Singapore Journal of Legal Studies
[1996] 111 – 135

LOCUS STANDI OF DIRECTORS TO PETITION FOR COMPANIES WINDING UP

Winding up proceedings have the potential to expose the company to ultimate dissolution. Thus, the issue of *locus standi* to petition the court for a winding up order assumes some importance. Under section 217(1)(a) of the Malaysian Companies Act 1965, the 'company' has standing to petition the court. However, under article 73 of Table A of the Act, the directors are delegated the management power. The question then arises as to whether the management power encompasses the power to petition the court for winding up without a resolution of the members in general meeting. There appears to be a serious conflict of judicial opinion on the issue. This article traces the case law on the subject, focusing on the recent Malaysian case of *Miharja Development Sdn Bhd & Ors* v *Tan Sri Datuk Loy Hean Heong & Ors and Another Application* (1995) 4 MSCLC 91,285.

I. INTRODUCTION

IT is commonplace that under the Malaysian Companies Act, 1965 (Act 125, "the Act"), as under the corresponding provisions in many other jurisdictions, persons associated for any lawful purpose may, by complying with requirements of the Act, form an incorporated company.[1] Upon the issue of a certificate of incorporation, the subscribers and persons subsequently becoming members "shall be a body corporate ... 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...."[2] It is also commonplace that the "perpetual succession" can only cease by invoking the appropriate provisions of the Act and bringing the company to an end, namely, winding it up and subsequently dissolving it.[3]

The question then arises as to who or which party has the right or indeed the duty or obligation to take the necessary steps to commence winding up proceedings under the provisions of the Act. This question of *locus standi*

1 S 14(1) of the Act. The corresponding provision in the Singapore Companies Act (Cap 50, 1994 Rev Ed) is s 17(1). Hereafter, references to the corresponding Singapore provision will be indicated thus: "Singapore:".

2 S 16(5) of the Act; Singapore: s 19(5).

3 That is, by invoking Part X of the Act; Singapore: s 247 *et seq*.

of persons to rank as one of the authorised persons under companies legislation to petition the court to wind up a company assumes great importance in view of the effects of a winding up order. The winding up of a company has serious consequences for various parties having dealings with the company. For instance, by virtue of section 223[4] of the Act, any "disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company" is void unless the court otherwise orders. An outsider purchasing goods from the company on a cash basis may have no reason to inquire into the financial situation of the company, and so he may be blissfully unaware that a winding up petition is already pending, making the transaction void. The purchaser would then be compelled to seek the mercy of the court for validation. The court's power here is discretionary and there is no certainty that it would be exercised in the purchaser's favour. Moreover, it is by no means clear what factors would be considered by the court as relevant in deciding one way or the other. Even more serious is section 224[5] of the Act which makes totally void any "attachment, sequestration, distress or execution put in force" against the company after the commencement of winding up by the court, thus placing judgment creditors of the company at a great disadvantage, even though the court is given a measure of discretion to set aside the rights of the liquidator in favour of the creditor under section 298(1)(c)[6] of the Act, (in cases where the creditor has not completed the execution before the commencement of winding up). Further, the matters of voidable preferences under section 293[7] of the Act and the validity of floating charges under section 294[8] of the Act come into issue once a winding up petition is filed in court. The aforesaid consequences take on a more serious tone if it is borne in mind that the crucial date for resolving the competing and often conflicting interests of the various parties is not the date of the winding up order, but the date of commencement of the winding up, and this is deemed by the Act to be the date of presentation of the petition.

In view of the foregoing, it is hardly surprising that the legislature has seen it fit to bestow the right of presenting a winding up petition on certain persons only, namely, those who are specified in the legislation and not on all and sundry.[9] However, despite particular persons being enumerated

4 Singapore: s 259.
5 Singapore: s 260.
6 Singapore: s 334(1)(c).
7 Singapore: s 329.
8 Singapore: s 330.
9 It may be noted that Part VIIIA of the Singapore Companies Act (modelled on Part II of the UK Insolvency Act 1986) has 'directors' as a category entitled to petition

in the companies legislation, courts have from time to time allowed others[10] to present a winding up petition. However, it is noteworthy that these others have had some nexus with those persons specified in the list of applicants, such as an assignee of a debt, who is a legitimate extension of 'creditor', a category which appears on the list. A more doubtful category of applicant which has also been sometimes permitted to present a petition is 'directors' of the company, although this category is not necessarily a natural extension of 'company' or any other applicant stated in the list. In fact, 'directors' as a category has been the subject of several cases in various jurisdictions. Unfortunately, there does not appear to be much consensus in this regard amongst the judges. In particular, the question as to whether a board of directors has standing to petition the court for winding up without first obtaining the sanction of the shareholders in general meeting has been controversial for some time. It has been contended that the general authority of directors to manage the business of the company under the articles of association empowers them to proceed to file a winding up petition by merely passing a board resolution to do so, without the necessity of having a resolution to that effect of the company passed at a general meeting. This contention has been accepted in several cases.[11] On the other hand, there is an equally impressive array of cases which have taken a more restrictive view and denied the right to directors.[12]

To the line of cases in favour of granting the right to directors must now be added the Malaysian High Court case of *Miharja Development Sdn Bhd & Ors* v *Tan Sri Datuk Loy Hean Heong & Ors and Another Application*.[13] In view of the fact that this is the first time the issue has arisen in the Malaysia-Singapore region, it is perhaps an opportune moment to delve

the court for judicial management, while this power is omitted from the winding up section. It is worth pointing out that whilst the purpose of judicial management is to rescue companies which are essentially viable, that of winding up is to ultimately terminate the company. Hence, the timely intervention of directors might preempt any over-zealous creditor from trying to throw the company into liquidation. There are no corresponding provisions in the Act.

10 Some examples are an assignee of a debt: *Re Paris Skating Rink Co* (1877) 5 Ch D 959; an equitable assignee of a debt: *Re Steel Wing Co Ltd* (1921) 1 Ch 349; and the personal representative of a deceased shareholder: *Re Bayswater Trading Co Ltd* (1970) 1 All ER 608.

11 See, *eg*, *Campbell* v *Rofe* (1932) 48 CLR 258; [1933] AC 91; *Re Inkerman Grazing Pty Ltd* (1972) 1 ACLR 102; *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477; and *Re Interchase Management Services Pty Ltd* (1992) 10 ACLC 1624.

12 See, *eg*, *In re Standard Bank of Australia Ltd* (1898) 24 VLR 304; 4 ALR 287; *Re Birmacley Products Pty Ltd* [1943] VLR 29, [1942] ALR 276; *Re United Uranium NL* [1990] 1 Qd R 107, 8 ACLC 741; *Re Woulfe & Son Pty Ltd* [1972] QWN 115 (SC Qld); *Re Giant Resources Ltd* [1991] 1 Qd R 107, (1991) 9 ACLC 1418.

13 (1995) 4 MSCLC 91,285.

deeper into the matter. The purpose of this article is to consider the statutory provisions of the Act and some of the case-law on the issue, with particular reference to *Miharja,* in an attempt to answer the vexed question of whether it is legitimate to grant a right to directors to petition the court for winding up, particularly in the face of the fact that the Act itself does not specify 'directors' as a possible applicant.

II. Standing to Apply for Winding Up

The court has power to order the compulsory winding up of the company on any of the grounds specified in section 218(1)[14] of the Act, including the insolvency ground under section 218(1)(e). Section 217[15] of the Act, which bears the title 'Application of winding up', provides, by sub-section (1) thereof, that a company may be wound up under an order of the court on the petition of the following:

(a) the company;

(b) any creditor, including a contingent or prospective creditor, of the company;

(c) a contributory or any person who is the personal representative of a deceased contributory or the trustee in bankruptcy or the Official Assignee of the estate of a bankrupt contributory;

(d) the liquidator;

(e) the Minister pursuant to section 205 or on the ground specified in section 218(1)(d) of the Act;

(f) in the case of a company which is a licensed institution, or a scheduled institution in respect of which the Minister charged with responsibility for finance has made an order under section 24(1) of the Banking and Financial Institutions Act 1989, or a non-scheduled institution in respect of which such Minister has made an order under section 93(1) of that Act, Bank Negara Malaysia,

or of any two or more of those parties.

What is clear from the above is that any one or more of the parties enumerated in section 217 may present a petition for a winding up, subject to the conditions and stipulations in subsections (1) and (2) thereof. However,

[14] Singapore: s 254.
[15] Singapore: s 253.

what is not so certain is whether persons other than those specified in section 217 could also, in given circumstances, file a petition. It is true that section 217(1) stops short of stating "and no others" or words to that effect after the words "those parties". The presence of those words would have made the matter clearer. This is in fact the case in some jurisdictions.[16] Unfortunately, in the absence of any such express provision,[17] there is a severe difference of judicial opinion as to whether section 217 should be treated as exclusive and exhaustive or whether courts may add to the list from time to time as justice may demand.

Other provisions of the Act may also be relevant and some of these were in fact referred to and contributed to the final decision in *Miharja*. These and other relevant provisions will be adverted to and considered in due course. At this juncture perhaps a review of some of the more important cases from various jurisdictions touching on *locus standi* to petition the court for winding up may be usefully undertaken.

III. The Case-law Background

One of the earliest cases to have considered the issue is *Smith* v *Duke of Manchester*.[18] In this case several directors took it upon themselves to present a winding up petition in their own names, but purportedly acting for and on behalf of the company. This was done on the premise that they had the requisite power under paragraph 100 of the company's articles. The petition was dismissed and the appeal therefrom was disallowed. The issue in *Smith* was whether the directors could make use of company funds to pay the solicitors'costs of the petition and the appeal. The plaintiff, also a director of the company, entered a formal protest against any such payment and sought an order to restrain the defendants from doing so. Article 100 of the company, so far as is relevant for present purposes, was as follows:

> The directors may ... direct any action or other legal proceedings to be commenced and prosecuted on behalf of the company in the name

[16] For instance, s 462(5) of the Australian Corporations Law states: "Except as permitted by this section, a person is not entitled to apply for an order to wind up a company". However, by a recent amendment, a director may, with leave of court, apply for a winding up order if the company is insolvent: s 459P(2), Corporate Law Reform Act, 1992. A provision similar to s 462(5) of the Corporations Law has also been inserted in the Corporate Law Reform Act: s 459P(5).

[17] Admittedly, a provision such as the one in *supra*, note 16, might not really go to the heart of the problem as directors petitioning the court are purportedly doing so as agents of the 'company', a category of applicant which is specifically mentioned in the section dealing with standing to apply.

[18] (1883) 24 Ch D 611.

> of the company, or of such officer or other person as the directors may be advised, and may defend any action, suit, or other proceeding that may be brought or prosecuted against the company, or any of the officers thereof, and may release, discontinue, become nonsuit in, settle, or compromise any such action or other proceeding as they shall deem expedient, and they shall be indemnified out of the funds of the company against all costs, damages, and expenses by reason of such action, suit or proceedings.

It was urged on behalf of the defendants that the petition to wind up the company was for the benefit and in the interests of the company, as it was impossible, having regard to the position and prospects, for the company to be carried on successfully. It was argued that the directors had power under article 100 to present the petition and likewise to be indemnified out of company funds. Article 100 clearly granted directors the authority to commence "legal proceedings ... on behalf of the company in the name of the company, or of such officer or other person as the directors may be advised ...." It was also submitted that the defendants had acted under advice. Despite these facts, the court came to the conclusion that what was done by the defendants was not done on behalf of the company. The court observed:

> The statute enables a company to take its own proceedings for winding up, but then there must be a meeting of the shareholders, and the shareholders would have a right to vote upon the very important question of whether this company should be destroyed or not.[19]

The court was also not impressed by the fact that the defendants had taken advice:

> When I am told that they [defendants] have taken advice of persons, and have deliberated among themselves, all I can say is, that I cannot attend to that, because most persons who are litigants do take very sanguine views of their own expectations, and persuade themselves that what they are doing is right.[20]

In the result the court held that as the defendants' action in petitioning for winding up was not justifiable under article 100, the intended payment of the costs out of company assets amounted to an *ultra vires* act and granted the injunction sought.

[19] *Ibid*, at 615 (*per* Bacon, VC).
[20] *Ibid*.

The rationale in *Smith* was followed in *In re Standard Bank of Australia Ltd* [21] by the Supreme Court of Victoria, Australia. The directors' powers of management in the articles were similar to those contained in article 73[22] of Table A of the Act. On the question of whether the articles gave directors the power to petition the court for winding up, Hodges J observed:

> The ordinary powers of directors are powers given to them to carry on the business of the company. The whole idea of the persons who bring the company into existence is as a rule for the continuance of that company, and for the carrying on of its business, and to make profits.... It is said that [the articles] give power to the directors to do everything that the company can do, unless there is something in the Act which restricts them or requires the company itself to do it. In my opinion those words cannot be rendered in that unlimited way. The article says 'the business of the company shall be managed', and in construing the article those words must be kept in mind. The 'business of the company shall be managed' – that is, for the purpose of conducting the business of the company all these powers are given, not for the purpose of destroying the company.[23]

The same rationale was also followed in the Irish case of *In re Galway and Salthill Tramways Co*[24] in which the directors also took it upon themselves to file a petition for winding up pursuant to their own decision and without consultation with the shareholders in general meeting. The question of directors' *locus standi* was directly raised and the court had to consider section 90 of the Companies Clauses Act 1845 (the equivalent of the general management clause of a company's articles). With reference to this section O'Connor MR echoed the sentiments expressed by Hodges J in *In re Standard Bank of Australia Ltd*:

> ...That section enacts that the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to all such matters as are directed by ... the ... Act to be transacted by a general meeting of the company. Counsel contend that ... the power of presenting

[21] *Supra*, note 12.

[22] The gist of this article is as follows: "The business of the company shall be managed by the directors who ... may exercise all such powers of the company as are not, by the Act or by the regulations, required to be exercised by the company in general meeting ..."; Singapore: Art 73, Table A.

[23] *Supra*, note 12, at 306-307.

[24] [1918] I R 62.

> a petition for winding up is not within the exceptions. But in my opinion that part of the section which gives the directors all the powers of the company subject to the exception must be read along with the opening words giving powers of management, and is merely in aid of the proper and effective exercise of such powers ... [which] are only powers of managing, and if the argument relied on is sound, a winding up of the company must come within the scope of management. But the object of management is the working of the company's undertaking, while the object of a winding up is its stoppage.[25]

In the event the Master of the Rolls held that the directors had no power under that section to file a petition for winding up without first obtaining the sanction of the shareholders in general meeting. The Master also ruled, however, that since the company could have authorised the filing in the first place, it could now ratify the directors' action if it wanted to.[26]

In *Campbell* v *Rofe,*[27] a case on appeal from the High Court of Australia to the Privy Council, the point directly in issue did not concern the *locus standi* of directors to present a winding up petition. However, what the Privy Council had to consider in this case may have some relevance to the present discussion. In issue was whether directors had power under a particular article (article 10)[28] of the company's articles to issue preference shares. Having decided that the directors had the power under that article, the Privy Council went on to observe that even if it had decided that there was no power under article 10, it was prepared to hold that there would be power under article 117[29] of the company's articles (the general management power).

The High Court of Australia had unanimously held, *inter alia,* that article 117 was concerned only with the management of the business of the company and not with the relations of members *inter se*. However, the Privy Council was not inclined to give article 117 such a restricted application and opined that this article clearly delegated to the directors power to do everything that a company could do except where the authority of a general meeting was expressly prescribed, and that such delegation would include the power to issue preference shares. As already intimated earlier, the *locus standi* of directors to petition the court for winding up was not in issue in this case. It is also noteworthy that, of the cases cited

25 *Ibid*, at 65.
26 *Ibid*, at 66.
27 *Supra*, note 11.
28 Quoted in the text between, *infra*, notes 66 and 67.
29 So far as may be relevant for present purposes, article 117 is broadly in terms of article 73 of Table A of the Act (see *supra*, note 22, for gist of this article).

in the High Court and the Privy Council, none of them had any relevance to directors' *locus standi* to petition for winding up. This is of course not surprising for that question was not in issue in *Campbell,* and consequently, neither the High Court nor the Privy Council addressed the matter. The value, if any, of this decision then lies in the general observation of the Privy Council on the import of an article such as article 117 and will be further discussed in the context of *Miharja*.[30]

In *Re H L Bolton Engineering Co Ltd* [31] the question of the *locus standi* of a trustee in bankruptcy to petition for winding up was in issue. Wynn Parry J, having observed that section 224 of the (English) Companies Act, 1948 dealt with the persons and bodies by whom a petition for the compulsory winding up of a company may be presented, said:

> *Prima facie*, at any rate, that section would appear to be designed to provide an exhaustive list of those who are entitled to present a petition for compulsory winding up.[32]

This general observation is indicative of the English courts' attitude as to the persons who may petition the court under companies legislation.

Then in 1979 came a strong judgment from the Chancery Division of the High Court of England – in the case of *In re Emmadart Ltd*.[33] This case is interesting because the issue of the *locus standi* of directors to file a petition without the sanction of the shareholders arose incidentally and in peculiar circumstances. A receiver and manager was appointed by a bank under the terms of a debenture creating a first floating charge over all the company's assets and undertakings. By the terms of the debenture the receiver was the agent of the company. The receiver therefore had all the usual powers, including the power of taking possession of the property charged and also to do all such acts as may be incidental and conducive to that purpose. The company was insolvent and the receiver, seeking to take advantage of certain exemptions on rates on vacant property of a company subject to a winding up order, presented a petition to wind up the company in his own name. Later, by an amendment, the name of the company was substituted.

The issue in this case was whether, in the circumstances, the receiver had *locus standi* to present the petition. Brightman J noted that the company had the right to present a petition on the ground of insolvency and considered

[30] *Infra*, note 63 and text.
[31] [1956] 1 All ER 799.
[32] *Ibid*, at 800.
[33] [1979] 1 Ch 540.

the question whether the receiver had the authority which he professed to present the petition in the name of the company. The learned judge said: "This is nothing more nor less than a question of agency."[34]

Counsel for the receiver submitted, *inter alia*, that a board of directors could petition for winding up, and a receiver and manager of the entire undertaking of the company had vested in him all the powers of the board. Consequently, the argument went, the receiver should likewise be entitled to present the petition. Brightman J noted that the appointment of a receiver for debenture holders suspends the powers of the directors over the assets in respect of which the receiver is appointed to enable the receiver to discharge his functions. On this premise, it was arguable that the receiver stepped into the shoes of the directors and had like powers. The judge opined that this was not necessarily the case, as the powers of receivers were not co-terminous with those of directors, but was prepared to assume they were, without deciding the point for the purposes in hand. It was thus fundamental to the receiver's argument that it should be competent for directors to petition for winding up without the sanction of the shareholders. The directors' *locus standi* was therefore in issue.

The learned judge, relying on *Buckley on the Companies Acts*[35] and *Palmer's Company Law,*[36] noted that the Irish position had not been followed in England where orders had been made upon directors' petitions. He considered the cases of *Smith*,[37] *In re Standard Bank of Australia Ltd*,[38] *In re Galway and Salthill Tramways Co*[39] and *In re Birmacley Products Pty Ltd*.[40] Though the judge made it clear that none of the cases were binding upon him, he was inclined to follow them "as they appear to be of persuasive authority and based on sound principles".[41] On the issue of *locus standi* of directors, the learned judge observed:

> It would be theoretically possible for the articles of association of a company to be drawn in terms which confer power on the board of directors to present a winding up petition, but an article on the lines of article 80 [general management clause] of Table A is not so drawn.[42]

[34] *Ibid*, at 543.
[35] 13th edition, 1957, at 462.
[36] 22nd edition, (1976) Vol 1 at 891.
[37] *Supra*, note 18.
[38] *Supra*, note 12.
[39] *Supra*, note 24.
[40] *Supra*, note 12.
[41] *Supra*, note 33, at 546.
[42] *Ibid*.

The judge was of the view that the directors' action must either be authorised or ratified by the company in general meeting. The court also noted[43] that there was express power for the directors to present a petition in the name of the company pursuant to a special resolution of the company to this effect.[44] Alternatively the directors had to have an ordinary resolution of the shareholders. Brightman J then adverted to the position prevailing in England:

> I have been told that over the years a winding up order has often been made on the petition presented by an insolvent company pursuant to a resolution of the board of directors and without reference to the shareholders. That would seem to be so ...The practice which seems to have grown up ... is in my opinion wrong and ought no longer to be pursued, unless the articles confer the requisite authority, which article 80 of Table A does not. What is stated in *Buckley* to be the law according to Irish authority is in my view equally the law in this country.[45]

In India, the Supreme Court, in *National Textile Workers' Union* v *PR Ramakrishnan*[46] was unanimously of the view that the corresponding winding up section in India enabled only those enumerated therein to petition the court. The issue arose indirectly, as the case actually involved the right of employees to be *heard* in winding up proceedings otherwise brought properly by one of the parties enumerated in the winding up section.[47] It was contended that the Indian Companies Act was a self-contained code on all matters relating to companies and the dissenting judges (ES Venkatramiah and Amrendra Nath Sen JJ) in fact went so far as to hold that employees, being excluded from the category of persons who could petition, had no corresponding right to be heard as of right. Their view was that rights were purely statutory and as the right to petition or be heard was not specifically given, employees had no such right outside the com-

[43] *Ibid*.

[44] The power was conferred by s 222(c) of the English Companies Act 1948 which power is similar to that in s 218(1)(a) of the Act (Singapore: s 254(1)(a)) and is in fact a *ground* for winding up.

[45] *Supra*, note 33, at 547.

[46] AIR 1983 S C 75.

[47] It should be pointed out, however, that the issue of directors being agents of the company was neither relevant nor addressed by the court. What is of relevance is the acceptance by the court of the premise that companies legislation is a statutory scheme, and rights, if any, must be confined to those specifically given therein. On the matter of employees' right to be heard in winding up proceedings, see the writer's article, "*Locus Standi* of Employees in Companies Winding Up" (1993) 11 C & S L J 141.

panies legislation and to grant them a right will tantamount to an usurpation of the function of the legislature. The majority (PN Bhagwati, O Chinnappa Reddy and Baharul Islam JJ), while being inclined to allow employees a right of audience, agreed with the minority that only persons specified in the winding up section were entitled to *present* a petition, as opposed to having a right to be *heard*.

In Australia, judicial opinion on the issue is severely divided across State jurisdictions. In the early case of *In re Birmacley Products Pty Ltd* [48] the Supreme Court of Victoria decided that directors did not have the power to petition for winding up under the general management article. The court had relied on the cases of *Smith,*[49] *In re Standard Bank of Australia Ltd*[50] and *In re Galway and Salthill Tramways Co.*[51]

In New South Wales on the other hand, directors have been regarded as having the power to present a winding up petition by virtue of the general management power: *Re Inkerman Grazing Pty Ltd*.[52] In this case, Street J was particularly impressed by the "practical justifications and ... necessities"[53] for recognising the power in the directors, in that a company with widespread financial interests affecting actual and prospective creditors can move quickly to protect its creditors and shareholders in the event of a sudden financial crisis developing.[54] In *Spicer* v *Mytrent Pty Ltd,*[55] Needham J, sitting in the Supreme Court of New South Wales, followed *Inkerman*; the learned judge said that his "experience" supported the course of practice adopted by Street J.

There are at least five other cases of more recent origin in the Australian jurisdictions, all indicating a widespread difference of judicial opinion. The first is *Re Compaction Systems Pty Ltd,*[56] a decision of the New South Wales Supreme Court, where Bowen CJ, citing *Inkerman*, said that the argument that directors have no power to file a winding up petition had not been accepted. The learned Chief Justice opined that it was a misstatement to say that a decision to present a winding up petition was itself a decision to terminate the affairs of the company, as the decision to wind up the company is at the court's discretion. However, no other cases on the point appear to have been cited to the court.

[48] *Supra*, note 12.
[49] *Supra*, note 18.
[50] *Supra*, note 12.
[51] *Supra*, note 24.
[52] *Supra*, note 11.
[53] *Ibid*, at 106.
[54] *Ibid*.
[55] (1984) 8 ACLR 711.
[56] *Supra*, note 11.

The second is *Re United Uranium NL,*[57] a decision of the Victorian Supreme Court. McGarvie J noted the position in England and New South Wales and in particular the cases of *Inkerman* and *Spicer*. His Honour said that although he was attracted by the New South Wales position during argument, he eventually preferred the "competing construction" and ruled that directors did not have the power claimed. This case is interesting in that McGarvie J, having observed that the matter rested on a proper construction to be placed upon the articles of the company concerned, turned to several other articles of the company to buttress his preference for giving the general management article a restricted application. In particular, the learned judge referred to the company's articles requiring the sale and disposal of the company's main undertaking to be sanctioned or ratified by the company in general meeting and an article which set out the various activities of the business of the company, and came to the conclusion that he saw no reason for the word "business" in the general management article to be construed more widely than the meaning given in the other articles of the company. Perhaps more importantly, the court observed that the restriction on disposal of the company's undertaking was inserted in the articles because such disposal had the effect of depriving the company of everything, a consequence which will also befall a company on a winding up order. It is interesting that a similar restriction is also to be found in the Act: section 132C.[58]

Then there are the cases of *Re Giant Resources Ltd*[59] and *Strong* v *J Brough & Son (Strathfield) Pty Ltd & Ors,*[60] which were for and against directors' power, respectively. *Strong* is important because the court also placed reliance on the Privy Council case of *Campbell*[61] in opting for the broader construction of the general management article.

The last case is *Re Interchase Management Services*,[62] a case of the Federal Court of Australia, decided by Cooper J who relied heavily on *Inkerman* and also *Campbell*. The court said the the effect of the decision in *Campbell* was that directors' powers could be construed disjunctively if the context allowed. The judge also was of the view that the cases of *United Uranium* and *Giant Resources* might not have been decided the way they were, if the arguments in *Campbell* and *Strong* had been advanced. However, it is noteworthy that *Compaction Systems* was cited to the court in *Giant Resources*.

57 *Supra*, note 12.
58 Singapore: s 160.
59 *Supra*, note 12.
60 (1991) 9 ACLC 1018.
61 *Supra*, note 11.
62 *Supra*, note 11.

IV. THE *MIHARJA* CASE

The above was basically the state of the case law when the High Court of Malaya came to decide the case of *Miharja Development Sdn Bhd & Ors* v *Tan Sri Datuk Loy Hean Heong & Ors and Another Application*.[63] The facts of the case are complex. It will suffice for present purposes if only the directly salient facts are set out. Miharja Development Sdn Bhd ("Miharja") was the owner of certain lands which were agreed to be developed by Uncang Emas Sdn Bhd ("Uncang"). However, in effect, the project was to be executed by one of the Mbf Group of Companies, Mbf Property Services Sdn Bhd, and the financing was to be provided by another Mbf company by the name of Mbf Finance Bhd. A loan agreement was entered into with Mbf Finance Bhd and the security included a debenture and a deposit of shares. The holders of all the issued shares of Miharja and Uncang had pledged them to Mbf Finance Bhd. Mbf Finance Bhd had the shares registered in the name of their nominees, Mbf Nominees Sdn Bhd, though it was understood that the shares were in fact to be held as security for the loan.

The project soon got into difficulties and suffered a loss of some RM51m and it was realised that its continuance will only result in further losses. As the project was the sole business of the two companies and the directors having concluded that it was impossible to carry it on profitably, they decided that "justice and equity"[64] required that both the companies be wound up. As the shares of the two companies were registered in the nominee company, it was not possible for the previous registered owners (referred to in the case as 'the alleged real shareholders') to participate in any general meeting as shareholders. In the circumstances the directors took it upon themselves to file a winding up petition without first obtaining the sanction of the registered shareholders, the nominee company. The alleged real shareholders also joined in the petition claiming to be contributories, but this is not relevant for present purposes. The petitions were filed pursuant to section 217(1)(a) (application by 'the company') and section 218(1)(i) (the 'just and equitable' ground) of the Act. Various MBf companies, including MBf Nominees Sdn Bhd were made respondents.

The respondents contended that the petitions ought to be dismissed on the ground that the directors lacked the requisite *locus standi* under section 217. The trial judge, VC George J, considered several authorities, and decided in favour of the directors. The court was persuaded by the arguments in *Inkerman*[65] and appears to have treated *Campbell*[66] as conclusive of the

[63] *Supra*, note 13.
[64] To use the words of the trial judge, *supra*, note 13, at 91,287.
[65] *Supra*, note 11.
[66] *Supra*, note 11.

issue. *Miharja* is important for, as the learned judge observed, this is the first time the issue of standing of directors to petition for a winding up has arisen in the Malaysia-Singapore jurisdictions. As this might well be a precedent, the learned judge said it fell on him to lay down the Malaysian practice and concluded,

> ... I would and do lay down that the effect of and the practice in respect of section 217(1)(a) is and should be that the directors of a company may petition the court to wind up the company without having to first obtain the sanction of the shareholders.[67]

The general management article of each of the petitioner companies, article 116, was, so far as may be relevant to the present discussion, in *pari materia* with article 73,[68] Table A of the Act and the articles referred to in the various cases discussed. Some of the arguments for the petitioners which were accepted by the court are interesting, if not intriguing. These will be considered in light of the previous case law as discussed above, together with relevant statutory provisions, including those which have been raised in the judgment.

The court noted the English, Irish and Australian positions and was clearly uncomfortable with Brightman J's reversal of the English practice in rather pointed terms in *Emmadart*.[69] The court took the point that the Victorian case of *Re Inkerman* and the Privy Council case of *Campbell* were not brought to the notice of Brightman J in *Emmadart* and that the learned judge was not properly assisted by counsel. It is true that these cases were not cited in *Emmadart*. However, with respect, although Brightman J said, "the only opposition has come from the bench and in the circumstances of this case that is a reluctant opposition",[70] the judge did go on to remark, "Mr Crystal [counsel for the petitioner] has carried out some extensive researches into the law, which is not as clear and decisive in his favour as the text-books seem to suggest."[71] Moreover, it is also plain that Brightman J admitted that the English practice was in fact to permit directors to petition. It is submitted that even if the cases of *Inkerman* and *Campbell* were cited to the court it would have made little or no difference to the judgment of the court. Brightman J was not exactly unaware of the contrary practice and neither did he consider any of the cases cited as binding on him. The learned judge made it clear that he nevertheless proposed to follow

67 *Supra*, note 13, at 91,289.
68 *Supra*, note 22.
69 *Supra*, note 33.
70 *Ibid*, at 542-543.
71 *Ibid*, at 544.

them as "...they appear to ... be of persuasive authority and based on sound principles."[72]

Although a great deal has been made of *Campbell* as an authority for the proposition that directors have the power to petition, not only by VC George J but also in several New South Wales cases, perhaps that case ought to be more closely scrutinised. The question in the Privy Council was whether, if the company had power to issue different classes of shares such power was communicated to the directors under either the general management article or article 10 of the company. Article 10 was as follows:

> The shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit and with full power to give to any person the call of any shares either at par or at a premium and for such time and for such consideration as the directors think fit. The directors may reserve any of the shares in the original or increased capital of the Company upon such terms as to payment for same and otherwise as they may deem fit.

The High Court of Australia had unanimously held, *inter alia*, that article 10 did not deal with the classification of shares but only with the terms and conditions of their allotment and disposal. It also held that the general management article was concerned only with the management of the business of the company and not with the relations of members of the company *inter se*. The Privy Council disagreed with the High Court on both counts. The Privy Council held that the directors had power under article 10 to control the character of the shares and that the words "terms and conditions" have a wider meaning than that assigned to them by the High Court. Further, the Privy Council held that if they had come to a different view on article 10, they would have been prepared to hold that the directors had the necessary power under the general management article. It is important not to lose sight of what exactly was in issue in the case. What the Privy Council were unable to agree with the High Court was the "narrow construction of the words 'management of the business of the Company'" inasmuch as the High Court had held that the business of the company did not include *the relations of members inter se*. Hence, to put it in another way, what was really castigated by the Privy Council was the High Court's exclusion from the purview of the management article matters relating to members *inter se*.

It is true that the Privy Council made the general remark that the management article "... clearly delegated to the directors power to do everything that

[72] *Ibid*, at 546.

the company could do except where the authority of a general meeting is expressly prescribed..."[73] With respect, this is a mere repetition of the management article and does not advance the argument any further. The case concerned the question of the powers of directors to issue preference shares, a function manifestly in the domain of management and hence, as stated by the Privy Council, well within the delegated powers of directors. The question of standing to bring about the dissolution of a company is, with respect, a fundamentally different issue and one which was not even present to the minds of the learned judges of the Privy Council. Cases on the point were neither cited nor considered. In the circumstances, the case is easily distinguishable on the facts from the matter under discussion. Consequently, it is difficult to see how *Campbell* can be taken as an authority of any kind. Little wonder, then, that the relevant volumes of the 3rd and 4th editions of *Halsbury's Laws of England*[74] do not mention this case even in passing, let alone citing it as authority.[75] In the event, it is respectfully submitted that the citation of this case in *Emmadart* would have made no difference to the view taken by Brightman J.

Furthermore, VC George J remarked that *Emmadart* "...does not lay down any universal principle of law but only reversed a practice."[76] It is true that, as stated by the learned judge, Brightman J was not apprised of the merits of the practice of the New South Wales courts. Be that as it may, in view of the rather extensive and cogent reasons advanced by Brightman J for his decision to reverse the English practice, it was incumbent upon the judge in *Miharja* to at least state why the decision in *Emmadart* did not commend itself to him, instead of dismissing it as not being "universal". Moreover, the key to the resolution of the matter in question lies, not so much on the "merits" of allowing directors the power, but in placing a proper construction on the relevant articles and statutory provisions. The court basically followed *Campbell* and echoed the sentiments expressed by Street J in *Inkerman* and said that it was "not desirable that there be a fetter on the directors",[77] and again, that, "in the face of section 303(3), a fetter on the directors is far from desirable".[78] With respect, what may be desirable is not the point, which is, or ought to be, whether the Act clearly grants them the power.

The point on section 303(3)[79] will be dealt with in a moment, but first the question of "desirability". On this issue the court said:

[73] *Supra*, note 11, at 265.
[74] (1954) Vol 6 and (1974) vol 7 respectively. Both are entitled "Companies".
[75] Brightman J in fact found the omission as reinforcing his view in *Emmadart*.
[76] *Supra*, note 13, at 91,288.
[77] *Ibid*, at 91,289.
[78] *Ibid*.
[79] Singapore: s 339(3). For further discussion of this section see note 86 and text.

> ... there could be situations where *expediency* calls for urgent steps to be taken or where as is the case here, it is not possible to obtain the views of *the real shareholders* at an EGM because the shares are held as security by a financial institution *in whose name they are registered* and because of that it appears that it is not possible to obtain the sanction of the *shareholders* because of the doubt of the status of the *alleged real shareholders vis-à-vis* the shares.[80] [Emphasis added.]

This confusing statement is objectionable on several fronts. First and foremost, it is a basic canon of construction that in enacting a provision in a statute the legislature intended the provision to serve a purpose. This purpose can only be ascertained from a construction of the words used in the provision, and not by reference to some extraneous notions, however laudable:

> The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just and expedient. The words cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.[81]

Hence, it is submitted that the court is confined to construing the words of section 217 and other relevant sections of the Act, if any, together with the articles concerned and is not really permitted to appeal to notions of expediency. In short, what may indeed be desirable and wanting in the Act should be left to the legislature and this function should not be usurped by the court.

The difficulty or indeed the impossibility of holding a meeting because of the particular circumstances of the company is a poor excuse for bypassing the members. In this connection, it must be borne in mind that if the directors feel the shareholders are being difficult, they are not exactly without any recourse. There is power in the court to grant relief under

[80] *Supra*, note 13, at 91,288.

[81] *Maxwell on the Interpretation of Statutes*, (Wilson & Galpin eds, 11th ed, 1962) at 4-5; passage was cited by Lim Beng Choon J in *Pembinaan KSY Sdn Bhd* v *Lian Seng Properties Sdn Bhd & Anor* (1991) 1 MSCLC 90,746 at 90,754.

section 150[82] of the Act. This section enables, *inter alia*, a director, "if for any reason it is impracticable to call a meeting" to apply to court for an order to call a meeting. On such an application the court has wide powers not only to order a meeting to be held and conducted in a manner it thinks fit, but also to give ancillary and consequential directions as it deems expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting.[83]

Apparently, on the facts of the case, the real reason for not convening a meeting was not so much the difficulty of holding one, but because it would have been of no avail to the petitioners, as the "nominee" shareholders (who have opposed the petition) would have out-voted them on any proposed resolution to wind up. Finding themselves on the horns of a dilemma, the directors opted for the only way out.

This prompts the next objection. The court has chosen to characterise the parties in the case under various categories. There are, for instance, '*members* in whose names the shares were registered prior to the registration of the nominee company', also dubbed the 'alleged real shareholders', and 'nominee shareholders'. These categorisations may be convenient for referring to the various parties in the case during the hearing. However, what is disconcerting here is that the court seems to have dealt with the categories as though they mattered in law.[84] With respect, at least for purposes of a meeting, there is no relevance of 'previous members' or 'shareholders' for that matter, as only members as such are entitled to attend company meetings. Membership rights only arise upon a shareholder getting onto the register of members. The Act does not take cognisanze of 'shareholders' as such. What is important for purposes of exercising rights is membership. In fact, the Act specifically states that a company is not affected by any trust, unless the shares are held by a trustee in respect of a particular trust and marked in the register of shares as such, with the consent of the company: section 163 (3) and (4).[85] Thus, though it is understandable for the court to sympathise with the plight of these so-called 'real shareholders', it is not clear what contractual or other rights these 'shareholders' had, to justify the court according them a status higher than the 'nominee shareholders' who are the members. That these 'shareholders' might rank as contributories is an entirely different matter and irrelevant to the argument in hand.

Moreover, the so-called 'nominee shareholders' ought to have been described as the 'real shareholders' on the facts of the case, as they had

[82] Singapore: s 182.

[83] See, for instance, the court's power in respect of irregularities in proceedings: s 355; though not exactly *in pari materia*, the Singapore equivalent is s 392.

[84] See, for instance, note 80 and text.

[85] Singapore: s 195.

lent the money and were chargees and consequently should rightly be concerned as to the fate of the company.

Strangely, reliance was also placed on section 303(3)[86] of the Act as being relevant to support the decision in favour of the directors. This sub-section reads as follows:

> 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 against this Act. [Emphasis added]

It is worth pointing out that this section appears in Division 4 of the Act, under the general heading, "Provisions Applicable To Every Mode Of Winding Up", and in particular, under Subdivision (4) thereof, under the heading, "Offences". Section 303 deals with "liability where proper accounts not kept". It is clear that Subdivision (4) is in fact nothing more nor less than a list of offences for the commission of which officers, including directors, may be punished on conviction.

Section 303(3) seeks to punish recalcitrant officers who are bent on carrying on trade and incurring debts when the company is either insolvent or on the verge of insolvency. The purpose of insolvent trading legislation has been explained, in the context of the corresponding provision of the Australian Corporations Law, as follows:

> The whole purpose or object ... was to discourage officers of corporations from improvidently committing the corporation to obligations to pay money as a debt when they have reasonable grounds for supposing that their corporation is (or will, upon incurring the debt in question) become insolvent.[87]

Thus, the primary aim behind section 303(3) is to ensure that directors promptly cease incurring debts and initiate winding up proceedings, without further ado, once it is reasonably apparent that the company cannot trade its way out of its financial difficulties. Failing such prompt action, directors open themselves up to the criminal sanction of the sub-section. Hence, it is clear that the sub-section contemplates the prosecution of directors who

[86] Singapore: s 339(3).
[87] *Hawkins* v *Bank of China* (1992) 10 ACLC 588 at 599, *per* Kirby, P.

are actually engaged in *mismanagement*, as it speaks of *knowingly*, which means *mens rea* is essential. In fact, aside from the offence of knowingly contracting a debt, which may itself amount to fraud,[88] fraudulent trading is a distinct offence under section 304(5)[89] of the Act. If this be the case, it is a self-serving argument to say that directors who engage in such prohibited conduct ought to be permitted to petition the court for winding up without consulting the shareholders, who are in fact entitled to look to directors for the proper management of the company. It is noteworthy that the offence under section 303(3) is most serious and the prohibited conduct is concerned with an aspect of management, as a conviction under this sub-section is ground for a further conviction under section 130[90] of the Act if the person convicted, within five years of the date of conviction, or release from prison, without leave of court, is a director or promoter or is in any way, whether directly or indirectly, concerned or takes part in the management of a corporation. Consequently, the argument that directors must be able to move to petition without shareholders' consent because they fear that they may be violating section 303(3) is untenable.

Moreover, the rationale is that directors should promptly *initiate* winding up proceedings, namely, proceedings in compliance with the requirements of the Act. This does not give them a licence to side-step procedures and take it upon themselves to petition without consultation with shareholders. It is submitted that if directors are indeed afraid of falling foul of section 303(3) they should cease all trading forthwith, and call an emergency meeting to pass an ordinary resolution to petition the court for winding up. If these steps are taken, it is difficult to see how they would still be guilty of an offence under the sub-section.

The learned judge was also concerned that section 217(1)(a)[91] does not even call for an ordinary resolution while section 218(1)(a)[92] spells out a special resolution. The court's argument was that this difference was a further indication that directors could act on behalf of the company. With respect, the fact that the Act specifically gives the shareholders the right to pass a special resolution for winding up does not change anything, as the passing of such a resolution is a *ground* for winding up under section 218(1)(a) and is unrelated to the question of *locus standi* under section 217. It is suggested that the reason why section 217(1)(a) does not go on to state that the 'company' shall act by ordinary resolution is that, first, that section

88 *Re William C Leitch Bros Ltd* [1932] Ch 71; *R* v *Grantham* [1984] 3 All ER 166 CA, which considered provisions similar to s 304 (Singapore: s 340).
89 Singapore: s 340(5).
90 Singapore: s 154.
91 Singapore: s 253.
92 Singapore: s 254.

deals with an enumeration of persons and bodies who are entitled to petition, and secondly, it would be superfluous to provide so, as unless a particular provision of the Act calls for the company to act by special resolution, it is understood that an ordinary resolution would suffice. In this case, the will of the company is shown in general meeting by a simple majority of members present and voting. It must be taken that the legislature was aware, when it enacted section 217, that 'company' as such is a different legal person. There are various provisions in the Act which make specific reference to 'company' and 'directors', for instance, sections 132C[93] and 132D.[94] Likewise, the scheme of the companies legislation as set out in the Act specifically provides for the company to act by resolution of directors where it is thought fit. An example of this is section 147(3)[95] which starts off: "A corporation may by resolution of its directors or other governing body...."

Consequently, as section 217 concerns entitlement to petition and section 218 deals with grounds, the two matters are discrete and ought to be treated as such. It is submitted that the mingling of the two will only create confusion.

It is true that a company acts by the agency of its officers, and the general management article envisages this. However, the activities comprised in the agency must of necessity be confined to such acts as would be furthering the business interests of the company. In other words, the agent must act for and on behalf of the principal, the company, in its dealings with others. It would be strange indeed, if the agency also extends to dissolving the principal, for this must surely go against the grain of basic agency theory. The point was made by Bowen CJ in *Re Compaction Systems Pty Ltd*[96] that it is

> ... a misstatement of the position to say that a decision to present a petition to wind up is itself a decision to terminate the affairs of the company ... The decision as to whether the company shall be wound up is committed to the court.[97]

Much may be said in support of this contention. Whilst it is true that a winding up petition exposes a company to the possibility of dissolution, it may be argued that the court is no mere mechanical agent in the process. On the contrary, whether or not an order of winding up should be made in any given case is a matter for the court which is duty-bound to decide after considering all relevant circumstances, including a careful assessment

[93] Singapore: s 160.
[94] Singapore: s 161.
[95] Singapore: s 179(3).
[96] *Supra*, note 11.
[97] *Ibid*, at 149.

of any objections by interested parties. Thus, the decision is not one arrived at willy-nilly, but only after a serious consideration of the various interests involved and a judicial exercise of discretion. Viewed in this light, the opposing shareholders' interests are not exactly being ignored. Even if the directors are permitted to file the petition without consulting the members, the courts will undoubtedly give their objections the serious consideration they deserve, before deciding one way or another. It is therefore basically true to say that the court is the final arbiter of the question whether a company ought to be wound up.

The fact remains, however, that once directors are permitted to have this right, there is the *potential* that a court might order a winding up. Thus, shorn of all the legal niceties, the real question is whether the directors have the right to *expose* the company, their principal, to this eventuality. It is to no avail to allow the directors the right and then piously hope that the court will not make a winding up order. Moreover, the real question is not who is responsible for the termination of the affairs of a company, but who has the *statutory right* to petition the court for winding up.

Be that as it may, there might conceivably be some real benefits for the company as a whole in according the board of directors some measure of entitlement to petition. A number of cases considered above have in fact alluded to some of these.[98] It might well be argued that inasmuch as shareholders' opposition to winding up is most seriously considered by the court, their interests are not being ignored and consequently, there is no real harm in permitting the directors to petition the court. The question therefore revolves around policy considerations. The key to the resolution of the issue probably lies in trying to formulate the legislation in a way which is conducive to promoting and maintaining the balance of power between the two organs.

V. Conclusion

The above analysis of the cases and related statutory provisions reveals a disarray of judicial views on the question of whether, as the Act and the articles stand, directors are entitled to petition the court for winding up under section 217(1)(a) without first obtaining the consent of shareholders in general meeting. There appear to be divergent views in Ireland, England, and the various jurisdictions in Australia. On the one hand, there is a line of cases which supports the proposition that directors have the power under the said section to file a winding up petition without the shareholders' consent on the basis that the general management article is broad enough to justify

[98] See, for instance, *Inkerman*, *supra*, note 11 and *Miharja*, *supra*, note 13.

the directors' action. On the other, a diametrically opposite construction is placed on the purview of the section and the ambit of the article in question.

For the proponents of the former view, it is argued that section 217(1)(a) falls short of requiring even an ordinary resolution to suggest that the company must act only in general meeting. The argument goes, therefore, that since this section does not call for a company to act even by an ordinary resolution, directors may act on behalf of the company. Further, that the general management article specifically states that the management of the business of the company is delegated to the directors and as such the directors have the power to exercise, by their own resolution, all the powers of the company unless the Act specifically states that the company must act in general meeting. For the contrary view, it is argued that the general management clause ought not to be construed as being without limitation; that it should be read in the context of the opening words of the article, namely, '[t]he business of the company shall be managed by the directors ....' Thus construed, the argument goes, directors' powers are restricted and confined to the arena of *management* as such and the purview of the article could not have been intended to reach winding up of the company itself as this aspect of companies regulation is a fundamentally distinct issue and outside the ambit of management.

Some of the cases analysed above, including *Miharja,* have alluded to the "merits" and "expediency" of allowing directors the right to petition the court. However, as argued above, in the present state of the law, it is by no means clear whether the courts have the jurisdiction to appeal to these notions in view of the fact that companies are regulated by a statutory scheme and the legislation ought perhaps be construed as being exhaustive of the rights and powers of the various organs of the company.

It is trite law that the general meeting of members, even by unanimous vote, cannot override the exercise of powers properly in the domain of the board of directors. Similarly, the general meeting cannot dictate as to how the board of directors will perform their duties. On the other hand, the general meeting has its use. The members as a body show their will in a general meeting. When something as fundamental as initiating winding up proceedings is in issue, surely the will of the general body of members ought to be an essential factor if not a decisive one. Hence, it is imperative that the parameters of power be made clear and demarcation lines between the competing and often conflicting interests of the two organs of the company be clearly drawn by the legislature. Thus, the problem is not just one of detail. On a conceptual level the issue is intertwined with the more fundamental question of overall corporate governance.

In the present state of the law the more compelling view is probably that directors do not have the power to petition the court for winding up

without the sanction of the members.

In view of the difficulties of construction posed by the language of the provisions touching on standing to petition the court for winding up and the severe conflict of judicial opinion which is pervasive, perhaps a re-appraisal should be undertaken on the question of whether directors ought to be granted the right to petition the court for winding up at all, and if so, in what circumstances. An appropriate amendment to the relevant section of the Act and the general management article in Table A of the Act, will no doubt go a long way in clearing the air and resolving this irksome issue.

It is tempting to suggest that the recent amendment to the Australian Corporations Law granting the right to individual directors (albeit only with leave of court) to petition the court for winding up when the company is insolvent, should be emulated. The current Australian position is no doubt attractive. However, it would perhaps be more prudent to carefully evaluate the local conditions in the legal environment of business before succumbing to the temptation to just copy the Australian provision as the Australian amendment was not an isolated exercise but one of a package of amendments. Moreover, it is commonplace that most of these amendments were prompted by the recent mushroom of corporate collapses in Australia and the consequent need to tighten the provisions regarding directors' liability, particularly in the context of insolvent trading. Hence, a cautious approach would be in order.

Though both the board of directors and the members in general meeting are essential components and have an overall interest in the welfare of the company, their particular interests often do not coincide. Thus, if this symbiotic relationship is to be workable, the issue should perhaps be resolved without delay, after a careful study of their competing interests and the implications thereof.

KRISHNAN ARJUNAN*

* LLB (Hons); LLM (London); PhD (Dundee); Barrister (UK); Advocate & Solicitor (Malaya & Singapore); Associate Professor of Law, School of Accountancy, Chinese University of Hong Kong.