mortgage, and Pan-El’s right to buy-back the shares was an equity of redemption. Next, he argued that the mortgage was void against him, as contrary to section 131(3), the mortgage had not been registered. The Court of Appeal rejected his arguments.

- The Court of Appeal pointed out first that it was not argued that the documents were a sham or disguise designed to conceal the true agreement between the parties. What the court was saying here was that the liquidator did not argue that the documents did not reflect the parties’ true intention of the legal relations that they intended to create between themselves. If it was argued that the documents were a sham, the court would have to discover by extrinsic evidence what the parties’ true agreement was and to disregard, if inconsistent with the true agreement, the written words of the sham agreement.

- Second, the Court of Appeal held that as it was not argued that the documents were a sham, their proper characterization was a matter of construction of the documents. The court went on to explain its approach on construction. It held, following the English courts, that while the court is scrupulous to ensure that the policy of protecting creditors enunciated in section 131 was not evaded by the adoption of a legal shell that apparently and formally lied outside the statutory provisions, the court should not take a hostile attitude and presumed that evasion of the policy was intended. The justification for this was that different legal forms could be used to achieve the same economic object or end and that some legal forms legitimately fell outside the statutory provisions.

- Guided by this principle, the Court of Appeal construed the documents and concluded that they constituted a genuine sale and buyback. This was so even though there were elements in the documents that were at variance with the transaction being a sale and buyback. First, the prices bore no relation to the value of the shares at the date of the two agreements but were based simply on the financing requirements; and secondly, there were some terms in the repurchase agreement which were not usually found in a contract for the sale of shares.

It may be essential to determine if the transaction creates a charge as it may have a bearing on the obligation to register the transaction and the priority of the security so created. Is an agreement to give a charge a charge?


4. Registration of Charges

The following rules are important:

- Certain types of charges have to be registered: sections 131 to 133.
- The failure to register the charge within the stipulated period renders the charge void as against the liquidator and other creditors.
- The Court has the power under certain conditions to extend the time within which a charge may be registered: s.137.

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4 For example, the court would look at the post-contractual conduct of the parties, even though generally speaking post-contractual evidence was usually inadmissible. This was referred to as the external route of construction by Staughton LJ in Welsh Development Agency v Exfinco. An example is the dressing up of a tenancy agreement as a licence, in order to avoid creating a protected tenancy under rent control legislation. If a transaction relied on as a sale was a sham, the court might strike it down as a security for a loan.

5 This was referred to as the internal route of construction by Staughton LJ, and this involved a two-stage process. First, the rights intended by the parties to be created was to be ascertained from the terms of their agreement, and then the court, at the second stage, would apply the relevant tests to the rights thus ascertained to characterise the nature of the transaction which the parties had created. The internal route of construction was applied in some high profile recent cases, which we will look at in a moment, when the courts held that floating charges, rather than fixed charges as the parties had claimed, had been created.
The issue of the purpose of the registration requirement was addressed briefly by Lord Hoffmann in *Smith v Bridgend Borough County Council* [2002] 1 AC 336 (HL) 347-348.

*Smith v Bridgend Borough County Council*
- The relevant provision was section 395 of the UK Companies Act 1985, now section 874 of the UK Companies Act 2006:
- Section 395, which can be traced back to the Companies Act 1900, was intended for the protection of the creditors of an insolvent company.
- It was intended to give persons dealing with a company the opportunity to discover, by consulting the register, whether its assets were burdened by floating and certain fixed charges which would reduce the amount available for unsecured creditors in a liquidation.
- Lord Hoffmann would not say whether this was a realistic form of protection and whether the choice of registrable charges was entirely logical, because the issue was not relevant in the case before him.
- What was plain was that the legislature intended that property subject to a registrable but unregistered charge should be available to the general body of creditors (or a secured creditor ranking after the unregistered charge) as if no such charge existed.

5. **Effect of Registration**

- Registration does not confer priority.
- Priority depends on the common law rules that govern the priorities of competing securities.
- Once a charge is registered, a certificate of registration of charge is issued. Such a certificate is conclusive evidence that the charge is registered and cannot be attacked for late registration: s.134(2).


6. **Types of charges**

- Charges may be fixed or floating.
- A fixed charge attaches itself to specific property and follows the property wherever it goes.
- A floating charge on the other hand floats over the charged assets until it “crystallises”, and is thus useful as a security over a changing class of property.

No particular form of words is required to create the different types of charges. It is a question of interpretation of the particular loan instrument to determine whether the security created is a fixed or floating charge.

The classical description of the characteristics of a floating charge was that of Romer LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, 294.

*Re Yorkshire Woolcombers Association Ltd*

“I certainly think that if a charge has the three characteristics that I am about to mention, it is a floating charge.
(1) If it is a charge on a class of assets of a company present and future;
(2) If that class is one which, in the ordinary course of business of the company, would be changing from time to time; and
(3) If you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.”
The above must now be read in light of *Re Spectrum Plus Ltd*.

**Siebe Gorman & Co Ltd v Barclays Bank Ltd** [1979] 2 Lloyd’s Rep 142

*Re Bond Worth Ltd* [1980] Ch 228

*Dresdner Bank AG v Ho Mun-Take Don* [1992] SGCA 75; [1992] 3 SLR(R) 307

*Re Cosslett (Contractors) Ltd* [1998] Ch 495 (CA)

*Agnew v CIR* (also reported as *Re Brumark Investments Ltd*) [2001] 2 AC 710 (PC) affirming [2000] 1 BCLC 353 (CA, NZ)

  - PC stressed importance of actual control over the collateral (book debts and their proceeds). The decision cast doubt on the *Siebe Gorman* case.
  - PC refused to follow the *New Bullas* case, a decision of the English Court of Appeal. It is not possible to have a fixed charge over the book debts (where there is sufficient control) and a floating charge over the proceeds (where the debtor can use in its business once collected).


  - The English Court of Appeal in this case refused to follow *Agnew v CIR*.
  - Instead, it followed *Siebe* and decided that a fixed charge could be created by placing a certain restriction on the freedom of the chargor to use the proceeds of its book debts once paid into a bank account as required by the terms of the debenture.
  - On appeal, the House of Lords, despite strong arguments that this would disrupt banking practice, held that *Siebe Gorman* was wrong.
  - The HL held that to create a fixed charge over book debts, the bank needs to have actual control over the book debts and the collection through payment into a blocked account. It is not enough to contractually create control; the bank must in fact exercise it.
  - As the *Spectrum* case has the usual effect and does not only apply prospectively, old banking documentation based on *Siebe Gorman* would have to be looked at again.

Dora Neo ‘Fixed and Floating Charges over Book Debts: A Post Mortem on the Debate’ (2005) 17 SAcLJ 617

Lee Eng Beng ‘Surviving *Spectrum Plus*: Fixing Charges over Debts’ (2005) 17 SAcLJ 932

7. **Crystallisation of a floating charge**

  - Until a floating charge crystallises, the chargor is at liberty to use the assets charged in the ordinary course of business.
  - The crystallisation of a floating charge converts it into a fixed charge over whatever assets are within the class at the time of crystallisation.
  - Usually, charge documents stipulate “events of default” upon the happening of which the chargee may crystallise the charge.
  - In the absence of such stipulations the charge may also crystallise when the creditor takes steps to take possession of the security or generally upon the winding up of a company or its business.

*Dresdner Bank AG v Ho Mun-Take Don* [1992] SGCA 75; [1992] 3 SLR(R) 307

A floating charge also loses priority to preferential debts in a winding up or receivership: s.226, s.328(5).