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BOOK REVIEWS

MINORITY SHAREHOLDERS' RIGHTS AND REMEDIES BY MARGARET CHEW. [Singapore: Butterworths Asia. 2000, xxxi + 282 pp (including index). Softcover: $101.97 (inclusive of GST)]

THERE can be no more eminent jurist today in the fields of company law and equity than Sir Anthony Mason, the former Chief Justice of the High Court of Australia. These two areas of law often provide the only means of redress for minority shareholders of a company locked in an uncomfortable or, what is often worse, unprofitable relationship with other shareholders or management. Thus, a foreword penned by Sir Mason is the highest accolade that can be given to any book on minority shareholders' rights and remedies.

The recognition given to Ms Chew's book is well merited; her work signals that legal academic writing in Singapore is evolving from generalised textbooks to more focused subjects of immediate currency, where there is more than a neutral assessment of the cases and legislation. Here, the author's philosophy is set out clearly in Chapter 1, "Majority Rule and Minority Protection", and the reader is given a framework to work within or to depart from. She believes that a balance has to be struck between the rights of minority shareholders that are voluntarily part of a company, and the continued existence of the company. This is particularly so given the extent to which the oppression action under section 216 of the Companies Act (Cap 50) has developed in Singapore. As the author notes, it threatens to overwhelm common law derivative actions (the decision of the Singapore Court of Appeal in *Kumagai Gumi Co Ltd* v *Zenecon* [1995] 2 SLR 297 is discussed at various points in the book) and may render otiose the distinction between wrongs to the shareholder and corporate wrongs (discussed at section 2.1). Her work on section 216 in Chapter 4 is thus crucial in helping set the boundaries to this action.

But prior to that, there is an extremely useful analysis of the important but often overlooked decision of TQ Lim JC in *Credit Development Pte Ltd* v *IMO Pte Ltd* [1993] 2 SLR 370, where the learned judicial commissioner held that an ordinary resolution passed by shareholders in general meeting could override a decision taken by the board of directors under a general power of management conferred on it by articles of association that were not dissimilar to Article 73 of Table A (Fourth Schedule) of the Companies Act. She convincingly distinguishes the English decision of *Breckland Group Holdings Ltd* v *London and Suffolk Properties Ltd* [1989] BCLC 100, where, when faced with a similar article of association, Harman J had chosen to uphold the board's decision. On the facts of that case, the author points out that it was quite clear from a separate shareholders' agreement that the relevant decision was one for the board of directors.

It is of course, customary for a reviewer to provide suggestions on how the next edition of the book may be improved. In this vein, the recent decision of the New South Wales Court of Appeal in *Brunninghausen* v *Glavanics* (1999) 32 ACSR

294 could be mentioned at section 2.6, which discusses personal actions by shareholders against directors. *Percival* v *Wright* [1902] 2 Ch 421 has dominated the landscape of directors' duties for a long time, suggesting that directors owe duties to the company but not to individual shareholders. As the late Professor Loss, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States" (1970) 33 MLR 34 at 40, pointed out, *Percival* has enjoyed "a remarkable career for a lower court decision." It may therefore be that *Brunninghausen* could signify a shift towards a general willingness on the part of Commonwealth judiciaries to find duties owed by directors, and indeed even shareholders, to other shareholders (see Goddard (2000) 116 LQR 197, *cf* Dharmananda & Sim (2000) 18 C & SLJ 224).

If this were to happen, it would further lessen the need for derivative actions. Ms Chew notes at the beginning of Chapter 3 that "there are no reported cases on the common law derivative action in Singapore." Yet that chapter contains an interesting exposition of how the concept of "fraud on the minority", which is the major exception to the rule in *Foss* v *Harbottle*, should be examined from a commercial perspective. There is also an excellent discussion of the difficult decision of Knox J in *Smith* v *Croft (No 2)* [1987] 3 All ER 909, which appears to have inserted the concept of independent shareholders into the issue of whether there is wrongdoer control in order for a derivative action to be allowed to proceed. She seems to favour the principle, but is unsure of its application in practice. At the end of the chapter, she makes a spirited defence of the continued relevance of common law derivative actions in light of section 216, as well as the statutory derivative action now found in section 216A. Coming as it does just before her important chapter on oppression actions, one senses that she is not totally convinced, however, that this is the case.

There, she traces the historical development of section 216 and strongly advocates the use of cases on section 459 of the UK Companies Act 1985 which focuses on unfairly prejudicial conduct in interpreting section 216. This is quite justified since that phrase is one of four grounds on which section 216 operates, alongside 'oppression', 'unfair discrimination' and 'disregard of interests', but which was not found in section 210 of the UK Companies Act 1948, which preceded section 459 of the 1985 Act. Lord Hoffmann in *O'Neill* v *Phillips* [1999] 1 WLR 1092 has also reminded us that the provision is one essentially about equitable considerations of fairness, and legitimate expectations of the corporators "is a consequence, and not a cause, of the equitable restraint" (at 1102). Of perhaps greater interest to academics, the author also adopts a contractarian analysis of section 216, and advocates an objective test of fairness that extends beyond breaches of fiduciary duties.

What practitioners will find most helpful are sections 4.5 onwards. Here, all the relevant cases on oppression are organised into seven headings: (1) Exclusion from Management; (2) Excessive Remuneration; (3) No or Inadequate Dividends; (4) Diversion of Company's Assets or Opportunities; (5) Improper Purposes; (6) Loss of Substratum; (7) Oppressive Mismanagement. Each category is discussed in detail, and extracts of the more relevant parts of some judgments are provided.

Just as important perhaps may be section 4.7 on remedies for oppressive conduct, particularly the discussion on buyout orders and the methods by which shares are valued by the courts. This includes issues such as discounts for minority shareholding and the relevant date of valuation. The interaction between section 216 and derivative actions, which figures most prominently in section 216(2)(c), under which a court can sanction a derivative action where there is oppressive conduct, is also discussed. The author argues, however, that this provision is of little importance given the

"willingness of the court to order that any person or entity responsible for diverting monies away from the company pay back the money to the company, without the necessity of a separate derivative action." In short, a corporate remedy can be obtained without the need for a corporate action under section 216. The authority for this is *Kumagai Gumi, supra,* – the ramifications of which have perhaps not been fully absorbed in our legal community.

There is little doubt that Chapter 4 will be heavily cited to the Singapore courts given the importance of oppression actions in a society where many companies are still structured in the form of quasi-partnerships. Contained within it are also innovative and bold arguments, such as that a "series of non-disclosures or stock exchange censures may be said to compromise the shareholders' interests thereby amounting to oppression" (at page 160). This would be of great interest to corporate lawyers given the recent problems that the Singapore Exchange has had with the disclosure practices of some listed companies in Singapore. The available sanctions like censure are too weak, and those such as delisting, too extreme. In this regard, the author also makes justified criticisms of the restriction of the section 216A statutory derivative action to unlisted companies (at pages 241-3).

The author's years spent in practice are very much in evidence in the practical advice she dispenses throughout the book. Thus, she discusses the nuisance value of a petition to wind-up a company under section 254(1)(i), where "the Court is of opinion that it is just and equitable" to do so, even though winding up is already one of the many remedies available under section 216 (sections 5.2-5.4). But such practical advice is throughout founded on sound theoretical arguments. All of this is written in a very readable style and there is little doubt that this book is a welcome addition to the jurisprudence in this heavily litigated area of law.

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